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Runway for Justice:
A Fashion Show
A lunch benefitting the
New Mexico State Bar Foundation
Friday, July 13, 11:45 a.m.–1:15 p.m.
Ticketed Event

Join other Annual Meeting attendees for a delicious lunch and a show of the latest fashions for well-dressed attorneys and their families. At this ticketed lunch, we’ll be featuring clothes for men, women and kids. Lawyers and their kids will entertain your lunch table with their fashions and their flair on the runway.

Fashions are provided by three popular Albuquerque clothing stores. Hair and makeup is provided by the Aveda Institute. Your lunch ticket will raise money for legal services for the elderly throughout the state of New Mexico. Do good, eat good, and have a good time! Check the “Runway for Justice: A Fashion Show and Lunch” box on the Annual Meeting registration form to purchase your tickets.

Visit www.nmbar.org and select 2012 State Bar Annual Meeting
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MEETINGS

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Law Practice Management Committee, noon, State Bar Center
19
Health Law Section BOD, 7:30 a.m. via teleconference
20
Board of Editors, 8:30 a.m., State Bar Center
20
Family Law Section BOD, 9 a.m., via teleconference
20
Trial Practice Section BOD, noon, State Bar Center
25
Intellectual Property Law Section BOD, noon, Lewis and Roca, LLP
26
NREEL BOD, 12:30 p.m., State Bar Center
27
Immigration Law Section BOD, noon, State Bar Center

STATE BAR WORKSHOPS

APRIL
25
Consumer Debt/Bankruptcy Workshop 6–8 p.m., State Bar Center
26
Consumer Debt/Bankruptcy Workshop 5:30 p.m., Law Office of Kenneth Egan, Las Cruces

MAY
8
Lawyerly Referral for the Elderly Workshop 9:30–10:45 a.m., Presentation 12:30–2:30 p.m., Clinics Red Rock Convention Center, Church Rock
9
Estate Planning/Probate Workshop 6 p.m., Mary Esther Gonzales Senior Center, Santa Fe
15
Lawyerly Referral for the Elderly Workshop 10:15–11:30 a.m., Presentation 1–4:30 p.m., Clinics Las Vegas Senior Citizens Center, Las Vegas

Cover Artist: Helen Gwinn's expressive images are acrylics on wooden panels and watermedia on paper with collage. She often embellishes her works with handmade paper packets stuffed, folded, tied, painted and incorporated into each composition (www.hgwinn.com).

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April 18, 2012, Vol. 51, No. 16
Proposed Revisions to the District Court Civil Forms

The Domestic Relations Rules Committee has recommended proposed new forms for the Supreme Court’s consideration for use in contested divorce proceedings. The proposed new Form 4A-100 is intended to replace current instructions in Forms 4A-100, and 4A-201 to -205. The proposed new divorce petition forms are intended to replace current Forms 4A-301 and 4A-302. The committee is planning to publish for comment additional new forms in the months ahead for use by self-represented litigants in subsequent stages of a contested divorce proceeding. To comment on the proposed amendments before they are submitted to the Court for final consideration, either submit a comment electronically through the Supreme Court’s website at http://nmsupremecourt.nmcourts.gov/ or send written comments to:

Joey D. Moya, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, NM 87504-0848

Comments must be received by the Clerk on or before April 25 to be considered by the Court. Note that any submitted comments may be posted on the Court’s website for public viewing.

Sixth Judicial District Court Judicial Vacancy New Application Period

In response to Governor Martinez’ request for additional names to fill the vacancy on the Sixth Judicial District Court which exists in Deming due to the retirement of the Honorable Gary Jeffries, the dean of the UNM School of Law, designated by the New Mexico Constitution to chair the 6th Judicial District Nominating Committee, is soliciting additional applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution.

Applications, as well as all information related to qualifications for the position, may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or via email by calling Sandra Bauman, 505-277-4700. The deadline for applications is May 23. Applications received after that date will not be considered.

Applications received by the initial March 5 deadline remain viable, and those individuals need not reapply at this time.

Applications seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State.

The date and time of the reconvening of the 6th Judicial Nominating Committee will be announced upon the close of this application period. The meeting is open to the public, and members of the public who wish to speak about any of the candidates will have an opportunity to be heard.

US District Court District of New Mexico April Seminar

Join your colleagues for an afternoon seminar at the beautiful Las Cruces courthouse. “Doing Justice in Criminal Cases” will be presented from 11 a.m.–5 p.m., April 27, in the Jury Assembly Room, Second Floor, 100 N. Church Street, Las Cruces.

Judicial Records Retention and Disposition Schedules

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

<table>
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<tr>
<th>Court</th>
<th>Exhibits/Tapes</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
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<tbody>
<tr>
<td>1st Judicial District Court (505) 455-8275</td>
<td>Exhibits children's court, civil, criminal, domestic relations, and probate cases</td>
<td>1977–1997</td>
<td>May 14</td>
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</table>
Federal judges and attorneys will discuss and share insights on effectively handling criminal cases. Sessions include being professional and ethical in the courtroom; prosecution and defense disclosure obligations; and inadmissibility, removability and prosecutorial discretion in immigration cases. For complete program information, agenda and online registration, visit www.nmcourt.fed.us. Hosted by the Federal Bar Association and the U.S. District Court, District of New Mexico. For questions and assistance, call 505-348-2080.

STATE BAR NEWS

Attorney Support Group
- May 21, 7:30 a.m.
  - Morning groups meet on the third Monday of the month.
- May 7, 5:30 p.m.
  - Afternoon groups meet on the first Monday of the month.
Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, 505-242-6845.

Support Group for Legal Professionals
- May 9, 5:30 p.m.
  - The group meets regularly on the second Wednesday of the month at the Unitarian Universalist Church, 107 West Barcelona Rd., Santa Fe.
For more information, call Diego Zamora, 505-629-7343.

Board of Bar Commissioners Appointments

Judicial Standards Commission
The Board of Bar Commissioners will make one appointment to the Judicial Standards Commission for a four-year term. The responsibilities of the Judicial Standards Commission are to receive, review, and act upon complaints against state judges, including supporting documentation on each case as well as other issues that may surface. The commission meets once every eight weeks in Albuquerque and additional hearings may be held as many as four to six times a year. The time commitment to serve on this commission is significant and the workload is voluminous. Applicants should consider all potential conflicts caused by service on this commission. Members wishing to serve on the commission should send a letter of interest and brief résumé by April 27 to Executive Director Joe Conte, State Bar of New Mexico, P.O. Box 92860, Albuquerque, NM 87199-2860, fax to 505-828-3765 or email at jconte@nmbar.org.

ABA House of Delegates
The Board of Bar Commissioners will make one appointment to the American Bar Association (ABA) House of Delegates for a two-year term, which will expire at the conclusion of the 2014 ABA Annual Meeting. The delegate must be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members wishing to serve on the board must be a current ABA member in good standing and should send a letter of interest and brief résumé by April 27 to Executive Director Joe Conte, State Bar of New Mexico, P.O. Box 92860, Albuquerque, NM 87199-2860, fax to 505-828-3765 or email at jconte@nmbar.org.

Third Bar Commissioner District Vacancy (Los Alamos, Rio Arriba, Sandoval and Santa Fe Counties)
A vacancy in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe Counties, was created due to the resignation of Debra R. Armstrong. The Board will make the appointment at a meeting on May 11 to fill the vacancy until the next regular election of Commissioners in November. The term will run through December 31, 2012, and applicants should plan to attend the remaining 2012 board meetings scheduled for July 12 at the Tamaya, September 7 in Albuquerque, a board retreat in Cloudcroft in late October or early November, and December 5 in Santa Fe. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply. Members interested in serving on the Board should submit a letter of interest and résumé by April 27 to Executive Director Joe Conte, State Bar of New Mexico, P.O. Box 92860, Albuquerque, NM 87199-2860, fax to 505-828-3765 or email at jconte@nmbar.org.

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 on the first Wednesday of each month. The next meeting will be held at noon, May 2, at the State Bar Center. Lunch is provided to those who R.S.V.P. to membership@nmbar.org. For information about the section, visit the State Bar website, www.nmbar.org, or contact Chair Victor Montoya, montoyav@jacksonlewis.com or 505-830-8251.

Young Lawyers Division
Volunteers Needed for National Mock Trial Championships
Looking for a fun and easy way to get some volunteer hours? Volunteers are needed for the 2012 National Mock Trial Championships on Friday, May 4, and Saturday, May 5, in Albuquerque. This is also a great opportunity to see some top kids in action and support their interest in the judicial system. To volunteer, contact YLD Region 1 Director Ken Stalter, kstalter@da.state.nm.us. Include your name, email address, and phone number. You will have the opportunity to select what times you want to help.

AAA New Mexico

Members receive:
- 24-hour roadside assistance
- Competitive rates on auto insurance
- A full-service travel agency
- Discounts at hotels, restaurants retailers and attractions

Join now and receive $20 off first year membership. You pay only $52!

Contact Kasha Gordon, (505) 291-6717 or gordon.kasha@aaa-newmexico.com.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.
24-Hour Helpline
Attorneys/Law Students
505-228-1948 • 800-860-4914
Judges
888-502-1289
would like to volunteer. Volunteers will also need to attend a volunteer training at 4:30 p.m., May 3.

Volunteers Needed for Project Salute
The YLD is seeking attorney volunteers to participate in Project Salute: Young Lawyers Serving Veterans, during the Spring and Summer of 2012. Project Salute is a pro bono program that educates military veterans on the Federal Veterans Benefits they may be entitled to receive and provides assistance completing VA forms to obtain those benefits. Volunteer attorneys must become VA accredited and attend a three-hour web-based training seminar. For more information or to volunteer and obtain the VA accreditation form/training schedule, contact Samantha Hults at sammysam01@yahoo.com.

Other Bars
Lesbian and Gay Lawyers Bar Association
Mixer with Law Students
The Lesbian and Gay Lawyers Association and the LAMBDA Law Student Association will host a mixer from 5:30–9 p.m., April 25, at the Slate Street Café, 515 Slate Avenue, Albuquerque. Hors d’oeuvres will be provided and a cash bar will be available.

NEW MEXICO COURTS E-FILING UPDATE

■ File and Serve Statistics, Week of April 2:
The total number of documents filed during the week, statewide, was 7,302. The total number of e-filings during the week for all five court districts that are accepting e-filings was 5,773, and the total number of discrete e-filed documents during the week was as follows:
1st Judicial District Court: 1,730
2nd Judicial District Court: 3,520
5th Judicial District Court: 738
10th Judicial District Court: 71
13th Judicial District Court: 1,243

■ File and Serve System Upgrade:
The File and Serve upgrade, which took place April 3, went very well. Immediately following the upgrade, there was a problem with processing of confidential documents, but that problem was solved quickly. We had some complaints of slowness in the 2nd Judicial District Court in Albuquerque and the 5th Judicial District Court in Carlsbad, but it appears that the slowness was not related to the upgrade.

■ File and Serve Calls for Assistance, Week of April 2:
The Judicial Information Division received only 11 calls for assistance from filers during the week, which is down significantly from previous weeks. This seems to indicate that new users added during the implementation of e-filing in the 5th and 10th Judicial district courts are becoming comfortable with the File and Serve system.

■ Helpful Links and Contacts
  • Visit https://ofs.tylerhost.net/nm for Odyssey File and Serve support, training, and contact information.
  • The Judicial Information Division (JID) support is available from 8 a.m.–5 p.m., Monday–Friday.
    JID Help Desk 1-505-476-6911
    JID Help Desk Email helpdesk@nmcourts.gov
  • Judicial District Emails
    1st Judicial District Court: sfedefile@nmcourts.gov
    2nd Judicial District Court: albdefile@nmcourts.gov
    13th Judicial District Court: lludedefile@nmcourts.gov

—From the New Mexico Supreme Court

NM Legal Aid
Free Legal Clinics
Free legal clinics to qualified low-income New Mexico residents, 301 Gold Avenue SW, Albuquerque:
• Unemployment Insurance Compensation Clinic
  Once a month on Friday morning 9 a.m., April 27, May 22, June 22
• Divorce Clinic
  Every other Friday afternoon 1 p.m., April 20, May 18
Contact New Mexico Legal Aid to apply and schedule a date to attend one of the clinics. For further information, call 505-243-7871. Also contact the office with legal questions involving housing, consumer and public benefits. Victims of domestic violence or sexual assault can call the hotline, 505-243-4300 or 1-877-974-3400.

NM Family Legal Assistance Group
Volunteer With No Fear
Only 2½ hours a month. No client representation—just counseling. Liability insurance coverage provided. Contact the New Mexico Family Legal Assistance Group (formerly known as LegalFACS), 505-256-0417. Please refer clients falling at 200% or below federal poverty level. Can’t volunteer? Your thoughtful tax-deductible donation also supports this work.

OTHER NEWS
Christian Legal Aid
New Volunteer Training
Christian Legal Aid of New Mexico invites new members to join us as we work together to secure justice for the poor and uphold the cause of the needy. A New Volunteer Seminar will be held from 11 a.m.–5 p.m., April 20, in the State Bar Boardroom. Join us for free lunch and training as we learn the basics on how to provide legal aid. For more information or to register, contact Jen Meisner, 505-610-8800, or Jim Roach, 505-243-4419, or email christianlegalaid@hotmail.com.

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### April

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<th>Date</th>
<th>Event Title</th>
<th>Details</th>
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<td>18</td>
<td><strong>Compatibility of Legal and Judicial Ethics</strong></td>
<td>2.0 EP</td>
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<td>Teleconference</td>
<td>TRT, Inc. 800-672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>19</td>
<td><strong>Landlord Tenant Law</strong></td>
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<td>General</td>
<td>Albuquerque Sterling Education Services 715-835-5132 <a href="http://www.sterlingseducation.com">www.sterlingseducation.com</a></td>
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<td><strong>Confrontation Rights in the Bullcoming ERA</strong></td>
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<td>Albuquerque Center for Legal Education of NMSBF 505-797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td><strong>Mediation: Basics and Procedure</strong></td>
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<td><strong>2011 Real Property Institute</strong></td>
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<td><strong>The Cybersleuth’s Guide to the Internet (2011)</strong></td>
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<td><strong>Franchisee Red Flags and Traps: What You Should Know Before Your Client Buys</strong></td>
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<td><strong>Build Your Practice</strong></td>
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<td><strong>Construction Contracts: Anticipating the Unanticipated, Ensuring Performance and Limiting Downside Risk</strong></td>
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<td>26</td>
<td><strong>Electronically Stored Information: What’s Under Lock and Key</strong></td>
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<td><strong>Retain Your Clients</strong></td>
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<td><strong>31st Annual Update on New Mexico Tort Law</strong></td>
<td>6.5 G</td>
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<td>Albuquerque New Mexico Trial Lawyers’ Foundation (505) 243-6003 <a href="http://www.nmtla.org">www.nmtla.org</a></td>
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<td>27</td>
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<td><strong>Recusal: A Hot New Legal Ethics Topic</strong></td>
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### Published Opinions

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<td>31610</td>
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<td>CV-08-213, AC CATTLE v PORTALES NATIONAL (affirm)</td>
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Slip Opinions for Published Opinions may be read on the Court’s website:

http://coa.nmcourts.gov/documents/index.htm
NEW MEXICO’S NEW CHIEF JUSTICE

The Honorable Petra Jimenez Maes was sworn in as chief justice of the New Mexico Supreme Court by Justice Charles Daniels in the Supreme Court courtroom in Santa Fe April 4.

The Honorable Petra Jimenez Maes was sworn in as chief justice April 4 for a two-year term. The five justices elect a chief justice to preside over the court, with Maes last holding the position from 2003 to 2005. Elected to the New Mexico Supreme Court in 1998, Maes became the first female Hispanic to serve on the state's highest court.

Prior to sitting on the Supreme Court, Maes was a district court judge, serving four years in the criminal division, six in the family division and seven in the civil division.

Her efforts to improve the justice system include currently serving as co-chair of the New Mexico Commission on Access to Justice and creating the Criminal Justice Task Force to address inequities in the public defender agency. She is also the Supreme Court liaison on the Court Improvement Project, a comprehensive effort to assess and improve judicial proceedings related to child abuse and neglect, foster care, and adoption. She also serves on a Supreme Court committee that oversees automation for the entire judiciary.

Maes was one of the first two Hispanic women to graduate from the UNM School of Law (1973). She was admitted to the New Mexico bar that same year. After one year in private practice, she worked for Northern New Mexico Legal Services.

NOMINATIONS NOW BEING ACCEPTED

2012 STATE BAR ANNUAL AWARDS

Send a letter of nomination for each nominee to:
Joe Conte, Executive Director
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199-2860
Fax (505) 828-3765 or e-mail jconte@nmbar.org

Deadline for Nominations: April 30

For more information, see the March 7 (Vol. 51, No. 10) Bar Bulletin or visit http://www.nmbar.org/Attorneys/AM/Nominations2012.pdf.

CELEBRATE LAW DAY

NEW MEXICO LAW DAY ACTIVITIES

- Albuquerque Bar Association Law Day Luncheon
  Noon, May 1, Hyatt Regency Hotel, 330 Tijeras NW, Albuquerque
  Keynote Speaker: The Hon. Jimmie V. Reyna, Circuit Judge, U.S. Court of Appeals for the Federal Circuit
  Judge Reyna was born and raised in New Mexico. He attended the University of Rochester (B.A., 1975) and the UNM School of Law (J.D., 1978).
  Special Recognitions:
  2012 Gene Franchini Mock Trial Champions
  State Bar Essay Contest Winners

Pre-paid event. Tickets will not be sold at the door. A large turnout is expected so make your reservations today:
Individual tickets, $40; table of 10, $400; sponsorship and table of 10, $720; sponsorship, $400.
Recognition of sponsors and donations will appear on the program and will be announced at the luncheon.
Register by noon, April 27.
To register: log on to www.abqbar.org; send email to abqbar@abqbar.org; call 505-842-1151 or 505-243-2615; fax to 505-842-0287; or mail to PO Box 40, Albuquerque, NM 87103.

- Chaves County Bar Association Schedule of Events
  April 26, 6 p.m.
  Law Day Banquet ($50/person)
  Bassett Auditorium-Roswell Museum and Art Center, 100 W. 11 Street.
  Guest Speaker: The Honorable Neil M. Gorsuch, U.S. Court of Appeals for the 19th Circuit

April 27, 7–8 a.m.
Young Lawyers Breakfast With the Judges, Sale Barn Café, 900 N. Garden Avenue
9–10 a.m.
Student Mock Trial and Question/Answer Period With Young Lawyers, Roswell High School Little Theater, 500 W. Hobbs Street
10 a.m.–noon
New Mexico Court of Appeals Oral Arguments and Question/Answer Period, Roswell High School Little Theater, 500 W. Hobbs Street
noon–1 p.m.
Chaves County Bar Association Luncheon, Roswell Regional Hospital Conference Room, 117 E. 19 Street.
Guest Speaker: Chief Judge Celia Foy Castillo, New Mexico Court of Appeals
$10/person

For more information, contact Chair Chelsea R. Green, Law Day Committee, cgreen@hinklelawfirm.com or 575-622-6510.
During a recent conversation regarding the practice of law in today’s challenging world, an attorney remarked, “Stress might be unavoidable, but I don’t have to let it run the show.” He went on to explain that serious health concerns in 2010 convinced him it was time to curtail his 60-hour workweek and learn effective stress-reduction skills.

Like many successful and driven professionals, he initially found it daunting to make the necessary lifestyle changes because much of his self-image was tied to his work. “I’m embarrassed to admit it, but I used to brag I could count on one hand the number of meals I shared in a month with my family. Aside from an occasional game of golf, de-stressing typically meant having a couple of drinks before bed. Since I reduced my work hours and began practicing mindfulness (meditation), my health has greatly improved, I am more productive, and my life is much more satisfying! I still have stress—after all, who doesn’t? But there’s a lot less of it, and I’m better equipped to deal with it.”

Taking action now before stress sends you a personal “wake-up call” gives you more choices, more control, and less negative consequences in the future. Not only has a strong body of research found connections between chronic stress and depression, anxiety, and alcohol/other drug abuse, but chronic stress has also been linked to heart disease, hypertension, insomnia, digestive disorders, memory impairment, and immune system dysfunction. The question is, are you ready to do something about it?

If that’s not enough to motivate you, consider this. According to a recently released Yale University study, stress hormones that circulate through your body and brain cause the brain to shrink by eating away at brain tissue.

“Stress is literally chewing miniature holes in your brain,” says Houston neuroscientist and author David Eagleman. While stress affects four areas of the brain, the most vulnerable is the hippocampus where learning and memory functions reside, followed by the frontal lobe which is critical for everyday functionality and decision-making.

Science now shows us that the brain can regenerate, although to what degree is yet unknown. There are many examples of individuals with depression or severe anxiety (often stress-related) who fear they have Alzheimer’s or some other form of dementia because of their concentration problems, impaired decision-making, and noticeable memory deficits. Fortunately, treatment and stress-reduction training significantly improve mood, memory, and coping skills for most of these individuals, and regularly practicing stress-reduction techniques can help many others ward off these concerns all together. But there is one caveat according to Dr. Robert Sapolsky, Professor of Neurology and Neurological Sciences at Stanford University: “You can’t save stress management for weekends or holidays. It has to be done daily.”

Plan to join us in the State Bar Boardroom at 4 p.m., April 26, for an introduction to the techniques of mindfulness. Class size is limited to 10.
# Writs of Certiorari

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

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective April 6, 2012**

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## Petitions for Writ of Certiorari Filed and Pending:

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Response ordered; due 4/12/12

## Certiorari Granted but not yet Submitted to the Court:

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No. 32,441  State v. Torres  COA 28,234  03/02/12
No. 32,446  State v. Garcia  COA 31,478  03/13/12
No. 32,389  State v. Garcia  COA 31,481  03/13/12
No. 32,466  State v. Puliti  COA 29,509  03/20/12
No. 32,483  State v. Consaul  COA 29,559  03/23/12
No. 32,275  State ex rel. Solsbury Hill v. Liberty Mutual Insurance  COA 30,068  03/23/12
No. 32,383  Presbyterian Health Plan v. Starko, Inc.  COA 29,016/27,922  03/30/12
No. 32,384  Cimarron Health Plan v. Starko, Inc.  COA 29,016/27,922  03/30/12

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

(Submission Date = date of oral argument or briefs-only submission)  Submission Date
No. 32,524  Republican Party v. Taxation and Revenue Dept.  COA 28,292  03/14/11
No. 32,534  Bustos v. Hyundai Motor Co.  COA 28,240  04/11/11
No. 32,695  Diamond v. Diamond  COA 30,009/30,135  05/10/11
No. 32,690  Joey P. v. Alderman-Cave Milling and Grain Co.  COA 29,120  05/11/11
No. 32,756  Lenscrafters, Inc. v. Kehoe  COA 28,145  07/18/11
No. 32,291  State v. Torres  COA 29,603  08/16/11
No. 32,589  State v. Ordunez  COA 28,297  08/31/11
No. 32,776  Sais v. N.M. Department of Corrections  COA 30,785  09/12/11
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No. 32,915  State v. Collier  COA 29,805  11/15/11
No. 32,944  Freedom C. v. Brian D.  COA 30,041  11/15/11

Petition for Writ of Certiorari Denied:

No. 32,430  State v. Muqqddin  COA 28,474  11/16/11
No. 32,632  State v. Dominguez-Meraz  COA 30,382  11/16/11
No. 32,941  Titus v. City of Albuquerque  COA 29,461  11/16/11
No. 32,800  State v. Spearman  COA 30,493  11/30/11
No. 33,011  Felts v. CLK Management, Inc.  COA 29,702/30,142  12/12/11
No. 33,103  Felts v. CLK Management, Inc.  COA 29,702/30,142  12/12/11
No. 32,968  Sunnyland Farms, Inc. v. Central N.M. Electric  COA 28,807  12/11/11
No. 32,985  Helena Chemical Co. v. Uribe  COA 29,567  12/13/11
No. 32,987  Helena Chemical Co. v. Uribe  COA 29,567  12/13/11
No. 32,937  SF Pacific Trust v. City of Albuquerque  COA 30,930  12/14/11
No. 32,876  Gonzales v. State  12-501  01/09/12
No. 32,860  State v. Stevens  COA 29,357  01/10/12
No. 32,939  United Nuclear Corp. v. Allstate Insurance Co.  COA 29,092  01/13/11
No. 33,070  Montoya v. City of Albuquerque  COA 29,838  01/30/12
No. 33,023  State v. Gurule  COA 29,734  01/30/12
No. 33,135  Horne v. Los Alamos National Security  COA 29,822  03/13/12
No. 32,943  State v. Hall  COA 29,138  03/26/12
No. 32,605  State v. Franco  COA 30,028  03/28/12
No. 32,940  State v. Vest  COA 28,888  03/28/12
No. 33,083  Martinez v. Department of Transportation  COA 28,661  04/09/12
No. 32,976  State v. Olson  COA 29,010  04/09/12
No. 33,008  State v. Lasky  COA 28,782  04/11/12
No. 33,136  State v. Bent  COA 29,227  04/30/12
No. 33,057  State v. Turrietta  COA 29,561  04/30/12
## Recent Rule-Making Activity

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

Joey D. Moya, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective April 18, 2012**

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- 03/01/12

#### 1-030 Depositions pon oral argument

- 02/17/12

#### 1-001 Scope of rules; definitions

- 02/06/12

#### 1-004 Process

- 02/06/12

### Rules of Criminal Procedure for the District Courts

#### 5-502 Disclosure by the defendant

- 02/06/12

### Rules of Criminal Procedure for the Magistrate Courts

#### 6-503 Disposition without hearing

- 01/31/12

### Rules of Criminal Procedure for the Metropolitan Courts

#### 7-503 Disposition without hearing

- 01/31/12

### Rules of Procedure for the Municipal Courts

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To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court’s website at http://nmsupremecourt.nmcourts.gov.
To view recently approved rule changes, visit the New Mexico Compilation Commission’s website at http://www.nmcompcomm.us.
2012 CLE at SEA
September 16-23, 2012

7-Day Spanish Serenade
Mediterranean Cruise
(featuring Barcelona, Palma de Mallorca, Cadiz, Casablanca (Morocco), Strait of Gibraltar, Ibiza)
aboard Holland America’s ms Ryndam
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Call CLE for further details at (505) 797-6060.
CONFRONTATION RIGHTS IN THE BULLCOMING ERA
Friday, April 20, 2012 • State Bar Center, Albuquerque
☐ Standard Fee $189  ☐ Government, Legal Services Attorney, Paralegal $159
also available via LIVE WEBCAST

BUILD YOUR PRACTICE:
A Roadmap to Effective, Ethical Business Development
Thursday, April 26, 2012 • State Bar Center, Albuquerque
A.M. and P.M. Sessions ☐ Standard Fee $209
Presenter: Roy S. Ginsburg, J.D, Minnesota
Across the nation, Roy Ginsburg coaches lawyers one-to-one in the areas of business development, practice management and career development/ transitions to help them achieve individualized practice goals and career satisfaction. Roy has practiced for more than 25 years in law firms from large to small and in a corporate setting. As a currently active solo with a part-time practice in legal marketing ethics and employment law, he is completely familiar with the challenges working lawyers face each and every day of their professional lives. Roy regularly presents CLE programs nationwide to bar associations and law firms.
No Auditors Permitted

A.M. Session Only ☐ Standard Fee $119
This practical seminar delivers proven methods to build your practice within professional and ethical parameters. You will learn how to identify the best ways to connect with potential clients and referral sources, maximize networking, create higher visibility for your practice, spend marketing and advertising dollars wisely, and more.
8:30 a.m. Registration
9:00 a.m. Build Your Practice (3.0 EP)
10:30 Break
10:45 a.m. Build Your Practice (continued)
12:15 p.m. Lunch (provided at the State Bar Center)

RETAIN YOUR CLIENTS:
A Roadmap to Effective, Ethical Client Service
P.M. Session Only ☐ Standard Fee $119
Many lawyers forget that law is a service profession. Studies show that the most frequent reason for losing clients is poor service. And retaining clients in a volatile economy is crucial to your practice. This seminar will provide you with the tools you will need to consistently deliver exceptional service, retain and develop more business from existing clients, and increase referrals. Learn to apply best practices that will exceed client expectations, eliminate the most common causes of client dissatisfaction, deal effectively with client complaints, handle angry clients, and more.
12:15 p.m. Registration and Lunch (provided at the State Bar Center)
1:00 p.m. Retain Your Clients (3.0 EP)
2:30 p.m. Break
2:45 p.m. Retain Your Clients (continued)
4:15 p.m. Adjourn

LAS CRUCES VIDEO REPLAYS
3rd Judicial District Court – Jury Assembly Rm 1, 201 W. Picacho Ave., Las Cruces, NM
MAY 7, 2012 THE RELEVANCE AND RISK OF E-DISCOVERY FOR EVERY DAY PRACTICE
8:30 a.m. 4.7 G, 2 EP ☐ $249
MAY 8, 2012 THE BASICS OF EMPLOYMENT LAW
8:00 a.m. 6.1 G ☐ $209

Save the date!
2012 Annual Meeting – Bench and Bar Conference
The Hyatt Regency Tamaya Resort & Spa • July 12-14, 2012
2012 NEW MEXICO COLLABORATIVE LAW SYMPOSIUM: The Basics
Friday and Saturday, April 27-28, 2012 • State Bar Center, Albuquerque

[☐] Standard Fee $349  [☐] NMCPG Member $319  

Co-Sponsor: New Mexico Collaborative Law Practice Group, Inc.

(Note: New membership for New Mexico Collaborative Practice Group requires 12 hours of initial training. Attending both days satisfies this requirement.)

DAY ONE, Friday, April 27, 2012
8:45 a.m.  I. Collaborative Family Law Defined
Jan Gilman-Tepper, Esq., Little, Gilman-Tepper & Batley, PA
A. A brief overview of CFL
B. The critical elements of CFL
C. CFL distinguished from other options
   a. Pro Se
   b. Mediation
   c. Traditional Mediation
   d. CFL

II. Preparing to Practice Collaboratively
Jan Gilman-Tepper, Esq.
A. The paradigm shift
B. The role of the law
C. Skills development – Practice Groups

10:30 a.m.  Break

10:45 a.m.  III. Role of the Attorney
Kathryn Terry, Esq., Walther Family Law
A. Explanation
B. Vignette

11:30 a.m.  IV. Multidisciplinary Breakout Session
Noon  Lunch (provided at the State Bar Center)

1:00 p.m.  V. Role of the Divorce Coach
Janice Griffin, PhD
A. Explanation
B. Vignette

2:00 p.m.  VI. Role of the Child Specialist
Maureen Polikoff, JISW
A. Explanation
B. Vignette

3:00 p.m.  Break

3:15 p.m.  VII. Role of the Financial Coach
Timothy Reynolds, CPA/CFF, CVA, Ricci & Company LLC
A. Explanation
B. Vignette

4:15 p.m.  VIII. Breakout by Discipline
5:00 p.m.  Adjourn

DAY TWO, Saturday, April 28, 2012
9:00 a.m.  I. Establishing a Collaborative Case
Tiffany Oliver Leigh, Esq., Little, Gilman-Tepper & Batley, PA
Kathryn Terry, Esq., Walther Family Law
Westly Wellborn, CPA, Westly Wellborn CPA, LLC
Robert Matteucci, Esq., Atkinson & Kelsey, P.A.

A. Client Consultation – Selling Collaborative
B. Forming a Collaborative Team – Contacting Other Professionals
C. Explaining / Signing the Four-Way Agreement

10:30 a.m.  Break

10:45 a.m.  II. Professional Phone Call
Tiffany Oliver Leigh, Esq.
Kathryn Terry, Esq.
Ken Gilman, PhD, Psychology in Collaboration & Mediation
Timothy Reynolds, CPA/CFF, CVA

III. Team Meeting
Tiffany Oliver Leigh, Esq.
Kathryn Terry, Esq.
Ken Gilman, PhD
Timothy Reynolds, CPA/CFF, CVA
Westly Wellborn, CPA
Robert Matteucci, Esq.

11:30 a.m.  IV. Practice Groups
Witter Tidmore, Esq., Witter Tidmore Attorney at Law PC
Julie Wittenberger, Esq., Cuddy & McCarthy LLP
Ingrid Rooslid, MBA, CRC

Noon  Lunch (provided at the State Bar Center)

1:00 p.m.  V. How to Build and Grow Your Collaborative Practice: A Panel Discussion
Ken Gilman, PhD
Timothy Reynolds, CPA/CFF, CVA
Jessica Roth, Esq., New Mexico Legal Group

2:00 p.m.  VI. Ethics and Collaborative Law (1.0 EP)
Gretchen Walther, Esq., Walther Family Law
Ken Gilman, PhD
Timothy Reynolds, CPA/CFF, CVA

A. Scope of Representation and Informed Consent
B. Confidentiality and Privilege
C. Uniform Collaborative Practice Act

3:00 p.m.  VII. Concluding the Collaborative Process
Gretchen Walther, Esq.
A. Narrative about Next Steps
B. Withdrawal
C. Signing Final Documents

3:30 p.m.  Adjourn

9th ANNUAL SPRING ELDER LAW SEMINAR
Friday, May 11, 2012 • State Bar Center, Albuquerque

[☐] Standard Fee $129  [☐] Elder Law Section Member, Government, Legal Services Attorney, Paralegal $109

Co-Sponsor: SBNM Elder Law Section

Noon  Registration
Lunch (provided at the State Bar Center)
Elder Law Section Meeting

1:00 p.m.  Introductory Remarks and Course Overview
Sara Traub, Esq., Pregenzer Baysinger Wideman & Sale, PC

1:10 p.m.  Update on Medicaid Law
Ellen Leitzinger, Esq., Law Office of Ellen Leitzinger
Nell Graham Sale, Esq., Pregenzer Baysinger Wideman & Sale, PC

2:45 p.m.  Break

3:00 p.m.  Mental Health Treatment Guardianship
Juan Baca, Esq., District Attorney’s Office
Mark Oberman, Mental Health Social Worker
Kortni Jones, Mental Health Treatment Guardian

3:30 p.m.  Adjourn and Reception (State Bar Lobby)

No Auditors Permitted
**2012 ETHICS PROFESSIONALISM: THE DISCIPLINARY PROCESS**

Friday, May 11, 2012 • State Bar Center, Albuquerque

- Standard Fee $79

9:30 a.m.  Registration
10:00 a.m.  The Disciplinary Process (2.0 EP)
            William D. Slease, Esq., Chief Disciplinary Counsel, New Mexico Disciplinary Board
Noon        Adjourn and Lunch (provided at the State Bar Center)

**BANKRUPTCY EXEMPTION LAW**

Friday, May 18, 2012 • State Bar Center, Albuquerque

- Standard Fee $119
- Bankruptcy Law Section Member, Government, Legal Services Attorney, Paralegal $99
- Co-Sponsor: SBMN Bankruptcy Law Section

8:30 a.m.  Bankruptcy Exemption Law
           Hon. William H. Brown, U.S. Bankruptcy Court, Western District of Tennessee (retired)
           Lawrence R. Ahern, III, Burr & Forman LLP, Nashville, Tennessee

10:00 a.m.  Break
10:15 a.m.  Bankruptcy Exemption Law (continued)
11:45 a.m.  Adjourn and Lunch (provided at the State Bar Center)
No Auditors Permitted

**CLE REGISTRATION FORM**

For more information about our programs visit www.nmbarcle.org • 505.797.6020

**TWO WAYS TO REGISTER:**

INTERNET: www.nmbarcle.org  FAX: (505) 797-6071, 24 hour access

Please Note: For all WEBCASTS and TELESEMINARS, you must register online at www.nmbarcle.org

Name__________________________________________________________ NMB#____________________
Street_____________________________________________________________________________________
City/State/Zip____________________________________________________
Phone __________________________ Fax __________________________
E-mail ______________________________________________________________________________________
Seminar ____________________________________________ Date of Seminar ________________

**CLE Materials:**  □ FLASH Drive  □ Printed
□ VISA  □ MC  □ American Express  □ Discover

Credit Card# ____________________________________________ Billing Zip Code __________ CVV# __________

Authorized Signature ___________________________________________

**REGISTER EARLY!** Advance registration is recommended as it guarantees admittance and course materials. If space and materials are available, paid registrations will be accepted at the door. PAYING BY CHECK/PURCHASE ORDER: If you will be paying by check or government issued Purchase Order, please complete this registration form and present it at the registration desk with your check/purchase order on the day of the seminar. CANCELLATIONS & REFUNDS: If you find that you must cancel your registration, send a written notice of cancellation via fax by 5 p.m., one week prior to the program of interest. A refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program. MCLE CREDIT INFORMATION: Courses have been approved by the New Mexico MCLE Board. CLE of SBMN will provide attorneys with necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required. ATTENTION PERSONS WITH DISABILITIES: Our meetings are held at facilities which are fully accessible to persons with mobility disabilities. If you plan to attend our program and will need an auxiliary aid or service, please contact the CLE of SBMN office one week prior to the program. PROGRAM CANCELLATION: Pre-registration is recommended. Program will be cancelled one week prior to scheduled date if attendance is insufficient. Pre-registrants will be notified by phone and full refunds given. TAPE RECORDING OF PROGRAMS IS NOT PERMITTED. CLE AUDIT POLICY: Members of the State Bar of New Mexico (to include attorneys and paralegals) and other legal staff (legal staff being defined as legal assistants and staff of members of the State Bar of New Mexico) may audit State Bar CLE courses at a cost of $10, space permitting. Course materials, breaks and/or lunch, if applicable, may be purchased at an additional cost of $29. Auditors should contact the CLE office in advance and notify staff of their intent to audit. “Walk-in” auditors will also be permitted on a space available basis. Auditors will not receive CLE credits for the audit fee. If an auditor chooses to receive CLE credit for attending the course, the request and payment must be made to CLE staff on the day of the program. Attendees who request CLE credit prior to the program will not be allowed to change to audit. No exceptions will apply. This policy applies to live seminars only and excludes special events. SCHOLARSHIPS: Please note, scholarships are available on an ‘as needed’ basis for up to 10% of any given seminar. The amount of the scholarship is equivalent to a 50% reduction of the standard fee for each seminar. To qualify, recipients are required to sign a financial assistance form available from the CLE department. For further information, please call (505) 797-6020. NOTE: Programs subject to change without notice.
PROPOSED REVISIONS TO THE CRIMINAL FORMS

The Rules of Criminal Procedure for the District Courts Committee, the Rules for Courts of Limited Jurisdiction Committee, and the Metropolitan Courts Rules Committee have recommended proposed amendments to the following Criminal Form for the Supreme Court’s consideration.

If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court’s web site at http://nmsupremecourt.nmcourts.gov/ or sending your written comments to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received on or before May 9, 2012, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s web site for public viewing.


STATE OF NEW MEXICO
COUNTY OF ___________________

__________________ COURT

[No. _____________]

STATE OF NEW MEXICO
COUNTY OF ___________________

v. No. __________

____________________________________, Defendant.

CONDITIONAL ORDER OF APPOINTMENT

This matter having come before the court, the court finds:
(please check appropriate box or boxes)

THE COURT FINDS THAT:
[ ] the defendant is incarcerated.
[ ] the defendant is not incarcerated.

THE COURT FURTHER FINDS THAT:
[ ] the defendant is indigent and unable to obtain counsel.
[ ] the defendant is not indigent, but is unable to obtain counsel.

IT IS THEREFORE ORDERED THAT:
[ ] the defendant is unable to obtain counsel and desires representation by the Public Defender Department.
[ ] the Public Defender Department is appointed to represent the defendant in the above-entitled case.
[ ] an attorney on contract with the Public Defender Department, shall represent the defendant in the above-entitled case.
[ ] the defendant shall reimburse the State of New Mexico in an amount of no less than $___________ for legal representation and related expenses.
[ ] the defendant shall make application to the Public Defender Department for representation. If the defendant is determined not to be indigent under the Department’s indigency guidelines as approved by the New Mexico Supreme Court, the defendant shall execute a contract to reimburse the State of New Mexico for legal representation and related expenses in the amount determined in accordance with the Department’s guidelines.

IT IS FURTHER ORDERED THAT the Public Defender Department is hereby appointed to represent the defendant in the above-entitled cause contingent upon the defendant making application to the Department for representation as set forth herein.

IT IS FURTHER ORDERED THAT:
[ ] the application fee is waived.
[ ] the application fee is [required] not waived.

____________________________________
(Magistrate Judge)
(Metropolitan Judge)
(District Judge)

CERTIFICATE OF MAILING

I certify that I mailed a copy of this order to the above-named defendant at ______________________ (set forth address), and to the public defender on the __________ day of __________________ , ________.

______________________________
(Judge ) (Clerk)

Date

[Adopted, effective July 1, 1988; as amended, effective January 1, 1996; as amended by Supreme Court Order No. ______________, effective _____________.]
In this appeal, we consider whether (1) a formation election under the Public Improvement District Act (PID Act), NMSA 1978, §§ 5-11-1 to -27 (2001, as amended through 2009), incorporates the election contest and recount procedures found in the Election Code, NMSA 1978, §§ 1-1-1 to 1-24-4 (1969, as amended through 2010), and (2) Plaintiffs’ amended complaint constituted an election contest subject to the Election Code’s election contest procedures. We hold that the PID Act’s formation election provisions incorporated the Election Code’s election contest procedures and that the entirety of Plaintiffs’ amended complaint constituted an election contest. Because an election contest requires direct appeal to our Supreme Court, this Court lacks jurisdiction, and we therefore transfer this case to our Supreme Court.

BACKGROUND

This case arises out of the efforts of Defendants to create a public improvement district within the Village of Angel Fire under the PID Act. Plaintiffs appeal the district court’s order of dismissal, pursuant to Rule 1-012(B)(1) NMRA, concluding that it lacked subject matter jurisdiction, because the entirety of the amended complaint was subject to and barred by the thirty-day statute of limitations found in the Election Code’s election contest provisions, Section 1-14-3, or the thirty-day statute of limitations found in the Municipal Election Code, NMSA 1978, § 3-8-63(C) (1999).

We summarize the facts in the amended complaint as follows. In April 2007, Defendant Angel Fire Resort Operations, LLC submitted a petition to Defendant Village of Angel Fire, requesting approval of a public improvement district to construct roads, water, a force main sewer system, and telephone and electrical utilities to serve 847 lots. The infrastructure improvements were to be funded by a special levy assessed against the property owners of the lots. The Resort resubmitted the petition on October 12, 2007, and included a general plan, a feasibility study, an estimate of construction costs, a rate and method of apportionment of a special levy, and other
documents in support of the plan. The Village subsequently mailed a notice of intent to form a public improvement district to lot owners affected by the plan. Following a public hearing, the Village council voted to approve the formation of the Angel Fire Public Improvement District (the AFPID) on February 14, 2008. The Village, the Resort, Defendant Association of Angel Fire Property Owners, and the AFPID executed a contingency agreement that allocated responsibility for construction, financing, ownership, maintenance, and operation of the AFPID plan. The agreement was contingent upon the formation of the AFPID through a formation election as required by Section 5-11-8(A) of the PID Act.

[4] On April 1, 2008, the Village mailed ballots to the property owners affected by the proposed AFPID. The ballots were to be returned by April 21, 2008, the returned ballots were counted, and the requisite majority approved the AFPID. Upon approval of the formation of the AFPID, the board of directors of the AFPID (the Board) passed a resolution authorizing a special levy upon the properties located within the AFPID. On November 1, 2008, the Village mailed property tax assessments, including the special levy, to property owners within the AFPID. The Board subsequently entered into various contracts to finance and construct the infrastructure improvements, including two loans from Defendant New Mexico Finance Authority.

[5] Plaintiffs filed a complaint for declaratory relief on June 1, 2009, more than twelve months after the formation election. Plaintiffs filed an amended complaint on June 19, 2009. Plaintiffs’ amended complaint sought declarations that (1) the AFPID has no valid legal existence and all contracts and agreements made by the Board are void and unenforceable; (2) if the AFPID was formed in accordance with the law, it is illegal pursuant to Section 5-11-8(B), because the improvements for which the levy is assessed will not confer a benefit upon the property contained within the AFPID and because it will not confer a benefit upon the properties assessed the levy; (3) the properties included in the 1995 reorganization plan are entitled to form a special assessment district; and (4) the AFPID has no authority to collect any tax or assessment or to expend such sums already collected. The district court characterized the entirety of the amended complaint as an election contest and dismissed the action as untimely under the thirty-day statute of limitations for election contests in the Election Code. This appeal followed.

ARGUMENTS ON APPEAL

[6] On appeal, Plaintiffs contend that (1) the PID Act’s formation election provisions did not incorporate the Election Code’s election contest procedures and therefore the thirty-day statute of limitations for election contests does not apply; and (2) even assuming that the Election Code’s election contest procedures apply to formation elections, the amended complaint does not present an election contest. In particular, Plaintiffs maintain that the amended complaint does not present an election contest because it does not challenge the results of the election and instead (1) challenges the underlying validity of the petition under the PID Act and the New Mexico Constitution’s elections clause, (2) claims that no election occurred for the imposition of the special levy, (3) claims that the special levies are excessive under the PID Act, Section 5-11-8(B), and (4) claims that certain property owners within the AFPID have a right under the Resort’s 1995 bankruptcy reorganization plan to form a special assessment district.

Defendants, on the other hand, argue that the Election Code requires direct appeal of election contests to our Supreme Court, and therefore this Court does not have jurisdiction.

STANDARD OF REVIEW

[7] On appeal from a dismissal based on a Rule 1-012 (B)(1) motion, we accept all facts alleged in the complaint as true and resolve all doubt about the sufficiency of the complaint in favor of the plaintiffs’ right to proceed. See Martinez v. Cornejo, 2009-NMCA-011, ¶ 6, 146 N.M. 223, 208 P.3d 443. The issues of whether the election contest provisions of the Election Code or the Municipal Election Code apply to formation elections under the PID Act and whether Plaintiffs’ claims constitute an election contest are legal questions that we review de novo. See id. (holding that determining whether the plaintiffs had an actionable claim required statutory construction, which is a question of law reviewed de novo).

ELECTION CODE’S ELECTION CONTEST PROCEDURES

[8] The district court dismissed the amended complaint as time barred by the thirty-day statute of limitations provided by Section 1-14-3 of the Election Code. This statute of limitations and other provisions found in the Election Code’s election contest procedures provide for the “speedy resolution” of election contests. See Guanaji v. Macias, 2001-NMSC-028, ¶ 26, 130 N.M. 734, 31 P.3d 1008 (noting that the purpose of the procedures relating to election contests is the speedy resolution of election contests in which the normal rules of civil procedure take too much time).

[9] Plaintiffs argue that the district court erred when it determined that the Election Code’s election contest procedures, including the thirty-day statute of limitations found in Section 1-14-3, applied to formation elections under the PID Act. The question of whether the PID Act incorporates the Election Code’s election contest procedures for formation elections is primarily a question of legislative intent.

[10] The Election Code provides that “[a]ny action to contest an election[, the] complaint shall be filed no later than thirty days from issuance of the certificate of nomination or issuance of the certificate of election to the successful candidate.” Section 1-14-3. Although this provision principally addresses elections with “candidates,” the Election Code’s election contest procedures also apply to “special district elections,” such as a PID Act formation election, “[]to the extent procedures are incorporated or adopted by reference by separate laws governing such elections or to the extent procedures are not specified by such laws[.]” Section 1-1-19(B) (2). Thus, the Election Code’s election contest procedures apply to a special district election when the laws governing the special district election incorporate the procedures. In addition, when the laws governing a special district election are silent as to the procedures, the Election Code applies as the default procedures for such an election.

[11] In determining whether the PID Act incorporated the Election Code’s election contest procedures by reference, we look to the plain meaning of the election provisions of the PID Act. See State v. Hubble, 2009-NMCA-014, ¶ 13, 146 N.M. 70, 206 P.3d 579 (“We first look to the plain meaning of the words chosen by the Legislature.”). Section 5-11-7(E) of the PID Act provides that “[e]xcept as otherwise provided by this section, [PID formation elections] shall comply with the general election laws of this state.” The plain meaning therefore indicates that the Legislature intended PID Act formation elections to incorporate the same procedural protections and requirements as general elections, unless the PID Act expressly excludes or contradicts a particular procedure.
Additionally, the PID Act formation election procedures do not contain independent election contest or recount procedures. See § 5-11-7 (general formation election provisions). Since, by virtue of Section 1-1-19(B)(2), the Election Code provides the default procedures for a formation election under the PID Act, the absence of separate election contest or recount procedures supports the conclusion that the Legislature’s language and actions indicate that the Legislature intended the Election Code to apply to formation elections under the PID Act. The Election Code’s provisions, including the election contest and recount procedures, therefore apply to formation elections under the plain meaning of the PID Act.

Plaintiffs argue that the general language contained in Section 5-11-7(E) is insufficient to incorporate the election contest and recount procedures of the Election Code. Plaintiffs rely on State ex rel. Denton v. Vinyard, 55 N.M. 205, 207-09, 230 P.2d 238, 239-40 (1951), which held that a statute stating that “[s]uch election shall be conducted in a manner provided by law for general elections within said county or city, except as herein provided” was too general to incorporate the Election Code’s contest and recount procedures. (internal quotation marks and citation omitted). While the language of Section 5-11-7(E) and the statute at issue in Vinyard are similar, Vinyard is distinguishable. At the time Vinyard was decided, the Election Code was silent as to its scope and did not contain a provision that stated that it applied to special district elections under any circumstance. See generally NMSA 1941, §§ 56-101 to -1017 (1951) (election code under previous compilation). It was not until 1969 that the Legislature added a provision to the Election Code that addressed the elections covered by the Election Code. See 1969 N.M. Laws, ch. 240, §§ 19-20. In addition, “special district elections” were originally excluded from the Election Code “[u]less otherwise provided in the Election Code or by separate laws governing such elections.” Id. § 20. In 1975, the Legislature changed this provision to read in the affirmative and state that “special district elections” are governed by the Election Code “[t]o the extent procedures are incorporated or adopted by reference by separate laws governing such elections.” 1975 N.M. Laws, ch. 255, § 6. The Legislature again changed and expanded this provision in 1977. 1977 N.M. Laws, ch. 222, § 4. The language adopted in 1977, which is the current language in the Election Code, provides that “to the extent procedures are not specified by such laws, certain provisions of the Elections Code shall also apply to . . . special district elections.” Id. By providing that the Election Code’s election contest procedures apply when procedures are not specified, the 1977 amendment enhanced the scope of the Election Code such that the Election Code now provides the default election procedures for all special district elections, which was not the situation when Vinyard was decided.

Further, Vinyard addressed the issue of whether the plaintiffs had a right to file an election contest under a local option statute. Vinyard, 55 N.M. at 209, 230 P.2d at 240. Vinyard recognized that the “right of recount and contest are purely statutory” and that a general statement is insufficient to incorporate the right to recount and contest. Id. at 207, 209, 230 P.2d at 239, 240. In this case, Plaintiffs’ amended complaint does not allege a statutory right to contest, but instead raises a claim under Article 2, Section 8 of the New Mexico Constitution. We must determine whether the Election Code procedures for an election contest apply to a formation election, or whether there is a substantive right to contest the election as in Vinyard.

Moreover, if Plaintiffs are correct, the statute of limitations for an election contest under the PID Act would be the general four-year statute of limitations under NMSA 1978, Section 37-1-4 (1880) (four-year catch-all statute of limitations). The practical effect would be to allow a plaintiff to challenge a formation election well after construction of a public improvement district has begun or possibly even completed. An election contest arising under the PID Act is precisely the type of case that requires the “need for speedy resolution” that the Election Code’s election contest procedures provide. Gunaji, 2001-NMSC-028, ¶ 26.

ScoPE OF AN ELECTION CONTEST

Having determined that the Election Code’s election contest procedures apply to election contests of formation elections under the PID Act, we must determine whether Plaintiffs’ amended complaint presents an election contest. If Plaintiffs are correct and the amended complaint does not present an election contest, the Election Code’s election contest procedures, such as the thirty-day statute of limitations, do not apply. We begin by examining New Mexico case law on the question of what constitutes an election contest.

In arguing that the amended complaint was not an election contest, Plaintiffs rely on several out-of-state cases and Heth v. Aroj, 83 N.M. 498, 500, 494 P.2d 160, 162 (1972), for the propositions that the defining features of an election contest are that an election was held in which one side won and that allegations “that conditions precedent to an election did not occur, . . . such as a valid petition for the election, complete and truthful notice to the electorate, and the preparation and dissemination of proper ballots” are not election contests. Plaintiffs note that our Supreme Court stated in Heth that

Since the objective of the contestant in an election contest is to be declared the winner, his notice of contest should allege that he has received more legal votes than the contestee, and a failure to so allege is not a claim showing that the contestant is entitled to relief. Id. at 500, 494 P.2d at 162. However, we do not read Heth in the limited manner Plaintiffs propose. Heth involved a claim by unsuccessful candidates who alleged various statutory violations of the Election Code. Id. at 498-99, 494 P.2d at 160-61. The candidates’ notice of contest failed to state that any of the alleged illegal ballots cast were cast for contestants, that the results would have been changed, or that the contestants were entitled to the offices for which they were candidates. Id. at 499, 494 P.2d at 161. Our Supreme Court held that the failure to assert that the results of the election would have been different in the notice of contest is “analogous to a complaint in tort alleging that the defendant negligently struck the plaintiff, but failing to allege that the plaintiff was injured thereby.” Id. at 500, 494 P.2d at 162. Heth only stands for the proposition that an election contest must contain an assertion that the underlying claim in the complaint would have changed the result of the contested election.

More recent cases clearly show that New Mexico courts have not recognized a distinction between allegations of failed conditions precedent to an election and allegations that the contestant should be declared the winner of a valid election in determining whether a complaint presents an election contest. In Dinsdell v. Board of County Commissioners of Lea
count, 103 N.M. 442, 443, 708 P.2d 1043, 1044 (1985), our Supreme Court addressed whether the statutory provisions concerning election contests and recounts applied to the plaintiffs’ complaint. The plaintiffs made two allegations: (1) the bond election at issue was held in violation of statutory provisions for the consolidation of precincts, and (2) certain ballots were cast by persons invalidly registered. Id. The plaintiffs argued that even if the second claim, challenging the results of the election, was held to be an election contest subject to the Election Code’s election contest procedures, the first claim, addressing the conditions precedent or validity of the election under the statute governing the election, was still outside the purview of an election contest. Id. at 444, 708 P.2d at 1045. Our Supreme Court did not agree with the distinction. Id. It stated that a “challenge to the validity of an election is also a challenge to its result, for if it is successful, the result is changed, and similarly, a challenge to the result contests the inherent validity of the election.” Id. Therefore, under Dinwiddie, any challenge as to the underlying validity of an election that would necessarily require overturning the results or effects of an election is an election contest subject to the Election Code’s election contest procedures.

[19] Plaintiffs argue that Dinwiddie has effectively been overruled by Gunaji. In Gunaji, our Supreme Court held that the Election Code did not provide a remedy due to a “gap in the statutory scheme” in an election contest arising from ballots containing the incorrect candidates. Gunaji, 2001-NMSC-028, ¶¶ 2, 13-15. The plaintiffs sued the county clerk, who was in charge of preparing the ballot, but our Supreme Court noted that the Election Code only provides for an election contest for error by the precinct board. Id. ¶¶ 14-15. The Court held that “[a]ssuming the Election Code does not provide a remedy when candidates’ names are omitted from the ballot,” there was “no barrier to our fashioning a remedy outside the Code” under Article II, Section 8 of the New Mexico Constitution. Gunaji, 2001-NMSC-028, ¶ 21, 26. The Court stated that “it is the procedure in an election contest which is exclusive, not the grounds and the remedy.” Id. ¶ 26. Thus, even while an election contest may not arise under a specific section of the Election Code and instead alleges some other problem “compromising the validity of the election,” the Election Code’s election contest must be followed to “accord[ ] with the need for speedy resolution of election contests[.]” Id. Gunaji therefore does not support Plaintiffs’ contention that there is a distinction between challenges to election results and the underlying validity of the election in defining an election contest. Instead, Gunaji supports applying the Election Code’s election contest procedures even when the remedy and grounds forming the basis of the election contest are found outside the Election Code, such as noncompliance with the PID Act or the New Mexico Constitution.

[20] We thus view New Mexico case law as defining an election contest as a challenge to the result of an election, as well as a challenge to the inherent validity of an election when the challenge would necessarily require overturning the results or effects of the election. An election contest can derive from a violation of a provision of the Election Code, from a violation of another statute governing the particular election at issue, or from the New Mexico Constitution. See Heth, 83 N.M. at 499-500, 494 P.2d at 161-62 (election contest derived from Election Code); Dinwiddie, 103 N.M. at 443-44, 708 P.2d at 1044-45 (election contest challenging the underlying validity of the election based on statute governing election for issuing general obligation bonds); Gunaji, 2001-NMSC-028, ¶ 2, 26 (noting that Election Code contest procedures apply to election contests alleging a violation of Article II, Section 8 of the New Mexico Constitution). Applying the Election Code’s election contest procedures to all election contests, including election contests of formation elections under the PID Act, “accords with the need for speedy resolution of election contests[.]” Gunaji, 2001-NMSC-028, ¶ 26.

AMENDED COMPLAINT AS AN ELECTION CONTEST

[21] We next turn to Plaintiffs’ amended complaint to determine whether it presents an election contest and therefore must follow the Election Code’s election contest procedures. Plaintiffs’ amended complaint sought declarations that (1) the AFPID has no valid legal existence and all contracts and agreements made by the Board are void and unenforceable; (2) if the AFPID was formed in accordance with the law, it is illegal pursuant to Section 5-11-8(B), because the improvements for which the levy is assessed will not confer a benefit upon the property contained within the AFPID and because the levy will not confer a benefit upon the properties assessed; (3) the properties included in the 1995 reorganization plan are entitled to form a special assessment district; and (4) the AFPID has no authority to collect any tax or assessment or to expend such sums already collected.

[22] Plaintiffs argue that they base the first prayer for relief on a claim that no legal election has occurred, and therefore it is not an election contest. In particular, the amended complaint alleges that the petition to form the AFPID was invalid because only the Resort signed the petition to form the AFPID, and Section 5-11-3(A) requires that the “owners of at least twenty-five percent of the real property” sign the petition. (Emphasis added.) Additionally, the amended complaint states that the formation election failed to comply with the requirements of the PID Act as stated in Section 5-11-7(E)(1)-(3) (requiring that the “ballot material” for a formation election include specified, detailed information). These claims relate to whether the petition and the ballot met statutory requirements required of a formation election by the PID Act, and the claims therefore challenge the underlying validity of the election. As we have discussed, these issues present an election contest. See Dinwiddie, 103 N.M. at 443-44, 708 P.2d at 1044-45 (holding that a claim that an election was held in violation of statutory requirements for consolidation of precincts was a challenge to the underlying validity of the election and therefore was an election contest subject to the Election Code’s election contest procedures).

[23] With regard to the second and third prayers for relief, Plaintiffs argue that they do not challenge the underlying validity of the formation election and that the amended complaint concedes that a valid election occurred. However, these prayers for relief also rest on challenges to the underlying validity of the formation election. The gist of Plaintiffs’ claim of illegality of the AFPID under Section 5-11-8(B) is that the feasibility study provided in the petition inflated the projected market value of the lots within the AFPID after construction of the infrastructure improvements. Plaintiffs allege that the inflated projections in the feasibility study were “incorrect, misleading, or fraudulent” and were designed to keep the projected amount of bond indebtedness of the AFPID within the sixty percent limit of bond indebtedness to market value ratio mandated by Section 5-11-8(B). Similarly, Plaintiffs base their claim that certain properties are entitled to form a special
assessment district on an assertion that the information in the petition is “incorrect, misleading, or fraudulent.” Specifically, the amended complaint alleges that the petition misrepresented the AFPID as necessary to comply with the Resort’s obligations under a final plan of reorganization from a 1995 bankruptcy. Both prayers for relief two and three address the accuracy of information provided to the Village and voters prior to the formation election to approve the AFPID. The claims challenge the underlying validity of the election by asserting that (1) the Village authorized the formation election and (2) voters approved the AFPID based on false, fraudulent, or misleading information designed to circumvent the requirements of the PID Act prior to the election. Further, the relief that Plaintiffs seek, allowing certain lots to form a special assessment district, as opposed to being included in the AFPID, and declaring the special levy illegal, would necessarily require overturning the election results. The second and third prayers for relief therefore state an election contest concerning the formation election.

See Dinwiddie, 103 N.M. at 444, 708 P.2d at 1045 (holding that a “challenge to the validity of an election is also a challenge to [the] result, for if it is successful, the result is changed”).

{24} Finally, the fourth prayer for relief, that the AFPID has no authority to tax, also derives from an assertion that the formation election was not conducted in accordance with the PID Act. Specifically, Plaintiffs claim that in order to have the authority to tax, the PID Act required that the ballot have a separate ballot question specifically addressing the authority to tax, aside from the question as to whether to form the PID. Further, the amended complaint alleges that the ballot failed to provide required details of the special levies assessed on the lot owners, as required by Section 5-11-7(E)(2) (requiring the ballot in a formation election to contain a description of district improvements and arguments for and against the imposition of the taxes and a statement that the taxes are for public infrastructure improvements and services within the district). Again, this claim challenges the underlying validity of the election based on failure to comply with statutory requirements and is therefore an election contest governed by the Election Code’s election contest procedures.

TRANSFER TO SUPREME COURT

{25} Having concluded that the Election Code’s election contest procedures apply to formation elections under the PID Act and that the amended complaint presented an election contest, we further conclude that this Court does not have jurisdiction over this appeal. “[L]ack of jurisdiction at any stage of the proceedings is a controlling consideration which must be resolved before going further.” In re Doe, III, 87 N.M. 170, 171, 531 P.2d 218, 219 (Ct. App. 1975). “[W]e have a duty to determine whether [we have] jurisdiction of an appeal.” State ex rel. Dep’t of Human Servs. v. Manfre, 102 N.M. 241, 242, 693 P.2d 1273, 1274 (Ct. App. 1984). This Court is a court of limited jurisdiction and only has appellate jurisdiction as provided by law. Id. at 243, 693 P.2d at 1275. NMSA 1978, Section 34-5-8(A)(1)

(1983) provides that this Court has appellate jurisdiction for “any civil action not specifically reserved to the jurisdiction of the supreme court by the constitution or by law.”

{26} The Election Code, Section 1-14-5, states that “[a]n appeal shall lie from any judgment or decree entered in the contest proceeding to the supreme court of New Mexico within the time and in the manner provided by law for civil appeals from the district court.” Thus, the Election Code provides that our Supreme Court has jurisdiction of direct appeals of election contests from a district court. We therefore transfer this appeal to our Supreme Court, pursuant to NMSA 1978, Section 34-5-10 (1966) (“No matter on appeal in the supreme court or the court of appeals shall be dismissed for the reason that it should have been docketed in the other court, but it shall be transferred by the court in which it is filed to the proper court.”).

CONCLUSION

{27} We hold that the PID Act’s formation election provisions incorporate the Election Code’s election contest procedures, which require a direct appeal to our Supreme Court, and that Plaintiffs’ amended complaint presented an election contest. We therefore hold that this Court lacks jurisdiction and transfer this case to our Supreme Court.

{28} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge
LINDA M. VANZI, Judge
Certiiorari Denied February 16, 2012, No. 33,401

From the New Mexico Court of Appeals

Opinion Number: 2012-NMCA-029

Topic Index:

Appeal and Error: Harmless Error
Constitutional Law: Confrontation
Criminal Law: Child Abuse and Neglect; and Homicide
Criminal Procedure: Cross-examination; Expert Witness;
Right to Confrontation; and Witnesses
Evidence: Admissibility of Evidence; Availability of Witness;
and Expert Witness

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
LEROY JARAMILLO,
Defendant-Appellant..
No. 28,517 (filed November 23, 2011)

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
STEPHEN QUINN, District Judge

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for Appellant

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for Appellant

OPINION

RODERICK T. KENNEDY, Judge

When a deputy medical examiner left the county medical examiner’s office to go into private practice and subsequently required a hefty fee from the State for his trial testimony, the State put his former supervisor on the witness stand to testify to the autopsy that the first pathologist had conducted. In the course of the supervisor’s testimony during direct examination, he read to the jury some contents of the autopsy report prepared by the absent doctor. The entire report was thereafter admitted as evidence and presented to the jury. To the extent the district court admitted the report as an exhibit, the admission was constitutional error as it violated Defendant’s confrontation rights. Thus, we reverse Defendant’s conviction.

I. BACKGROUND

In October 2004, ten-month-old Cristyan Ibarra was taken to the emergency room in Clovis, New Mexico by his mother and Defendant. Owing to his symptoms, which included internal cranial bleeding, Cristyan was transported by air to Lubbock, Texas. There, he was pronounced dead several days later. Dr. Sridhar Natarajan, who at that time was employed by the Lubbock County Medical Examiner’s Office, performed Cristyan’s autopsy. Dr. Natarajan determined the cause of death to be closed head injuries and ruled the manner of death to be a homicide. The findings in the autopsy report were reviewed, confirmed, and signed off by air to Lubbock, Texas. There, he was pronounced dead several days later. Dr. Natarajan recorded in the report. Because the State called Dr. Parsons, the Deputy Chief Medical Examiner for Lubbock County, to establish the cause and manner of Cristyan’s death.

Prior to Dr. Parsons being examined, the defense objected to any admission of the autopsy report into evidence based on the Confrontation Clause of the Sixth Amendment to the United States Constitution. The objection specifically asserted that the report was testimonial in nature and that Dr. Natarajan had not been shown to be unavailable as a witness. It is undisputed that the defense did not have an opportunity to cross-examine Dr. Natarajan. Defendant insisted that for the report and its contents to be admissible, its author, Dr. Natarajan, would be required to appear to testify about its contents. Defendant’s specific objection was that any use of or reference to the report by Dr. Parsons would be improper because it “would admit otherwise . . . unpresentable [evidence by] just filtering it through an expert witness.”

Nonetheless, the district court admitted the report and permitted Dr. Parsons to testify to its contents. Dr. Parsons confirmed that he was testifying for Dr. Natarajan. At the district attorney’s request, Dr. Parsons read directly from the autopsy report when testifying about Cristyan’s age and the circumstances leading up to his death. Dr. Parsons also testified to Dr. Natarajan’s specific observations and notations made during the autopsy. In addition, a section of the admitted autopsy report, signed by five non-testifying pathologists, stated: “It is our opinion that Cristyan . . . died as a result of [c]losed [h]ead [i]njuries . . . . The manner of death is classified as a [h]omicide.” The report identified one other person as having assisted in the autopsy and that person did not testify at trial. Subsequently, Defendant was convicted of child abuse resulting in death. He now appeals on the ground that his right to confrontation was violated.

II. DISCUSSION

Defendant argues that the district court erroneously admitted the autopsy report and improperly allowed Dr. Parsons to testify to the substantive findings that Dr. Natarajan recorded in the report. Because admission of the autopsy report alone constituted prejudicial error mandating reversal, we need not address Defendant’s argument regarding Dr. Parsons’ testimony.
The district court explicitly admitted the report as information of the type upon which medical examiners would typically rely in rendering their opinions. At trial, Defendant objected to the report's admission on the ground that Defendant had no opportunity to confront Dr. Natarajan. The State responded that, “if [Dr. Parsons] believes the information in the report is accurate, that should be able to be entered into evidence. And[,] of course, every expert’s going to be looking at reports and things of that nature to render opinions.” In making its ruling, the district court referred directly to its belief that Crawford v. Washington, 541 U.S. 36, 51 (2004), did not address the “expert witness section of the New Mexico [R]ules of [E]vidence [with regard to] an expert testifying from a prior report using [that] as a basis for his opinions.” We therefore review the district court’s admission of the report as pursuant to Rule 11-703 NMRA and consider whether the admission of the report was a violation of Defendant’s rights under the Confrontation Clause.

A. Confrontation Clause Requirements

“The Confrontation Clause guarantees the accused in a criminal trial the right to be confronted with the witnesses against him, regardless of how trustworthy the out-of-court statement may appear to be.” State v. Mendez, 2010-NMSC-044, ¶ 28, 148 N.M. 761, 242 P.3d 328 (internal quotation marks and citation omitted). “As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.” Bullcoming v. State, 131 S. Ct. 2705, 2713 (2011). Thus, we now analyze whether (1) the statements in the autopsy report were testimonial, (2) Defendant had a prior opportunity to cross-examine the declarant, and (3) the declarant was unavailable. We first address whether the statements were testimonial because “only testimonial statements cause the declarant to be a witness within the meaning of the Confrontation Clause.” State v. Aragon, 2010-NMSC-008, ¶ 6, 147 N.M. 474, 225 P.3d 1280 (internal quotation marks and citation omitted). “Questions of admissibility under the Confrontation Clause are questions of law, which we review de novo.” Id.

1. The Autopsy Report in This Criminal Case was Testimonial

The United States Supreme Court held in Bullcoming that “[a] document created solely for an evidentiary purpose, . . . made in aid of a police investigation, ranks as testimonial.” 131 S. Ct. at 2713 (internal quotation marks and citation omitted); Melendez-Diaz v. Mass., 129 S. Ct. 2527, 2531 (2009) (holding that a statement is testimonial if the declarant would reasonably expect the statements to be used prosecutorially). In Aragon, the New Mexico Supreme Court, adopting Melendez-Diaz, analyzed, in the context of reports of chemical analysis, what sort of forensic report might constitute a testimonial statement. Aragon, 2010-NMSC-008, ¶ 2. One factor the Aragon Court examined was the extent to which the person preparing the report exercised independent judgment and analysis. Id. ¶ 30. In this case, Dr. Natarajan’s report containing his findings and conclusions resulting from Cristyan’s autopsy included an exercise of judgment and analysis on his part, as he formed opinions based on his medical training and as he interpreted factual findings.

Aragon Court stated that a testimonial statement “is a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Id. ¶ 6 (internal quotation marks and citation omitted). In particular, Aragon considered whether the witness’s “statements go to an issue of guilt or innocence.” Id. ¶ 8. In this case, the autopsy report was made with the intention of the medical examiner to establish the cause and manner of Cristyan’s death. The medical examiner’s finding of homicide was critical to substantiate allegations that Defendant abused Cristyan and caused his death. Therefore, the autopsy report was prepared with the purpose of preserving evidence for criminal litigation. In this case, the face of the autopsy report itself states that an autopsy was requested because of “the circumstances” of Cristyan’s death, being a severe brain injury of a sort commonly associated with trauma. By the time the medical examiner had determined the cause of death to be closed head injuries and the manner of death to be homicide, there was no doubt this would be used against someone in a criminal prosecution. NMSA 1978, Section 24-11-7 (1973) requires an autopsy with complete findings when a “medical investigator suspects a death was caused by a criminal act or omission or the cause of death is obscure[.]”

Furthermore, Dr. Parsons testified that the report was prepared for use in litigation. There is no reason to suspect that a pathologist with considerable experience and knowledge of statutory duties to report suspicious deaths to law enforcement officers would not anticipate criminal litigation to result from his determination that the trauma-related death of a child was the result of homicide. The statements in the report were made to establish the facts related to Cristyan’s cause of death; ruling the death a homicide reflects directly on the issue of a defendant’s guilt or innocence. No question existed that the report would support and be used in a criminal prosecution.

The State advanced a number of contentions in its briefing to support the autopsy report being considered to be outside of what is considered a testimonial statement, all of which are unavailing or predominately based on law preceding Melendez-Diaz. In its supplemental brief, the State argues that Melendez-Diaz and Aragon do not address the issues in this case. First, the State argues that “[u]nlike [the] blood alcohol reports or chemical forensic reports, Texas medical examiners do not solely prepare autopsy reports for use in future prosecutions [because the] reports are prepared pursuant to [a] duty imposed by law to investigate many deaths which are not the subject of criminal prosecution.” See Tex. Code Crim. Proc. Ann. art. 49.25, § 6 (West 2003) (listing the instances where the medical examiner has a duty to investigate a death). The State insists that the autopsy was not performed at the request of law enforcement and was non-adversarial, relying on Garcia v. State, and was thus non-testimonial. 868 S.W.2d 337, 341-42 (Tex. Crim. App. 1993) (en banc). The State’s use of Texas law is unavailing both in Texas and here in New Mexico.

Texas courts have specifically rejected the State’s argument that a medical examiner’s statutory duty to conduct an inquest whenever there is an unexplained death renders the report non-testimonial. See Wood v. State, 299 S.W.3d 200, 210 (Tex. Crim. App. 2009) (holding that an autopsy report was testimonial when it was reasonable to assume that the pathologist “understood that the report containing her findings and opinions would be used prosecutorially”). More importantly, in New Mexico, any sudden, violent, or untimely death, the cause of which is unknown, must be reported to law enforcement. NMSA 1978, § 24-11-5 (1975). Medical examiners are obligated by statute to report their findings directly to the district.
attorney in all cases they have investigated. NMSA 1978, § 24-11-8 (1973). This forensic role is entirely in keeping with the medical examiner’s purpose to “serve the criminal justice system as medical detectives by identifying and documenting pathologic findings in suspicious or violent deaths and testifying in courts as expert medical witnesses.” Strengthening Forensic Science in the United States: A Path Forward 244 (Nat’l Research Council of the Nat’l Acads. 2009).

[14] Because Dr. Natarajan’s report was prepared to document a homicide and intended for use in prosecution of a criminal case, we conclude that the purpose of the autopsy report was to provide prosecutorial evidence. Thus, we hold that the statements contained in the report were testimonial.

2. Defendant had No Opportunity to Cross-Examine Prior to Trial

[15] “A criminal defendant is guaranteed the right to an effective cross-examination.” Aragon, 2010-NMSC-008, ¶ 25 (internal quotation marks and citation omitted). It is undisputed in this case that Defendant had no previous opportunity to cross-examine either the four other pathologists signing the summary statement in the report or Dr. Natarajan, who, himself, only testified at the grand jury hearing that resulted in Defendant’s indictment. Dr. Natarajan’s exercise of judgment in creating the report should be subject to cross-examination as to its basis in his training in, and the application of, forensic pathology. See Bullcoming, 131 S. Ct. at 2714 (stating that “representations, relating to past events and human actions[,] . . . are meet for cross-examination”). Cross-examination is the “crucible” in which the opinions of an expert, the basis for those opinions, and the methods producing them are tested. Aragon, 2010-NMSC-008, ¶ 32. Foreclosing on the opportunity to cross-examine could create an injury of constitutional magnitude. Even in scientific matters that are performed and documented frequently and routinely, cross-examination is necessary to explore the boundaries of the expert’s qualifications and correct application of scientific techniques and methods. In matters where experts base their opinions on circumstance-dependent factors, this need is acute. See Randy Hanzlick, John C. Hunsaker III, & Gregory J. Davis, A Guide for Manner of Death Classification 4 (Nat’l Assoc. of Med. Exam’rs, 1st ed. 2002) (“All [medical examiners] agree, however, on the fundamental premise that manner of death is circumstance-dependent, not autopsy-dependent.”).

[16] Defendant’s inability to cross-examine the declarant’s testimonial statements is dispositive in this case. Where the government seeks to admit a testimonial out-of-court statement, it must establish that the defendant had a prior opportunity to cross-examine the declarant. State v. Rivera, 2008-NMSC-056, ¶ 18, 144 N.M. 836, 192 P.3d 1213. As Defendant had no prior opportunity to cross-examine the declarant, we need not concern ourselves with his availability as a trial witness. In the absence of the cross-examination requirement in satisfaction of the Confrontation Clause, we hold that admission of the autopsy report resulted in the violation of Defendant’s right to confrontation.

B. The District Court Improperly Admitted the Autopsy Report Under Rule 11-703

[17] “We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse.” See State v. Sarracino, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. When the district court exercises its discretion based on a misapprehension of the law, it abuses its discretion. State v. Elinski, 1997-NMCA-117, ¶ 8, 124 N.M. 261, 948 P.2d 1209. Here, the district court’s misapprehension of the law regarding the admissibility of facts and data underlying Dr. Parsons’ testimony is inextricable from the confrontation violation.

[18] Although we have held that the admission of the autopsy report violated Defendant’s confrontation rights, we briefly address the State’s argument that the district court properly admitted the report under Rule 11-703, which provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

[19] Our Supreme Court’s opinion in Aragon dispose of this argument. First, the Court in Aragon stated that “[o]nce it has been established that the Confrontation Clause does not bar admission of the statement, the rules of evidence govern whether the statement is admissible.” 2010-NMSC-008, ¶ 6. Thus, if the Confrontation Clause bars use of the statement, the rules of evidence cannot make it admissible and that ends the inquiry.

[20] Second, Aragon stated that an expert could testify about his or her own opinion based on the facts and data contained in a non-testifying expert’s report, but only if the testifying expert “unequivocally testified that it was his opinion,” not the opinion of the non-testifying witness, and if the testifying expert testified that the facts and data are the types relied upon by experts in the field. 2010-NMSC-008, ¶ 33. Consistent with this analysis, had Dr. Parsons made it clear that he was stating his own independent opinions and that he relied on the facts contained in Dr. Natarajan’s report because it contained the types of facts and data upon which medical examiners rely, then Dr. Parsons’ testimony may have been admissible. However, Dr. Parsons did not testify to this effect and, thus, the narrow exception noted in Aragon is not applicable. Furthermore, even under such a narrow exception, the report itself and the facts contained in it would not be admissible absent further action by the court. See Rule 11-703 (“Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”); see also Aragon, 2010-NMSC-008, ¶ 23 (noting that reliance upon hearsay facts or data not in evidence “does not necessarily make the hearsay itself admissible”). Admission of the other five doctors’ opinions contained in the report and Dr. Parsons’ testimony concerning Dr. Natarajan’s opinions are even more prejudicial, and the admission of other experts’ opinions has in the past constituted reversible error. O’Kelly, 94 N.M. at 76, 607 P.2d at 614; Aragon, 2010-NMSC-008, ¶ 24.

[21] The district court in this case was operating under the misperception that the information contained in Dr. Natarajan’s autopsy report, upon which Dr. Parsons relied, was admissible because Dr. Parsons
relied on it. Whether the reliance was justifiable is of no importance. Komis, 114 N.M. at 666 n.4, 845 P.2d at 760 n.4. The district court’s position was not supported by law and caused the erroneous admission of otherwise inadmissible hearsay evidence in the report, in particular, Dr. Natarajan’s opinions and the opinions of other medical examiners based on their review of the autopsy. Admission of this information through Dr. Parsons’ testimony was an abuse of discretion under Rule 11-703 and inadmissible because it violated Defendant’s right to confrontation.

C. Erroneous Admission of the Report was not Harmless Error

{22} Admission of the report violated Defendant’s constitutional right to confrontation. "When a constitutional trial error has been committed, the burden is on the [s]tate to demonstrate the error is harmless beyond a reasonable doubt. The central focus of this inquiry is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” State v. Romero, 2006-NMCA-045, ¶ 70, 139 N.M. 386, 133 P.3d 842 (internal quotation marks and citations omitted). We may consider three factors to determine whether the error was harmless; no one factor is dispositive as we consider them together. Aragon, 2010-NMSC-008, ¶ 35. We evaluate whether there was “(1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear minuscule; and (3) no substantial conflicting evidence to discredit the[s]tate’s testimony.” State v. Barr, 2009-NMSC-024, ¶ 56, 146 N.M. 301, 210 P.3d 198 (footnote omitted).

{23} We do not reweigh the evidence in making this determination. Id. ¶ 57. “[H]armless error analysis does not center on whether, in spite of the error, the right result was reached. Rather, the focus is on whether the verdict was impacted by the error.” Aragon, 2010-NMSC-008, ¶ 35 (internal quotation marks and citation omitted). “Weighing these factors, a court must decide if it can conclude with the requisite level of certainty that an error did not contribute to the jury’s verdict.” State v. Macias, 2009-NMSC-028, ¶ 39, 146 N.M. 378, 210 P.3d 804. New Mexico appellate courts in the past have held that the admission of another expert’s inadmissible evidence is reversible error. Aragon, 2010-NMSC-008, ¶ 24; O’Kelly, 94 N.M. at 77, 607 P.2d at 615; Sewell v. Wilson, 101 N.M. 486, 488-89, 684 P.2d 1151, 1153-54 (Ct. App. 1984).

{24} Here, the cause and manner of death as human caused, rather than accidental, was critical. The testimony from the medical examiner regarding Cristyan’s injuries and the cause of his death were the crux of the case. The wrongfully admitted report bolstered the credibility of this testimony with the unchallenged corroborative opinions of five non-testifying pathologists. The impact of Dr. Parsons’ testimony is inseparable from the bolstering it received from the inadmissible original source of his information and the four other pathologists’ signatures attesting to its conclusions. Thus, to remove all constitutionally offensive evidence as to the cause and manner of death, there would not be substantial evidence to convict Defendant. The testimony of Dr. Parsons was heavily intertwined with the report and was supported by it. Its impact cannot be regarded as minuscule. No other evidence could have proven that Cristyan’s death was a homicide caused by Defendant’s abuse. Furthermore, Dr. Parsons’ statement to the jury that he was testifying for Dr. Natarajan, and the admission of the report and its included opinions provided the jury with an overwhelming quantity of unchallenged testimonial evidence that was improperly admitted. The report was the crux of the State’s case, proving that Cristyan’s death was a homicide.

{25} This constitutional violation rises to the level of harmful error because we cannot be certain that the wrongfully admitted evidence did not impact the verdict. Accordingly, we reverse Defendant’s conviction and remand this matter for a new trial.

III. CONCLUSION

{26} In light of the court’s improper admission of the autopsy report in violation of Defendant’s confrontation right, we reverse the district court and remand for a new trial consistent with our holdings here.

{27} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:
CELIA FOY CASTILLO, Chief Judge
CYNTHIA A. FRY, Judge
TEXT:

Opinion

Cynthia A. Fry, Judge

1. Candace S., a minor at the relevant time, appeals the district court’s denial of her motion to suppress the results of her field sobriety tests (FSTs) and breath alcohol tests. She argues that FSTs are searches that must be supported by a warrant, an exception to the warrant requirement, or voluntary consent. She further argues that the Children’s Code required the officer investigating her traffic violation to advise her of her right to remain silent and her right to withhold consent to the FSTs and breath tests. Because the officer did not so advise her, Candace maintains that her consent to the FSTs and breath tests was involuntary.

2. We conclude that FSTs must be supported by reasonable suspicion, that there is no requirement for an officer to advise a minor of a right to withhold consent, and that failure to advise a minor of a right to remain silent does not render FSTs inadmissible. We therefore affirm the district court’s denial of Candace’s suppression motion.

BACKGROUND

3. While on patrol in September 2009, Officer Brian Kinley observed a vehicle swerving across the white line on the roadway and traveling at least ten miles under the posted speed limit. He stopped the vehicle and made contact with Candace, who was driving the car. He asked Candace if she was weaving as she walked away from the car. Officer Kinley asked Candace for her driver’s license, and Candace said that she had left it at home. He then asked her again after he administered an FST, and she said that she had had “one can.”

4. Officer Kinley administered additional FSTs, during which Candace swayed, stumbled, and failed to follow directions. Officer Kinley asked Candace if she wanted to take a portable breath test and, without waiting for an answer, instructed her how to provide a breath sample. The portable breath test yielded a result of .153. Officer Kinley estimated that the time from contacting Candace in her car to her arrest was about five minutes. He then transported Candace to the New Mexico State Police office, where he obtained two breath samples from the Intoxilyzer testing machine, which registered .14 and .16. Officer Kinley did not advise Candace of her right to remain silent prior to this time.

5. The State filed a delinquency petition against Candace alleging that she drove while under the influence of intoxicating liquor (DWI), failed to maintain her traffic lane, and drove without a valid license. Candace’s attorney filed a motion to suppress all statements made by Candace and the results of the FSTs and the breath tests. As grounds for the motion, Candace asserted that the New Mexico Constitution and NMSA 1978, Section 32A-2-14 (2009), of the Children’s Code provide broad protections to children during police questioning and that, as a result, Candace’s unwarned statements to Officer Kinley should be suppressed. In addition, Candace argued that the greater protections provided by Article II, Section 10 of the New Mexico Constitution and by State v. Javier M., 2001-NMCA-030, 131 N.M. 1, 33 P.3d 1, compelled the suppression of the FSTs and breath tests because Candace’s consent to the tests was not voluntary.

6. In its response to the suppression motion, the State agreed that “any statements of [Candace] made in response to Officer Kinley’s questioning should be suppressed.” However, the State opposed suppression of the FST and breath test results. Following an evidentiary hearing, the district court suppressed all statements made by Candace, whether in response to Officer Kinley’s questions or volunteered, but it further determined that the FST and Intoxilyzer breath test results were admissible. Candace entered a conditional plea admitting to the allegations in the delinquency petition while reserving her right to appeal the denial of her suppression motion. This appeal followed.

Cite: State of New Mexico, Plaintiff-Appellee, versus Candace S., Child-Appellant. No. 30,331 (filed December 27, 2011)

Opinion Number: 2012-NMCA-030

Certiorari Denied February 13, 2012, No. 33,400

From the New Mexico Court of Appeals

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Criminal Procedure: Miranda Warnings; Motion to Suppress; Reasonable Suspicion; and Warrantless Search
Evidence: Blood/Breath Tests

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
CANDACE S.,
Child-Appellant.
No. 30,331 (filed December 27, 2011)

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
WILLIAM C. BIRDSALL, District Judge

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DISCUSSION

[7] Candace makes one overarching argument with several sub-parts. Her general argument is that the district court should have suppressed the FST and breath test results because Officer Kinley’s failure to advise her of her right to remain silent and of her right to refuse the testing rendered her consent to the tests involuntary and invalid. In support of this argument, Candace further argues that: (1) FSTs violate the right against self-incrimination under Article II, Section 15 of the New Mexico Constitution; (2) FSTs constitute a search and, under Section 32A-2-14 and the holding of Javier M., Candace should have been advised of her right to refuse consent before being asked to perform FSTs; and (3) Candace’s consent to the breath tests was involuntary.

Standard of Review

[8] The same standard of review applies to all of Candace’s arguments. “In reviewing an order of suppression, we defer to the district court’s findings of fact that are supported by substantial evidence, and we review the district court’s application of the law to the facts de novo.” State v. Randy J., 2011-NMCA-105, ¶ 10, N.M. 414, 120 P.3d 836, cert. denied, 2011 NMCERT 009, __ N.M. ___, ___ P.3d ___. In the present case, the facts are undisputed, so we review the district court’s order to determine whether it was correct as a matter of law. See id. In addition, we review the district court’s interpretation of Section 32A-2-14 de novo. Id.

Article II, Section 15 of the New Mexico Constitution and the Right Against Self-Incrimination

[9] Candace argues that the FSTs violated her right against self-incrimination, which is guaranteed by Article II, Section 15 of the New Mexico Constitution, and that Article II, Section 15 provides broader protections than the Fifth Amendment to the United States Constitution. We agree with the State that Candace failed to preserve this argument.

[10] Our Supreme Court recently clarified what is required in order to preserve an argument that the state constitution provides greater protection than the federal constitution in State v. Leyva, 2011-NMSC-009, ¶ 49, 149 N.M. 435, 250 P.3d 861. The Court stated:

Where a state constitutional provision has previously been interpreted more expansively than its federal counterpart, trial counsel must develop the necessary factual base and raise the applicable constitutional provision in trial court. Where the provision has never before been addressed under our interstitial analysis, trial counsel additionally must argue that the state constitutional provision should provide greater protection, and suggest reasons as to why, for example, a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.

Id. (internal quotation marks and citation omitted). In the present case, Candace acknowledges that Article II, Section 15 has never been addressed under our interstitial analysis because, as she notes, it “has been interpreted in lock step with the Fifth Amendment.” Yet she failed in the district court to suggest reasons why the provision should be interpreted as providing greater protection than the federal constitution. Indeed, in the district court, the only mention of Article II, Section 15 was Candace’s statement in her written suppression motion that she “relie[d] upon the New Mexico Constitution, Article 2 [sic], Sections 14, 15, and 18 . . . to support the proposition that children in New Mexico are provided broader and greater protections during police questioning than are provided to children . . . under the United States Constitution.” She did not elaborate on this conclusory statement in either her written motion or her argument at the hearing on her motion.

[11] Even if Candace had properly preserved her argument, our decision in Randy J. disposes of her contentions. In that case, we concluded that a child’s performance during FSTs is not a testimonial communication subject to suppression under the Fifth Amendment’s privilege against self-incrimination or in accordance with the protections provided by Section 32A-2-14(D) of the Children’s Code. Randy J., 2011-NMCA-105, ¶¶ 14, 17-18. Because our courts have never interpreted Article II, Section 15 differently from Fifth Amendment case law, the same holding would apply in the present case.

Prerequisite to Performance of FSTs

[12] Candace argues that FSTs are searches implicating constitutional protections and that they cannot be undertaken without establishing an exception to the warrant requirement or voluntary consent. Apparently assuming that there were no warrant exceptions established, Candace then contends that, consistent with Section 32A-2-14 and Javier M., a child must be told that consent to FSTs may be withheld. She further maintains that because Officer Kinley did not tell her this, any consent she may have given was involuntary.

[13] We begin by considering Candace’s argument that FSTs constitute a search with constitutional ramifications. Candace summarizes cases from other jurisdictions holding that FSTs constitute searches and notes that some of these jurisdictions require a showing of probable cause while some require only reasonable suspicion to justify FSTs. See, e.g., People v. Carlson, 677 P.2d 310, 316-18 (Colo. 1984) (en banc) (holding that FSTs constitute searches that must be supported by probable cause); Blasi v. State, 893 A.2d 1152, 1164, 1168 (Md. Ct. Spec. App. 2006) (holding that FSTs constitute a search subject to a showing of reasonable suspicion). Other cases hold that FSTs constitute an expansion of an investigatory detention, rather than a search, and that they require the articulation of reasonable suspicion to justify the expansion. See, e.g., State v. Little, 468 A.2d 615, 617-18 (Me. 1983) (determining that FSTs are part of an investigatory stop that must be based on reasonable suspicion); State v. Gray, 552 A.2d 1190, 1194-95 (Vt. 1988) (same).

[14] We need not decide whether FSTs constitute a search or an expansion of an investigatory detention. Regardless of how they are labeled, FSTs implicate constitutional protections under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Candace focuses on Article II, Section 10 and, as a result, we limit our analysis to that constitutional provision.

[15] Our Supreme Court’s decision in Leyva provides the framework for our discussion. Although that case involved an officer’s expansion of an investigatory detention with questioning unrelated to the initial traffic stop, the analysis is applicable to any search or seizure conducted in connection with any investigatory detention. 2011-NMSC-009, ¶¶ 4-5, 10. In Leyva, the Court reassessed its decision in State v. Duran, 2005-NMSC-034, 138 N.M. 414, 120 P.3d 836, and concluded that Duran no longer represented proper Fourth Amendment analysis in light of recent United States Supreme Court precedent. However, the Court further determined that the Duran analysis continues to be proper when a court assesses searches and seizures under Article II, Section 10. Leyva, 2011-NMSC-009, ¶¶ 2-3.

[16] Duran considered when an officer’s
questions about travel plans during a traffic stop are reasonable under the Fourth Amendment. *Leyva*, 2011-NMSC-009, ¶ 11. The *Duran* Court applied the two-part test first set out in *Terry v. Ohio*, 392 U.S. 1 (1968), for determining the propriety of a detention expansion. *Leyva*, 2011-NMSC-009, ¶ 11. The *Terry* test considers “[(1)] whether the officer’s action was justified at its inception, and [(2)] whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” 392 U.S. 20.

{17} The Court in *Leyva* determined that the *Terry*-type test had been replaced in Fourth Amendment jurisprudence with a bright-line test holding that if the initial stop was lawful, officers may ask questions unrelated to the initial reason for the stop “so long as they do not measurably extend the length of the stop.” *Leyva*, 2011-NMSC-009, ¶ 15 (internal quotation marks and citation omitted). However, in considering the propriety of a similar expansion of a traffic stop under the New Mexico Constitution, *Leyva* held that the two-part *Terry* test should still be utilized. *Leyva*, 2011-NMSC-009, ¶ 55 (stating that “*Duran*’s two-part analysis, adhering to the scope and duration requirements set forth in *Terry*, best protects the right against unreasonable searches and seizures under Article II, Section 10 of the New Mexico Constitution”). The Court concluded that “[t]he overall reasonableness of the stop continues to be determined [under the New Mexico Constitution] by balancing the public interest in the enforcement of traffic laws against an individual’s right to liberty, privacy, and freedom from arbitrary police interference.” *Leyva*, 2011-NMSC-009, ¶ 55 (internal quotation marks and citation omitted).

{18} Applying this analysis to FSTs, we hold that an officer may administer FSTs if the officer has developed independent reasonable suspicion that would support the extension of the traffic stop to conduct the FSTs. There is a “compelling public interest in eradicating DWI occurrences and the potentially deadly consequences” of that crime. *City of Santa Fe v. Martinez*, 2010-NMSC-033, ¶ 13, 148 N.M. 708, 242 P.3d 275. In accordance with *Leyva*, we must weigh this compelling interest against the intrusion of FSTs that assess the physical performance of a suspected drunk driver. In our estimation, such an intrusion is warranted if the investigating officer has reasonable, articulable facts upon which to base a suspicion that the driver in question may be impaired. See *State v. Williamson*, 2000-NMCA-068, ¶¶ 8, 9, 129 N.M. 387, 9 P.3d 70 (explaining that an officer may expand an investigatory detention related to a traffic stop if the officer “has a reasonable and articulable suspicion that the driver is impaired” and that the administration of FSTs may reasonably be a part of this investigation); see also *Kandy J.*, 2011-NMCA-105, ¶¶ 33-34 (holding that, under Article II, Section 10, the officer had reasonable suspicion to expand a traffic stop into an investigation of the possibility that the minor driver had been driving while impaired).

{19} We find support for our determination in cases from other jurisdictions that have reached a similar conclusion. For example, in *State v. Superior Court*, 718 P.2d 171, 176 (Ariz. 1986) (in banc), the Arizona Supreme Court weighed the intrusion of FSTs against the public’s interest in removing drunk drivers from the state’s highways. Consistent with *Terry*, which involved an officer conducting a pat-down search based on reasonable suspicion that the suspect might be armed, see 392 U.S. at 6-7, the Arizona court concluded that “the threat to public safety posed by a person driving under the influence of alcohol is as great as the threat posed by a person illegally concealing a gun.” *Superior Court*, 718 P.2d at 176. Similarly, the Vermont Supreme Court balanced the intrusion of FSTs against law enforcement interests and determined that the “minimal level of intrusion” of FSTs is “clearly outweighed by the strong law enforcement interest in attempting to keep a suspected drunk driver off the roads.” *Gray*, 552 A.2d at 1195; see *Little*, 468 A.2d at 617-18 (holding that FSTs may be conducted if they are supported by reasonable suspicion); *State v. Roefer*, 753 N.W.2d 333, 340 (Neb. 2008) (same); *People v. Walter*, 872 N.E.2d 104, 114 (Ill. App. Ct. 2007) (same).

{20} Given our disposition of this issue, we reject one premise underlying Candace’s argument—that administration of FSTs must be supported by a warrant, an exception to the warrant requirement, or valid consent. Instead, an officer may administer FSTs if the officer has reasonable suspicion that a driver was driving impaired. We turn now to Candace’s argument that she was entitled to additional protections due to her status as a minor. *Application of Section 32A-2-14 to FSTs*.

{21} Candace relies on Section 32A-2-14 to argue that Officer Kinley was required to advise her of her right to remain silent and of her right to refuse consent to the FSTs. Because Officer Kinley did not give Candace these warnings, she maintains that the district court should have excluded the FST results from evidence.

{22} We begin our analysis with a review of the applicable provisions of Section 32A-2-14. In relevant part, that statute provides:

A. A child subject to the provisions of the Delinquency Act is entitled to the same basic rights as an adult, except as otherwise provided in the Children’s Code, including rights provided by the Delinquency Act, except as otherwise provided in the Children’s Code [NMSA 1978, §§ 32A-1-1 to -21 (1993, as amended through 2009)].

C. No person subject to the provisions of the Delinquency Act who is alleged or suspected of being a delinquent child shall be interrogated or questioned without first advising the child of the child’s constitutional rights and securing a knowing, intelligent and voluntary waiver.

D. Before any statement or confession may be introduced at a trial or hearing when a child is alleged to be a delinquent child, the state shall prove that the statement of confession offered in evidence was elicited only after a knowing, intelligent and voluntary waiver of the child’s constitutional rights was obtained.

These provisions require that any child subject to an investigatory detention be advised of his or her “right to remain silent and that anything they say can be used against [the child].” *Javier M.*, 2001-NMSC-030, ¶ 41. In addition, under Section 32A-2-14(D), if a child is not so advised, “any statement or confession obtained as a result of the detention or seizure is inadmissible in any delinquency proceeding.” *Javier M.*, 2001-NMSC-030, ¶ 1. The State does not dispute that Candace was subject to an investigatory detention when Officer Kinley stopped her car and that he failed to advise her of the rights specified in *Javier M.*

{23} Candace contends that, consistent with Section 32A-2-14 and *Javier M.*, any child subject to an investigatory detention must also be advised that he or she has the right to deny consent to the performance of
FSTs. She argues that a request to perform FSTs is a question like any other and, as a result, if a child is not advised of his or her right to decline the request and/or if the state fails to prove that the child’s consent was voluntary, the results of the FSTs are inadmissible.  

(24) Candace’s argument boils down to the contention that the holding in Javier M. should be expanded. She maintains that, in addition to advising a child of the right to remain silent and of the fact that anything said can be used against the child, an officer detaining a child must also advise the child of the right to withhold consent to FSTs.  

(25) Our Supreme Court’s decision in Javier M. does not support Candace’s contention. In that case, the Court interpreted Section 32A-2-14(C) as requiring that “children who are subject to investigatory detentions are statutorily entitled only to be warned of their right to remain silent and that anything they say can be used against them.” Javier M., 2001-NMSC-030, ¶ 41 (emphasis added). Thus, we do not read Javier M. as requiring any additional warnings to a child, such as a warning that the child need not consent to FSTs.  

(26) In addition, the Court in Javier M. made it clear that Section 32A-2-14 “only protects against a child’s statements which are made during an investigatory detention in response to a police officer’s questioning.” Javier M., 2001-NMSC-030, ¶ 40 (emphasis added). It is also clear that a child’s “lack of muscular coordination during the [FSTs] is not a statement subject to suppression under Section 32A-2-14(D).” Randy J., 2011-NMCA-105, ¶ 18. Because Section 32A-2-14 was narrowly drawn to protect a child’s statements and because a child’s physical conduct in an FST is not a statement, it follows that Section 32A-2-14 does not require a police officer to advise a child that he or she may decline to perform FSTs. Indeed, it may well be a disservice to a child to advise him or her in this way because a refusal to perform FSTs may be admissible in evidence. See State v. Wright, 116 N.M. 832, 835-36, 867 P.2d 1214, 1217-18 (Ct. App. 1993) (holding that admission of evidence that the defendant refused to take an FST did not violate the right to be free of self-incrimination).  

(27) Furthermore, the Court in Javier M. interpreted Section 32A-2-14 as a very narrowly drawn statutory protection. The Court noted that Subsection (C) of the statute “is an exception to Subsection (A)’s general recognition that children are entitled to the same basic rights as adults.” Javier M., 2001-NMSC-030, ¶ 32 (internal quotation marks and citation omitted). Thus, with the exception of this very limited statutory requirement to advise a child of the right to remain silent and of the consequences of waiving that right, a child’s constitutional rights are the same as an adult’s rights. See id. ¶ 42 (noting that “in enacting Section 32A-2-14(C), the Legislature is providing juveniles with a separate statutory right, not codifying a constitutional mandate”). Candace has not directed us to any authority holding that an adult must be advised that he or she need not consent to FSTs, and we conclude that there is no constitutional mandate requiring an officer to so inform either an adult or a child. Cf. McKay v. Davis, 99 N.M. 29, 31, 653 P.2d 860, 862 (1982) (explaining that “there is no constitutional right to refuse to take a chemical test for the presence of alcohol”). We therefore reject Candace’s argument that the holding in Javier M. should be expanded to require a child to be advised that consent to FSTs may be withheld.  

Application of Holding to the Facts  

(28) Having disposed of Candace’s arguments with respect to the FSTs, we apply our determinations to the facts of this case. Officer Kinley had reasonable suspicion to administer FSTs to Candace because he observed her erratic driving, smelled the odor of alcohol on her person, and saw her sway as she walked to the back of her car. See State v. Walters, 1997-NMCA-013, ¶ 26, 123 N.M. 88, 934 P.2d 282 (stating that an officer had reasonable suspicion to investigate further when he detected the odor of alcohol). Officer Kinley had no obligation to advise Candace of a right to refuse FSTs in order to administer the FSTs. And, while Section 32A-2-14 required Officer Kinley to advise Candace of her right to remain silent and of the consequences of her waiver of that right, his failure to explain this to her did not render the FSTs inadmissible because her performance of the FSTs did not constitute statements subject to suppression. Therefore, we affirm the district court’s denial of Candace’s motion to suppress the results of the FSTs.  

Admissibility of Breath Test Results  

(29) Candace’s final argument is that Officer Kinley had to advise her of her right to refuse the portable breath test. In support of this contention, she relies on the same authorities and logic she relied on in arguing that Officer Kinley was required to advise her of her right to withhold consent to the FSTs. For the same reasons that we rejected her argument with respect to the FSTs, we also reject her argument regarding the portable breath test.  

(30) The district court stated that the results of the portable breath test would not be admissible. However, Candace argues that the Intoxilyzer breath tests taken at the police station after her arrest were “tainted by the earlier breath test which was a product of involuntary consent.” We are not persuaded by this argument. Before Officer Kinley transported Candace to the police station for the Intoxilyzer breath tests, he had probable cause, even without the portable breath test, to arrest her for DWI in light of her performance on the FSTs, her erratic driving, and the odor of alcohol. State v. Granillo-Macias, 2008-NMCA-021, ¶ 12, 143 N.M. 455, 176 P.3d 1187 (holding that “the smell of alcohol emanating from [the d]efendant, [his] lack of balance at the vehicle, and the manner of [his] performance of the FSTs” constituted probable cause to arrest him for DWI). As a result, the Intoxilyzer breath test results obtained at the station were not rendered inadmissible by anything that preceded them.  

CONCLUSION  

(31) For the foregoing reasons, we affirm the district court’s order denying Candace’s motion to suppress the results of the FSTs and the Intoxilyzer breath tests.  

(32) IT IS SO ORDERED.  

CYNTHIA A. FRY, Judge

WE CONCUR:  
MICHAEL D. BUSTAMANTE, Judge  
LINDA M. VANZI, Judge
Employment Law: Employee Grievances; and Termination of Employment
Federal Law: Family Medical Leave Act
Government: Municipalities
Jurisdiction: Appellate Jurisdiction; and Court of Appeals

CAROLYN MASCAREÑAS,
Plaintiff-Appellee,
versus
CITY OF ALBUQUERQUE
and MIKE TORRES, Parking Division Director,
Defendants-Appellees.
No. 30,123 (filed February 7, 2012)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
THERESA M. BACA, District Judge

PAUL S. LIVINGSTON
Placitas, New Mexico
for Appellant

PAULA I. FORNEY
STEPHEN G. FRENCH
FRENCH & ASSOCIATES, P.C.
Albuquerque, New Mexico
for Appellees

OPINION

JAMES J. WECHSLER, JUDGE

{1} After the City of Albuquerque’s personnel board (the personnel board) determined that Defendant City of Albuquerque (the City) had just cause to terminate Plaintiff Carolyn Mascarenas, Plaintiff filed a single complaint in district court appealing the personnel board’s decision and alleging constitutional, contract, and statutory claims against the City. Plaintiff appeals two district court orders in this case: (1) an order affirming the decision of the personnel board, determining that the City had just cause in terminating Plaintiff’s employment with the City; and (2) an order dismissing Plaintiff’s due process, breach of contract, and Family Medical Leave Act (FMLA) claims on the ground that the claims or the factual predicates of the claims were litigated in the prior personnel board proceedings. In this appeal, Plaintiff argues that (1) the personnel board’s decision was arbitrary, not in accordance with the law, and not supported by the facts, and (2) the district court erred by dismissing Plaintiff’s due process, breach of contract, and FMLA claims on preclusion grounds. We hold that (1) because Plaintiff did not file a timely petition for writ of certiorari pursuant to Rule 12-505 NMRA, we lack jurisdiction to consider Plaintiff’s appeal of the personnel board’s decision; and (2) the district court did not err in concluding that res judicata barred Plaintiff’s breach of contract claim, and collateral estoppel precluded litigating the factual predicates of Plaintiff’s due process and FMLA claims. Accordingly, we affirm.

BACKGROUND

{2} The City employed Plaintiff for more than seventeen years. She worked as a clerk for the City’s Parking Division of the Municipal Development Department (the Department), which was managed by Mike Torres beginning in late 2004. Shortly after he took over the Department and continuing through 2005, Torres inflicted “progressive discipline” upon Plaintiff.

{3} On January 3, 2005, Torres gave Plaintiff an “[o]fficial [v]erbal [w]arning” for late arrivals to work. Despite the verbal warning, Torres remained unsatisfied with Plaintiff, and Torres issued Plaintiff a pre-determination hearing notice on March 16, 2005, due to continued tardiness, abuse of her lunch hour, failing to call when arriving late or taking sick leave, and being late returning from appointments. After the hearing, the City issued Plaintiff a letter of reprimand on March 28, 2005, which was held in abeyance for three months. Plaintiff received another “verbal letter of reprimand” on June 10, 2005 for lunch break and work break abuse, patterns of absence on Mondays or Fridays, failure to begin work in a timely manner, and excessive personal use of the telephone.

On August 2, 2005, Plaintiff’s immediate supervisor, Shalene Andujo, gave Plaintiff another notice of pre-determination hearing for similar problems with tardiness; failure to call when arriving late or sick, to obtain permission to work through her lunch hour, to submit proper forms when taking leave, and to process four checks that were found in envelopes on her desk; and other work performance issues related to processing traffic citations and warrants. After a hearing, the City issued Plaintiff a three-day suspension and sent Plaintiff and Andujo to mediation, which resulted in Plaintiff agreeing to arrive at her job on time and complete her assigned tasks.

{4} On August 14, 2005, Plaintiff submitted an application for leave under the FMLA to care for her husband and children due to her husband’s disability. The leave was intermittent leave that was to be taken whenever her husband’s condition worsened and needed to be approved on an as-needed basis. On September 2, 2005, the City’s human resources department notified Plaintiff that it approved the FMLA leave retroactive to August 14, 2005.

{5} Plaintiff did not take any of the intermittent FMLA leave until the afternoon of September 26, 2005. Earlier that day, Plaintiff was issued a notice of investigation, claiming that Plaintiff “was being investigated for matters associated with

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her work.” Upon receiving the notice, Plaintiff became visibly upset and raised her voice in protest of the investigation. At roughly 2:00 p.m., Plaintiff left work after having placed a leave form on Andujo’s desk without consulting her. Plaintiff did not return to work on September 27, 2005. On September 28, 2005, she told Andujo during a telephone conversation that she was on FMLA leave for September 26-28, and Andujo informed Plaintiff that she needed a doctor’s note regarding her husband’s condition for the days she was absent from work.

[6] On September 28, 2005, Plaintiff was hand delivered, at her home, a notice of pre-determination hearing related to her work absence since September 26, 2005, her continued late arrivals to work, and her failure to call prior to her shift when she was late. Plaintiff did not appear for the hearing related to these charges scheduled for October 6, 2005, and the hearing was rescheduled for October 13, 2005. Plaintiff did not attend the rescheduled hearing, and it was held without her presence. At the conclusion of the hearing, the hearing officer recommended a fifteen-day suspension, which Plaintiff did not appeal to the personnel board.

[7] The human resources department sent Plaintiff a letter on October 10, 2005, requiring that Plaintiff submit, by October 11, 2005, medical information regarding her husband’s condition in order to recertify her FMLA leave. Plaintiff did not provide any medical information to the human resources department.

[8] On October 21, 2005, Plaintiff was again given a notice of a pre-determination hearing set for October 29, 2005, concerning allegations that she was on unauthorized leave since September 26, 2005. Plaintiff presented a doctor’s note at the hearing, stating that she should be excused from work on days her husband’s condition flared up, but did not mention when or if his condition had recently flared up. The hearing resulted in Plaintiff receiving a fifteen-day suspension.

[9] The next day, on October 27, 2005, human resources director Pat Miller informed Plaintiff that her FMLA leave was cancelled due to a lack of medical documentation, retroactive to September 26, 2005. Plaintiff also received a hand-delivered letter on October 28, 2005, notifying her that her FMLA leave was cancelled and that she would be terminated if she did not report to work on October 31, 2005. After Plaintiff did not return to work on October 31, 2005, the Department Director, John Castillo, notified her that the City was terminating her employment. [10] A post-termination hearing took place over a three-day period, in which Plaintiff argued that she was terminated without just cause. During the hearing, Plaintiff argued that she was a good and productive employee for seventeen years and that her problems with Torres and Andujo resulted from a longstanding grudge Torres had with Plaintiff’s husband. Plaintiff also argued that the City failed to provide her with a performance evaluation and that her supervisors failed to refer the disciplinary actions taken against Plaintiff to the City’s mediation coordinator, contrary to the City’s merit system ordinance. See Albuquerque, N.M., Code of Ordinances, ch. 3, art. 1, §§ 3-1-1 to -28 (1978, as amended through 2010).

[11] The hearing officer concluded that the City did not give Plaintiff a performance evaluation, contrary to Section 3-1-9(C) of the merit system ordinance, and that the City failed to refer the disciplinary actions to the City’s mediation coordinator, contrary to Section 3-1-23(C) of the merit system ordinance. However, the hearing officer concluded that both of these violations of the merit system ordinance by the City were harmless error. The hearing officer also found that Plaintiff failed to abide by the City’s personnel rules and regulations, that the City provided appropriate progressive discipline, and that Plaintiff did not provide valid documentation to support her FMLA leave. Further, the hearing officer determined that the City properly notified Plaintiff to return to work on October 31, 2005 or be considered to have quit her job, that Plaintiff failed to return to work, and she had testified that she “did not return to work because she chose not to.” The hearing officer therefore concluded that just cause supported Plaintiff’s termination.

[12] Plaintiff filed a complaint in district court on December 15, 2006, containing four claims. The first claim was a notice of appeal of the personnel board’s decision (the administrative appeal), pursuant to Rule 1-074 NMRA and Section 3-1-25(F) of the merit system ordinance. Plaintiff subsequently filed a statement of appellate issues related to the administrative appeal, pursuant to Rule 1-074(K). The second, third, and fourth claims (the civil complaint) alleged that the City violated Plaintiff’s due process rights; breached the implied employment contract consisting of the merit system ordinance, the City’s personnel rules and regulations, and the collective bargaining agreement between the City and City employees; and abridged Plaintiff’s rights under the FMLA.

[13] The City answered Plaintiff’s complaint, filed a demand for a twelve-person jury for the civil complaint, and filed a response to Plaintiff’s statement of appellate issues. Plaintiff subsequently filed a reply to the City’s response. While the parties awaited the district court’s decision on the administrative appeal, the district court erroneously dismissed the case for lack of prosecution on November 26, 2007. Plaintiff filed a motion to reinstate, informing the district court that the parties had fully briefed the administrative appeal and were awaiting the district court’s decision. Additionally, Plaintiff argued that the civil complaint, outside of the administrative appeal, would be litigated once the district court decided the administrative appeal. The district court reinstated the case and on April 15, 2008, filed a memorandum opinion and order affirming the decision of the personnel board. The district court also “discarded” Plaintiff’s civil complaint, stating that Plaintiff had not exhausted administrative remedies and that the same issues were covered by the administrative appeal.

[14] Plaintiff filed a motion for reconsideration on April 29, 2008, essentially arguing that the civil complaint and the administrative appeal raised separate issues. The City responded, arguing that the district court did not err under the law of the case doctrine. The district court reinstated the civil complaint on July 28, 2008, but it did not reinstate the administrative appeal. At a scheduling conference held on January 21, 2009, the district court set the case on its November 2-20, 2009 docket and set August 7, 2009 as the deadline for all dispositive motions.

[15] Represented by new counsel, on September 8, 2009, the City filed a motion for judgment of dismissal or, in the alternative, to vacate trial. The City’s brief erroneously stated that the district court had not reinstated the civil complaint. In addition, the City argued that res judicata barred the breach of contract claim and that collateral estoppel or the law of the case doctrine precluded the due process and FMLA claims because the personnel board decided the factual predicates of each claim. After a hearing, the district court granted the City’s motion and issued an order dismissing the civil complaint.
JURISDICTION OVER ADMINISTRATIVE APPEAL

(16) Plaintiff argues that the district court erred by affirming the decision of the personnel board in its memorandum opinion and order on April 15, 2008. In particular, Plaintiff claims that the personnel board’s decision was arbitrary, not in accordance with the law, and not supported by facts because (1) the City failed to hold a pre-termination hearing on the termination charges, (2) the personnel board failed to consider favorable testimony, and (3) the City’s actions regarding Plaintiff violated the FMLA and various City ordinances.

The City, on the other hand, argues that this Court lacks jurisdiction to address the district court’s order affirming the personnel board because Plaintiff did not file a petition for writ of certiorari pursuant to Rule 12-505. The City also asserts that because Plaintiff did not timely file a petition for writ of certiorari and therefore exhausted her ability to have the personnel board’s decision reviewed, issue preclusion bars Plaintiff from challenging the factual findings of the district court’s April 15, 2008 order affirming the personnel board.

(17) We first address the City’s argument that this Court lacks jurisdiction over the administrative appeal. See State ex rel. Dep’t of Human Servs. v. Manfré, 102 N.M. 241, 242, 693 P.2d 1273, 1274 (Ct. App. 1984) (“[W]e have a duty to determine whether [we have] jurisdiction of an appeal[].”); In re Doe, III, 87 N.M. 170, 171, 531 P.2d 218, 219 (Ct. App. 1975) ("[L]ack of jurisdiction at any stage of the proceedings is a controlling consideration which must be resolved before going further[]."). The City bases its argument on Plaintiff’s failure to file a petition for writ of certiorari pursuant to Rule 12-505. Specifically, the City contends that Plaintiff impermissibly combined her appeal of the district court’s order affirming the personnel board with the appeal of the order dismissing the civil complaint and that a writ of certiorari is “the only method for obtaining review by this Court” of the administrative appeal.

(18) As noted, Plaintiff brought the administrative appeal pursuant to Rule 1-074, which governs a district court’s appellate jurisdiction over appeals from administrative decisions or orders when there is a statutory right of review. Once a district court sitting in its appellate capacity has rendered a final order or decision on a Rule 1-074 appeal, further review by this Court is governed by Rule 12-505. See Rule 12-505(A)(1) (“This rule governs review by the Court of Appeals of decisions of the district court . . . from administrative appeals pursuant to Rule 1-074[].”). Rule 12-505(B) provides that a “party aggrieved by the final order of the district court . . . may seek review of the order by filing a petition for writ of certiorari with the Court of Appeals, which may exercise its discretion whether to grant the review.” Rule 12-505(C) requires that the petition for writ of certiorari be filed within thirty days of the final action by the district court. Plaintiff did not file a petition for writ of certiorari for the administrative appeal after the dismissal of the entirety of the complaint. When the district court granted the City’s motion for judgment of dismissal or to vacate trial and issued an order of dismissal on November 4, 2009, Plaintiff filed a notice of appeal pursuant to Rule 12-201(A)(2) NMRA on December 4, 2009, challenging the order of dismissal of the civil complaint. It was not apparent that Plaintiff intended to challenge the district court’s order affirming the personnel board until Plaintiff filed her docketing statement on January 4, 2010, which included the appeal of the personnel board’s decision as one of her appellate issues. We therefore address (1) whether the inclusion of the administrative appeal in the docketing statement was sufficient in form to comply with Rule 12-505 as a non-conforming petition for writ of certiorari, and (2) if so, whether Plaintiff’s non-conforming petition for writ of certiorari was timely under Rule 12-505(C) even though the docketing statement was not filed within the thirty-day period.

(20) This Court has recently addressed whether a timely notice of appeal and docketing statement are an adequate substitute for a petition for writ of certiorari. In *Wakeland v. New Mexico Department of Workforce Solutions*, 2011-NMCA-___, ¶13, N.M. ___, P.3d ___ (No. 31,031, filed Sept. 27, 2011), this Court determined that a notice of appeal alone is not an adequate substitute for a petition for writ of certiorari. See also *Roberson v. Bd. of Educ. of the City of Santa Fe*, 78 N.M. 297, 299-300, 430 P.2d 868, 870-71 (1967) (holding that a notice of appeal was an insufficient substitute for a petition for writ of certiorari). However, because “New Mexico courts have not been stringent about the form and content requirements of documents filed in an effort to seek appellate review,” a docketing statement complying with the substantive requirements of Rule 12-208(D) NMRA is an adequate substitute for a petition for writ of certiorari. *Wakeland*, 2011-NMCA-___, ¶1, 4, 7, 16; see also *Audette v. City of Truth or Consequences*, 2011-NMCA-___, ¶5, N.M. ___, P.3d ___ (No. 30,988, filed Sept. 27, 2011) (“[A] docketing statement that substantially complies with the content requirements for a petition for writ of certiorari will be accepted as a petition despite the fact that its form and content do not precisely comply with the requirements of Rule 12-505.”).

(21) However, in *Wakeland*, we held that a non-conforming petition for writ of certiorari, such as a docketing statement, must be filed within thirty days after the order to be reviewed, as required by Rule 12-505(C). *Wakeland*, 2011-NMCA-___, ¶18. We noted that parties seeking to substitute a docketing statement for a petition for writ of certiorari will often not meet the thirty-day time requirement due to the procedural differences governing appeal as of right and the rules governing discretionary review. Id.; see Rule 12-201(A)(2) (requiring the notice of appeal be filed within thirty days of the judgment or order appealed from); Rule 12-208(B) (requiring that the docketing statement be filed within thirty days of the notice of appeal). We stated that, because “the time requirement for filing a petition for writ of certiorari is a mandatory precondition to the exercise of an appellate court’s jurisdiction to review a petition on its merits[,]” a petitioner must file the docketing statement within thirty days in order to be considered as a timely non-conforming petition for writ of certiorari. *Wakeland*, 2011-NMCA-___, ¶18.

(22) Applying *Wakeland* and *Audette*, we construe Plaintiff’s docketing statement as a non-conforming petition for writ of certiorari. However, Plaintiff filed her docketing statement on January 4, 2010, which was sixty days after the district court entered its order dismissing the complaint. Therefore, although we accept her docketing statement as a non-conforming petition for writ of certiorari, it was untimely under Rule 12-505(C).

(23) When a petition for writ of certiorari is untimely, this Court will not excuse untimely filing “absent a showing of the kind of unusual circumstances that would justify an untimely petition.” *Wakeland*, 2011-NMCA-___, ¶20. Our Supreme Court has stated that unusual circumstances justifying the untimely filing of a petition for writ of certiorari exist when (1) there is error on the part of the court, or (2) “when the filing is not very late,
and there are other unusual circumstances that were not caused by the court system but that were not within the control of the party seeking appellate review.” Id. ¶ 24

Plaintiff does not argue, nor do we conclude, that unusual circumstances justify the untimely filing of the docketing statement. Plaintiff filed the docketing statement thirty days after the thirty-day period prescribed by Rule 12-505(C), and there is no claim of error on the part of the district court. The only apparent reason that Plaintiff did not file a petition for writ of certiorari for the administrative appeal after the dismissal of the complaint was because she believed that it was procedurally valid to include the administrative appeal in the notice of appeal and docketing statement for the civil complaint. However, the procedures governing this Court’s review of appeals from the personnel board pursuant to Rule 1-074 are well established. See Rule 12-505(A)(1) (stating that Rule 12-505 governs district court decisions addressing administrative appeals pursuant to Rule 1-074); City of Albuquerque v. AFSCME Council 18 ex rel. Puccini, 2011-NMCA-021, ¶ 7, 149 N.M. 379, 249 P.3d 510 (addressing the merits of an appeal from the personnel board after noting that this Court granted a petition for writ of certiorari pursuant to Rule 12-505). Further, this Court has stated that “[s]imply being confused or uncertain about the appropriate procedure for seeking review is not the sort of unusual circumstance beyond the control of a party that will justify an untimely filing.” Wakeland, 2011-NMCA-____, ¶ 25. This Court lacks jurisdiction to address the merits of Plaintiff’s administrative appeal because the appeal was untimely and unusual circumstances do not justify the untimeliness.

**PRECLUSION OF CIVIL COMPLAINT**

¶ 25 Plaintiff next argues that the district court erred in dismissing the civil complaint because she was required to file the civil complaint in the same action as her administrative appeal and res judicata does not bar litigation of the FMLA, breach of contract, and due process claims. The City responds by arguing that the factual predicates of each claim were litigated before the personnel board and therefore collateral estoppel, or issue preclusion, not res judicata, bars re-litigation of those facts, and that, as a result, there are no issues of material fact to support the claims.

¶ 26 Plaintiff supports her argument that she was required to file the civil complaint in the same action as the administrative appeal and that res judicata does not apply by citing Chavez v. City of Albuquerque, 1998-NMCA-004, 124 N.M. 479, 952 P.2d 474, Strickland v. City of Albuquerque, 130 F.3d 1408 (10th Cir. 1997), and Mares v. City of Albuquerque, 173 F.3d 864 (table), No. 98-2118, 1999 WL 224866 (10th Cir. April 19, 1999). We begin by discussing these cases.

¶ 27 In Chavez, 1998-NMCA-004, ¶ 2, the plaintiff filed a complaint in district court alleging breach of contract, denial of his right to privacy, violations of his right to be free from unreasonable searches and seizures, violations of his rights under the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 2009), and violations of both his procedural and substantive due process rights following termination for failing a drug test. The district court granted summary judgment in favor of the city based on res judicata, reasoning that the plaintiff did not and should have raised the claims in his previous grievance before the personnel board. Chavez, 1998-NMCA-004, ¶ 3. This Court reversed on all claims, except for the breach of contract claim, holding that, because the city’s grievance process was limited to matters within the purview of the merit system ordinance and the city’s personnel rules and regulations, the personnel board did not have jurisdiction over the plaintiff’s constitutional or statutory claims. Id. ¶¶ 8, 12. As a result, the district court erred by applying res judicata to the constitutional and statutory claims. Id. ¶ 29. However, this Court affirmed the district court’s determination that the claimant could have and should have raised his contract claims during the administrative proceeding before the personnel board. Id. ¶ 28.

¶ 28 In Strickland, 130 F.3d at 1410, the plaintiff filed a grievance after the city terminated his employment for failing a drug test. The city’s personnel board held that just cause supported the termination, and both the district court and this Court affirmed the personnel board’s decision. Id. While the personnel board appeal was pending in district court, the plaintiff filed a complaint in federal court asserting fourth amendment and procedural due process violations and various state claims. Id. After the state district court affirmed the personnel board, the federal court granted summary judgment based on res judicata. Id. Applying New Mexico preclusion law, the Tenth Circuit affirmed, holding that regardless of whether the personnel board had jurisdiction over the claims, the plaintiff was required to bring them in state district court during his appeal of the personnel board’s decision. Id. at 1411-13. Similarly, Mares, 1999 WL 224866 at *4, relied on Chavez and Strickland in holding that res judicata precluded the plaintiff from asserting constitutional claims in federal court because he should have asserted the claims in a state district court action appealing a decision of the personnel board.

¶ 29 We first determine that the district court did not err in holding that Chavez, 1998-NMCA-004, ¶ 28, precluded the breach of implied contract claim. Plaintiff based her breach of contract claim solely on the merit system ordinance, the City’s personnel rules and regulations, and the collective bargaining agreement governing employment with the City. The personnel board had jurisdiction over this claim, and res judicata prevented Plaintiff from raising the claim in the civil complaint. See id. ¶¶ 5, 28.

¶ 30 However, regarding the FMLA and due process claims in the civil complaint, we agree with Plaintiff that Chavez, Strickland, and Mares stand for the proposition that res judicata does not bar litigation of Plaintiff’s civil complaint based on the district court’s order affirming the personnel board. Further, Strickland and Mares seem to support Plaintiff’s argument that res judicata required that Plaintiff file the administrative appeal and civil complaint in the same action, although we note that our state appellate courts have not decided that issue. However, the district court held that collateral estoppel, not res judicata, precluded Plaintiff’s FMLA and due process claims. The two doctrines are distinct. As this Court has stated, [the doctrines of res judicata and collateral estoppel by judgment involve different and distinct principles. Res judicata in its proper application operates where there are identical parties, causes of action, subject matter, and capacities in the two cases; collateral estoppel by judgment arises where the causes of action are different but some ultimate facts or issues may necessarily have been decided in the previous case. Stated another way, where the causes of action in the cases are identical in all respects, the first judgment is a conclusive bar upon the parties and their privies as to every issue which
either was or properly could have been litigated in the previous case. But absent the identity of causes of action, the parties are precluded from relitigating only those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation.

C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 160, 597 P.2d 1190, 1200 (Ct. App. 1979) (internal quotation marks and citation omitted). We therefore must determine whether the district court erred in applying collateral estoppel to the personnel board’s decision.

{31} “The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of ultimate facts or issues actually and necessarily decided in a prior suit.” Shovelin v. Cent. N.M. Elec. Coop., Inc., 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993) (internal quotation marks and citation omitted). Our Supreme Court has acknowledged that collateral estoppel applies to issues resolved in an administrative agency adjudicative decision to a later civil trial when rendered under conditions in which the parties have the opportunity to fully and fairly litigate the issue at the administrative hearing. Id. at 298, 850 P.2d at 1001. For collateral estoppel to preclusively effect litigation, the moving party must show that “(1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.” Id. at 297, 850 P.2d at 1000. Once the moving party has produced sufficient evidence to meet all four elements, the district court must determine whether the party to be estopped had a full and fair opportunity to litigate the issue in the prior litigation. Id.

{32} In her due process claim, Plaintiff alleged that the City failed to hold a pre-termination hearing, pursuant to her rights under the merit system ordinance, that the ultimatum to return to work was a pretext that she voluntarily left her job, and that the post-termination hearing was unlawful because the hearing officer refused to consider evidence favorable to Plaintiff. The personnel board found, and the district court affirmed, factual findings that negate these allegations. Both the personnel board and the district court found that an adequate pre-termination hearing took place on October 26, 2005, which resulted in Plaintiff being informed to report to work on October 31, 2005, or face termination. Further, the district court found that there was no indication that the hearing officer did not consider all the evidence presented.

{33} With regard to Plaintiff’s FMLA claim, Plaintiff alleged that she was entitled to FMLA leave to care for her husband and children due to her husband’s physical disability. See 29 U.S.C.A. § 2612(a)(1)(C) (2009) (providing that eligible employees are entitled to twelve workweeks of leave per twelve-month period to care for a spouse or child that has a serious medical condition). Plaintiff further claimed that she properly certified the FMLA leave to which she was entitled, pursuant to 29 U.S.C.A. Section 2613(a) (2009), that the City’s demand for recertification was unreasonable, and that the City violated 29 C.F.R. Section 825.110(d) (2011) by retroactively denying Plaintiff’s FMLA leave. Again, the personnel board found, and the district court affirmed, factual findings that negate these allegations. The personnel board found that Plaintiff provided no valid documentation to support taking intermittent FMLA leave to support her absence from work from September 26, 2005 through October 31, 2005. The district court elaborated that the City was well within its rights to require Plaintiff to recertify her FMLA after taking her first day of leave on September 26, 2005, because of the unusual circumstances regarding her departure on that day and that, because she failed to properly recertify the leave after September 26, 2005, there was no retroactive denial of Plaintiff’s FMLA leave.

{34} The City has made a prima facie showing that collateral estoppel applies to these findings. First, Plaintiff and the City were identical parties to the hearing before the personnel board. Second, the cause of action in the personnel board hearing was different from the due process and FMLA causes of action in this case. See Chavez, 1998-NMCA-004, ¶ 12 (stating that the personnel board has limited authority to administer the merit system ordinance and that it has no authority to decide constitutional or statutory claims). Third, as the findings of the personnel board indicate, the issues of whether there was an adequate pre-termination hearing, whether Plaintiff voluntarily left her job, whether Plaintiff properly applied for and certified FMLA leave, and whether the FMLA leave was retroactively rescinded were actually litigated in the personnel board hearing. Fourth, the issues were necessarily decided in the personnel board hearing. The personnel board decided the issue of whether the City had just cause under the merit system ordinance to terminate Plaintiff’s employment. The personnel board considered whether the City granted Plaintiff’s FMLA leave and subsequently retroactively rescind it, because it was necessary to consider the issue of whether Plaintiff voluntarily abandoned her employment. Further, because the merit system ordinance requires a pre-termination hearing, the personnel board must have determined that the City held a proper pre-termination hearing in finding that the City provided appropriate discipline to Plaintiff.

{35} Turning now to the question of whether the parties had a full and fair opportunity to litigate, we employ the two-part inquiry described in Rex, Inc. v. Manufactured Housing Committee, 119 N.M. 500, 505, 892 P.2d 947, 952 (1995). First, we examine “whether the non-movant had . . . incentive to vigorously litigate the prior action.” Id. In this case, because the issue addressed in the personnel board hearing was whether the City had just cause to terminate Plaintiff’s employment, we cannot say that she did not have the incentive to vigorously litigate. See Larsen v. Farmington Mun. Sch., 2010-NMCA-094, ¶ 12, 148 N.M. 926, 242 P.3d 493 (holding that the plaintiff had a full and fair opportunity to litigate in an arbitration proceeding challenging his termination from employment); cf. Reeves v. Wimberly, 107 N.M. 231, 235, 755 P.2d 75, 79 (Ct. App. 1988) (holding that the plaintiff had “ample opportunity and incentive” to fully litigate when the issue at stake was the only issue in the prior case).

{36} The second part of our inquiry is “whether procedural differences between the two actions, such as representation by counsel, presentation of evidence, questioning of witnesses, and appellate review, would make preclusion unfair, and whether policy considerations exist to deny any preclusive effect. Rex, Inc., 119 N.M. at 505, 892 P.2d at 952. During the personnel board hearing, both parties were entitled to be and were represented by counsel. The hearing took place over a three-day period, and the parties submitted written briefs at the close of the hearing. Both parties submitted exhibits and presented witness testimony, and the hearing officer was entitled to subpoena witnesses.
and compel production of relevant documents. See Albuquerque, N.M., Code of Ordinances § 3-1-25(H). Further, the merit system ordinance requires that the hearing officer be an attorney licensed to practice in New Mexico or experienced in employee relations or personnel administration. See id. § 3-1-26(C). The hearing officer must issue factual findings and conclusions of law, and the decision is approved or rejected by a vote of the entire personnel board. See id. § 3-1-25(C), (E). The plaintiff is then entitled to an appeal as a matter of right in district court. See id. § 3-1-25(F). Considering the procedures, it would not be unfair to apply collateral estoppel to a personnel board’s decision. See Larsen, 2010-NMCA-094, ¶¶ 10-12 (upholding district court’s application of collateral estoppel when the plaintiff presented evidence, cross-examined witnesses, testified on his own behalf, and was represented by counsel); cf. Shovelin, 115 N.M. at 301, 850 P.2d at 1004 (holding that this factor weighs against application of collateral estoppel in an unemployment case because the hearing was two-and-one-half hours, provided minimal time for discovery, and was conducted by telephone). The district court did not err in applying collateral estoppel in dismissing Plaintiff’s civil complaint based on the factual determinations made by the personnel board.

CONCLUSION
{37} We hold that (1) because Plaintiff did not file a timely writ of certiorari pursuant to Rule 12-505, this Court lacks jurisdiction to consider Plaintiff’s appeal of the personnel board’s decision; and (2) the district court did not err in concluding that res judicata barred Plaintiff’s breach of contract claim, and collateral estoppel precluded litigating the factual predicates of Plaintiff’s due process and FMLA claims. Accordingly, we affirm.

{38} IT IS SO ORDERED.
JAMES J. WECHSLER, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
RODERICK T. KENNEDY, Judge
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