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Eagle Nest Storm, by Taylor Eidem (see page 3)

www.traynephotography.com

Inside This Issue

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7
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8
Business Law Section BOD,
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8
Elder Law Section BOD,
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8
Public Law Section BOD,
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9
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September

7
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6–8 p.m., State Bar Center, Albuquerque,
505-797-6003

7
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10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

7
Common Legal Issues for Senior Citizens Workshop
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POA AHCD Clinic: 12:30–1:30 p.m.,
Clayton Senior Citizens Center, Clayton,
1-800-876-6657

7
Sandoval County Free Legal Clinic
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Bernalillo, 505-867-2376

8
Common Legal Issues for Senior Citizens Workshop
Workshop: 10–11:15 a.m.
POA AHCD Clinic: noon–1 p.m.,
Raton Senior Center, Raton,
1-800-876-6657

About the Cover Image: *Eagle Nest Storm*
Taylor Eidem is an aspiring photographer in Albuquerque. She fell in love with freezing time and capturing memories and her love for photography continues to grow with each shot she gets. Although she focuses on portraits and live subjects, Eidem will occasionally take her camera on a nature stroll to capture the beauty of the world. Never one to miss a photo opportunity, she can be found laying in the rocks or water or somewhere in the mountains. For more of her photography, visit www.traynephotography.com.

Notices

Court News

Sixth Judicial District Court

Announcement of Vacancy

A vacancy on the Sixth Judicial District Court, Luna County, will exist as of Aug. 27 due to the retirement of Hon. Daniel Viramontes, effective Aug. 26. The assignment for this position is a general bench assignment, Division IV, and will be located in Deming. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Alfred Mathewson, chair of the Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may found at lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., Sept. 14. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The District Court Judicial Nominating Committee will meet at 8:30 a.m., Sept. 22, to interview applicants for the position at the Luna County Judicial Complex, 855 South Platinum Avenue, Deming. The Commission meeting is open to the public and anyone who has comments will have an opportunity to be heard.

U.S. District Court, District of New Mexico

Magistrate Judge Appointment

The Judicial Conference of the U.S. has authorized the appointment of a full-time U.S. magistrate judge for the District of New Mexico at Las Cruces. The current annual salary of the position is $186,852. The term of office is eight years. The full public notice and application forms for the magistrate judge position are posted in the U.S. District Court Clerk's Office of all federal courthouses in New Mexico, and on the Court's website at www.nmd.uscourts.gov. Application forms may also be obtained by calling 575-528-1439. Applications must be received by Sept. 30. All applications will be kept confidential unless the applicant consents to disclosure.

Proposed Amendments to Local Rules of Criminal Procedure

Proposed amendments to the Local Rules of Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. The proposed amendments apply to D.N.M.LR-Cr. 32, Sentencing and Judgment. A "redlined" version (with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the Court's website at www.nmd.uscourts.gov. Members of the bar may submit comments by email to localrules@nmcourt.fed.us or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Local Rules. Comments must be submitted by Sept. 30.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:
I will willingly participate in the disciplinary process.

State Bar News

Attorney Support Groups

- Sept. 12, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (group meets on the second Monday of the month). Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Sept. 19, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)
- Oct. 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group meets the first Monday of the month but will skip September due to Labor Day.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Animal Law Section

September Animal Talk, Blood Ivory: Wildlife Trafficking in the U.S.

The Animal Law Section and ABQ BioPark Zoo bring members a look into the world of wildlife trafficking and its impact on elephant species. Attorneys Ruth Musgrave and Susan George plus BioPark elephant staff will talk about what is being done in New Mexico to help save the species from extinction. The Animal Talk will be from 12:45-1:30 p.m., Sept. 10, at the ABQ BioPark Zoo Colores Education Building. Activities are included with regular admission. For more information, contact Animal Law Section Past Chair, Judy Durzo at jdurzo@mac.com.

Appellate Practice Section

Brown Bag Lunch with Judge Jonathan B. Sutin

Join the Appellate Practice Section and Young Lawyers Division for a brown bag lunch at noon, Sept. 9, at the State Bar Center with guest Judge Jonathan B. Sutin of the New Mexico Court of Appeals. The brown bag lunch series is informal and is intended to create an opportunity for appellate judges and practitioners who appear before them to exchange ideas and get to know each other better. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. with Tim Atler, tja@atlerfirm.com. Space is limited.

Business Law Section

Nominations Open for 2016 Business Lawyer of the Year

The Business Law Section has opened nominations for its annual Business Lawyer of the Year award, to be presented on Nov. 18 after the Section's Business Law Institute CLE. Nominees should demonstrate professionalism and integrity, superior legal service, exemplary service to the Section or to business law in general, and service to the public. Self-nominations are welcome. A complete description of the award and selection criteria are available at www.nmbar.org/BusinessLaw. The deadline for nominations is Oct. 3. Send nominations to Breanna Henley at bhenley@nmbar.org. Recent recipients include Leonard Sanchez, John Salazar, Dylan O'Reilly and Susan McCormack.

Paralegal Division

Criminal Law/Civil Liabilities CLE

The State Bar Paralegal Division invites members of the legal community to attend the Division's Criminal Law/Civil Liabilities CLE program (3.0 G, MCLE pending) from 9 a.m.–12:15 p.m., Sept. 24, at the State Bar Center. Topics include the unauthorized practice of law and increasing liabilities for paralegals,

financial discovery, figuring out what you do and don't have and an update on case management deadline changes. Remote connections for audio or video will not be available. Registration is $35 for Division members, $50 for non-member paralegals, $55 for attorneys. For more information and registration instructions, visit www.nmbar.org > About us > Divisions > Paralegal Division > CLE Programs (click on "See Flyer" at the bottom of the page) or contact Carolyn Winton, 505-858-4433 or Linda Murphy, 505-884-0777.

Senior Lawyers Division

Judicial Service Awards

The Senior Lawyers Division presents an award to any judge from a New Mexico court who has completed an aggregate of 25 years of judicial service. Any judge who fits this qualification should contact Judge Bob Scott (ret., U.S. Magistrate Court) at 505-255-5138 or flyings421@gmail.com.

Solo and Small Firm Section

Fall Luncheon Presentation Schedule Begins with Former Sheriff Darren White

The Solo and Small Firm Section will again sponsor monthly luncheon presentations on unique law-related subjects and this fall's schedule opens with former Department of Public Safety Secretary and Bernalillo County Sheriff Darren White. White will present "The Journey from Drug War Warrior to Legalized Marijuana" on Sept. 20. Albuquerque attorney Matt Coyte will discuss various penal issues on Oct. 18 with "New Mexico's Prisons and Jails—Are We Making Things Worse?" On Nov. 15 Fred Nathan, executive director of Think New Mexico, a results-oriented think tank serving New Mexicans, will discuss the work of Think New Mexico and various policy issues facing the 2017 legislative session. On Jan. 17, 2017, Ron Taylor will share his lawyerly insights as a juror in a long murder trial. All presentations will take place from noon-1 p.m. at the State Bar Center. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

Young Lawyers Division

State Bar Open House for Students and Lawyers

The Young Lawyers Division and UNM School of Law Student Bar Association invite all members of the State Bar and students to meet, mingle, and exchange information about opportunities within the State Bar at the annual State Bar Open House from 5:30-7:30 p.m., Sept. 13, at the State Bar Center. Food and beverages will be served. R.S.V.P. with Breanna Henley at bhenley@nmbar.org by Sept. 9.

Veterans Legal Clinic Changes Schedule, Needs Volunteers

The Young Lawyers Division and New Mexico VA Health Care System seeks attorney volunteers to provide advice to veterans on Sept. 13 at the New Mexico Veteran's Memorial located at 1100 Louisiana Blvd SE, Albuquerque. Volunteers should arrive at 8 a.m. for orientation and breakfast. Paralegals, law students, and other non-attorney volunteers are needed to conduct intake and provide other assistance at the clinic. For more information and to volunteer contact Keith Mier at kcm@sutinfirm.com. Please be advised that Sept. 13 will be the last Veterans Legal Clinic of 2016. The clinic will resume on a quarterly basis in 2017: Jan. 10, March 14, June 13 and Sept. 12 from 8:30-11 a.m.

Volunteers Needed for Roswell Wills for Heroes Event

The Young Lawyers Division is seeking volunteer attorneys for its Wills for Heroes event from 8:30 a.m.-noon, on Sept. 17, at Fire Station 1, 200 S. Richardson, Roswell. Attorneys will provide free simple wills, powers of attorney, and advanced medical directives for first responders and their spouses. Breakfast and coffee will be served. Even though volunteers need no prior experience with wills, those uncomfortable providing advice in this area can still volunteer to conduct intake or serve as witnesses or notaries. Contact Anna Rains at acrains@sbcw-law.com or 575-622-5440 to volunteer.

UNM

Law Library

Hours Through Dec. 18

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10a.m.–6p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed
Holiday Closures	
Sept. 5 (Labor Day)	
Nov. 24–25 (Thanksgiving)	

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

www.nmbar.org/JLAP

Address Changes

All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

Supreme Court
Email: attorneyinfochange@nmcourts.gov
Fax: 505-827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar
Email: address@nmbar.org
Fax: 505-797-6019
Mail: PO Box 92860
Albuquerque, NM 87199
Online: www.nmbar.org

2016 John Field Simms Sr. Memorial Lectureship in Law

CLE: The Legal Labyrinth of Brexit

The 2016 John Field Simms Sr. Memorial Lectureship in Law presents "The Legal Labyrinth of Brexit" (1.0 G) at 4:30 p.m., Sept. 7, at the UNM School of Law. The course will shed light on the political, legal and economic consequences about a matter that affects everyone—Britian's vote to leave the European Union. For the first time, a member state may leave the EU, creating a turning point in history. Brexit is a labyrinth of new and complex legal procedures that may completely transform the constitutional history of the Western world. Professor Bruno Aguilera-Barchet of the King Juan Carlos University of Madrid will discuss these issues. the program is free and open to the public. Parking is free in the Law School parking lot, "L" starting at 4 p.m. Register online at http://lawschool.unm.edu/alumni/events/simms.phpor R.S.V.P. by calling 505-277-8184.

Client Protection Fund Releases Annual Report

Paid $90K in Claims for Actions of Dishonest Lawyers in 2015

In an effort to protect New Mexicans and other members of the public and make clients whole for monetary losses due to lawyer dishonesty, the Client Protection Fund Commission paid $90,518 in claims for 2015. Twenty-five of the 35 claims resolved in 2015 resulted in payments to the complaining party as a result of the actions of 11 lawyers. The table below summarizes those decisions.

For more information about the Client Protection Fund Commission including a full description of the Commission and cumulative statistics since 2006, visit **www.nmbar.org/nmbardocs/formembers/cpf/2015CPF_AnnualReport.pdf.**

Lawyer	*Claims Approved*	*Dollars Dollars*	*Claim Type*
Joseph Camacho	2	$8,275	Unearned fees
Daniel Dolan	1	$2,260	Unearned fees
Thomas Esquibel	1	$1,000	Unearned fees
Marcos Gonzalez	1	$6,500	Unearned fees
Jeffrey P. Jones	1	$1,000	Unearned fees
Cody Kelly	1	$2,000	Unearned fees
Stephen Peterson	3	$4,000	Unearned fees
Sabrina Price	9	$31,274	Unearned fees
Luis Quintana	3	$6,414	Unearned fees
Sherry Tippett	1	$20,000	Unearned fees
Gilbert Vigil	2	$7,795	Unearned fees

Other Bars

Albuquerque Lawyers' Club

Season Starts with Luncheon Guest Judge M. Monica Zamora

Albuquerque Lawyers' Club announces the start of its 2016-2017 session. Membership dues for the year are $250 and will include nine lunches and two hours of ethics/professionalism CLE credits. Lunch meetings are held at noon, the first Wednesday of September through May, at Seasons Rotisserie and Grill. Non-members are welcome to attend ($30 in advance, $35 at the door).

The first meeting will be held Sept. 7 and the speaker is Judge M. Monica Zamora of the New Mexico Court of Appeals. Judge Zamora will be introduced by Judge Miles Hanisee, also of the Court of Appeals. For more information, visit the Club's brand new website at www.AlbuquerqueLawyersClub.com

First Judicial District Bar Association

September Buffet Luncheon

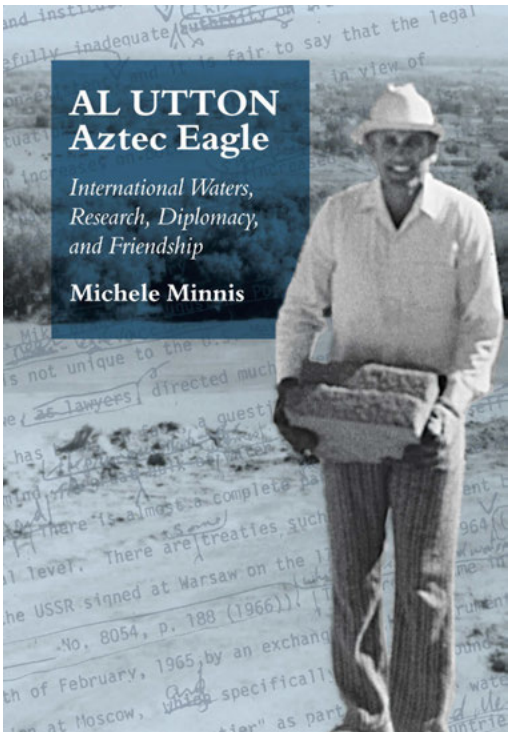
Join the First Judicial District Bar Association for its next buffet luncheon from noon–1 p.m., Sept. 26, at the Hilton Hotel, 100 Sandoval Street, Santa Fe. Kyle Harwood, partner at Egolf + Ferlic + Harwood, will give a Santa Fe land and water update, including a discussion of the Aamodt case and the impact of recent amendments to the county code. Attendance is $15 and includes a buffet lunch. R.S.V.P. by 5 p.m., Sept. 22, to erin.mcsherry@state.nm.us. Payment should be made upon arrival at the event with cash, card or check to the "First Judicial District Bar Association" or "FJDBA".

Al Utton—Aztec Eagle:

International Waters, Research, Diplomacy, and Friendship

Biography by Dr. Michele Minnis and Book Review by Charles DuMars

About the Reviewer:
Professor Charles "Chuck" DuMars knew Al Utton for more than 35 years, first as a friend and fellow natural resource attorney, and later for a period of 25 years as a colleague at the University of New Mexico School of Law. There they worked together on numerous international projects involving water treaties, specifically the Mexican Water Treaty of 1944 and the possible adaptation of a model groundwater treaty to accommodate international demand for this shared resource by the U.S. and Mexico. DuMars and Utton personally committed themselves to finding the "perfect margarita." They never reached that goal, but pursued the quest during their entire close and rewarding friendship.



A useful biography of Al Utton could have been written exploring his research and scholarship, his diplomatic skills or his complexity and decency as a human being. Dr. Minnis undertakes to explore all three themes in a single volume and pulls it off in *Al Utton—Aztec Eagle: International Waters, Research, Diplomacy, and Friendship.* The book captures the breadth of his character by summarizing Utton with one word: "friendship"—the capacity to be a friend to everyone he encountered.

This capacity led to his success in diplomacy, and ultimately to his being awarded the Order of the Aztec Eagle, Mexico's highest recognition of a foreigner's service to that nation or to humankind. Dr. Minnis traces the trails Utton blazed in international water law and his extensive body of academic work, which remain viable and relevant today. Utton was an internationally known expert in the area of transboundary resource allocation, specifically water allocation, for both ground and surface water. For more than 30 years, he edited the country's leading multidisciplinary quarterly—the *Natural Resources Journal*. He also convened multiple symposia and sophisticated working groups of participants from all over the world. The policies and practices collaboratively developed by those groups have improved the prospects for equitable and peaceful allocation of shared water resources.

Dr. Minnis's biography begins in the style of a historical novel tracing the grassroots of a young man who rises to the top in all his endeavors.

It has become a cliché to describe a book as "timely." This is not a cliché here. The U.S. shares two major rivers on its southern boundary: the Rio Grande and the Colorado. They are linked together by the Mexican Water Treaty of 1944, and in the case of the Rio Grande above El Paso, Texas, an earlier international agreement. For reasons many conclude are directly tied to climate change, each of these international rivers face extraordinary drought, and the prospects are bleak. Each is subject to a shortage-sharing provision that must be interpreted by the International Boundary and Water Commission, an institution designed to resolve treaty conflicts. Thus, an understanding of the precepts offered by Utton over his lifetime of collaboration is not only useful—it is critical.

Dr. Minnis's biography begins in the style of a historical novel tracing the grassroots of a young man who rises to the top in all his endeavors. With thrifty prose, personal letters, newspaper accounts, and heartfelt tributes, she leads the reader to understand how small-town America produced a leader who was consumed by affection for his country and its people. She does such a complete job in describing his journey from hometown Aztec, New Mexico, to life as a Rhodes Scholar at Oxford University that when one turns to the next segment of the book, there is no question who Utton was. For readers interested in the kinds of life experiences that form individuals who consume life and give back all they take and more, this is reason enough to read this book. However, the book does not end there. It takes the next step and traces Utton's contributions to the academic and practical underpinnings of modern thinking in international law.

Because Utton, the person, could not really be separated from Utton, the legal scholar, it is not surprising that a review of his life intersects with his lifelong fight to move international law away from the hard doctrine that "might makes right," which allows those upstream to take all of the

water and deprives those downstream of everything. Knowing that since the earliest civilizations disputes over water have resulted from these absolutist doctrines, Utton advanced the principle early on that transboundary waters are a shared resource allocated best not by force, but by applying equitable principles of maximum utilization benefiting each nation sharing the resource.

Utton championed river basins commissions and planning studies that avoid the "tragedy of the commons" or the race to the bottom of environmental standards to ensure the water is consumed before its poor quality makes it useless. Dr. Minnis traces this evolutionary process focusing on the multiple conventions and international forums that produced not only theoretical talking points, but specific guidelines and a model treaty for groundwater allocation—the only such model treaty at that time, and one that continues to dominate the field. Because Utton collaborated with virtually all other experts in the field of international water allocation, the footnotes to the book contain a gold mine of useful sources on these topics valuable to any scholar.

The final segment of the book brims with a description of Utton's attempts to imprint upon international negotiation processes

Utton was convinced that international problems can be solved through collaborative, preventive diplomacy.

the principle of what he and his colleagues called "preventive diplomacy." This approach is simple to state yet complex to implement. The principle is that one should not wait until a problem is intractable before trying to solve it. For example, knowing that India and Bangladesh share a common water supply coupled with disparities in economic capacity, bright, thoughtful academics, water administrators, and statespersons can devise methods to allocate the water fairly while some portion is not already tied to use within each country.

Implicit in his work was Utton's belief that all members of the world community share a duty and an obligation to bring themselves together before river systems and water quality have irreversibly degraded to hammer out agreements for allocation, or at a minimum, establish a forum for dispute resolution that will prevent unthinkable devastation for those sharing the common resource.

The book also demonstrates that Utton was a devotee of collaborative decision-making long before mediation became a topic in all law schools, and long before mediation was recognized throughout the U.S. as strong alternative to litigation. Dr. Minnis explains how Utton's vision for collaborative solutions led the Republic of Mexico to honor him for service to humankind with the Order of the Aztec Eagle award.

This biography offers up three generous helpings for those interested in how the ingredients of small-town life and a loving family, coupled with an excellent education, can bring about a true love of country and humanity that furthers the evolution of international law. Utton was convinced that international problems can be solved through collaborative, preventive diplomacy. This book will provide like-minded people with both guidance and inspiration to renew their commitment to these principles.

Books can be purchased at uttoncenter.unm.edu.

About the Biographer:
Al Utton—Aztec Eagle *author Michele Minnis, PhD, was one of the founders of the University of New Mexico Master of Water Resources Program (est. 1991). While teaching 15 years on its faculty, she served twice as its acting director. For most of that time she was also associate director of the Natural Resources Center, created by Al Utton as an education, research, and public service arm of the* Natural Resources Journal. *In the early 1980s, Minnis designed and directed a legal writing program for first-year UNM law students. Now retired, she lives in Corrales.*

Legal Education

September

7 **The Legal Labyrinth of Brexit**
1.0 G
Live Seminar, Albuquerque
UNM School of Law,
2016 John Field Simms Sr.
Memorial Lecturship in Law
gotounm.edu/simms or 505-277-8184

9 **2015 Fiduciary Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Wildlife and Endangered Species on Public and Private Lands**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Family Law 101**
3.0 G
Live Seminar, Albuquerque
New Mexico Legal Aid
505-545-8543

15 **Liquidated Damages in Contracts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Workers' Compensation Law and Practice Seminar**
5.6 G, 1.0 EP
Live Seminar, Santa Fe
Sterling Education Services
www.sterlingeducation.com

16 **27th Annual Appellate Practice Institute**
6.4 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **2015 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Legal Writing—From Fiction to Fact (Morning Session 2015)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Legal Writing—From Fiction to Fact (Afternoon Session 2015)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Spring Elder Law Institute (2016)**
6.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Estate Planning for Firearms**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **EEOC Update, Whistleblowers and Wages (2015 Employment and Labor Law Institute)**
3.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **The New Lawyer – Rethinking Legal Services in the 21st Century (2015)**
4.5 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Law Practice Succession – A Little Thought Now, a Lot Less Panic Later (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Guardianship in NM: the Kinship Guardianship Act (2016)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2016 Tax Symposium**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Keeping Secrets or Telling Tales in Joint Representations**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Estate Planning for Liquidity**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Legal Technology Academy for New Mexico Lawyers (2016)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Civility and Professionalism (Ethicspalooza Redux – Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **The US District Court: The Next Step in Appealing Disability Denials (2015)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Invasion of the Drones: IP-Privacy, Policies, Profits, (2015 Annual Meeting)**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

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 May 20, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,903	Las Cruces Medical v. Mikeska	COA 33,836	05/20/16
No. 35,900	Lovato v. Wetsel	12-501	05/18/16
No. 35,898	Rodriguez v. State	12-501	05/18/16
No. 35,897	Schueller v. Schultz	COA 34,598	05/17/16
No. 35,896	Johnston v. Martinez	12-501	05/16/16
No. 35,894	Griego v. Smith	12-501	05/13/16
No. 35,893	State v. Crutcher	COA 34,207	05/12/16
No. 35,891	State v. Flores	COA 35,070	05/11/16
No. 35,895	Caouette v. Martinez	12-501	05/06/16
No. 35,889	Ford v. Lytle	12-501	05/06/16
No. 35,886	State v. Otero	COA 34,893	05/06/16
No. 35,885	Smith v. Johnson	12-501	05/06/16
No. 35,884	State v. Torres	COA 34,894	05/06/16
No. 35,882	State v. Head	COA 34,902	05/05/16
No. 35,880	Fierro v. Smith	12-501	05/04/16
No. 35,873	State v. Justin D.	COA 34,858	05/02/16
No. 35,876	State v. Natalie W.P.	COA 34,684	04/29/16
No. 35,870	State v. Maestas	COA 33,191	04/29/16
No. 35,864	State v. Radosevich	COA 33,282	04/28/16
No. 35,866	State v. Hoffman	COA 34,414	04/27/16
No. 35,861	Morrisette v. State	12-501	04/27/16
No. 35,863	Maestas v. State	12-501	04/22/16
No. 35,857	State v. Foster	COA 34,418/34,553	04/19/16
No. 35,858	Baca v. First Judicial District Court	12-501	04/18/16
No. 35,853	State v. Sena	COA 33,889	04/15/16
No. 35,849	Blackwell v. Horton	12-501	04/08/16
No. 35,835	Pittman v. Smith	12-501	04/01/16
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No. 35,749	State v. Vargas	COA 33,247	02/11/16
No. 35,748	State v. Vargas	COA 33,247	02/11/16
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No. 35,669	Martin v. State	12-501	12/30/15
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No. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
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No. 35,479	Johnson v. Hatch	12-501	08/17/15
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No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,372	Martinez v. State	12-501	06/22/15
No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
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No. 34,680	Wing v. Janecka	12-501	07/14/14
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No. 34,706	Camacho v. Sanchez	12-501	05/13/14
No. 34,563	Benavidez v. State	12-501	02/25/14
No. 34,303	Gutierrez v. State	12-501	07/30/13
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No. 33,819	Chavez v. State	12-501	10/29/12
No. 33,867	Roche v. Janecka	12-501	09/28/12
No. 33,539	Contreras v. State	12-501	07/12/12
No. 33,630	Utley v. State	12-501	06/07/12

Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)			Date Writ Issued
No. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
No. 35,063	State v. Carroll	COA 32,909	01/26/15
No. 35,121	State v. Chakerian	COA 32,872	05/11/15
No. 35,116	State v. Martinez	COA 32,516	05/11/15
No. 35,279	Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,289	NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,290	Olson v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,278	Smith v. Frawner	12-501	08/26/15
No. 35,427	State v. Mercer-Smith	COA 31,941/28,294	08/26/15
No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
No. 35,451	State v. Garcia	COA 33,249	08/26/15
No. 35,499	Romero v. Ladlow Transit Services	COA 33,032	09/25/15
No. 35,437	State v. Tafoya	COA 34,218	09/25/15
No. 35,515	Saenz v. Ranack Constructors	COA 32,373	10/23/16
No. 35,614	State v. Chavez	COA 33,084	01/19/16
No. 35,609	Castro-Montanez v. Milk-N-Atural	COA 34,772	01/19/16
No. 35,512	Phoenix Funding v. Aurora Loan Services	COA 33,211	01/19/16
No. 34,790	Venie v. Velasquez	COA 33,427	01/19/16
No. 35,680	State v. Reed	COA 33,426	02/05/16
No. 35,751	State v. Begay	COA 33,588	03/25/16

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
No. 34,093	Cordova v. Cline	COA 30,546	01/15/14
No. 34,287	Hamaatsa v. Pueblo of San Felipe	COA 31,297	03/26/14
No. 34,798	State v. Maestas	COA 31,666	03/25/15
No. 34,630	State v. Ochoa	COA 31,243	04/13/15
No. 34,789	Tran v. Bennett	COA 32,677	04/13/15
No. 34,997	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,993	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,826	State v. Trammel	COA 31,097	08/26/15
No. 34,866	State v. Yazzie	COA 32,476	08/26/15
No. 35,035	State v. Stephenson	COA 31,273	10/15/15
No. 35,478	Morris v. Brandenburg	COA 33,630	10/26/15
No. 35,248	AFSCME Council 18 v. Bernalillo County Comm.	COA 33,706	01/11/16
No. 35,255	State v. Tufts	COA 33,419	01/13/16
No. 35,183	State v. Tapia	COA 32,934	01/25/16
No. 35,101	Dalton v. Santander	COA 33,136	02/17/16
No. 35,198	Noice v. BNSF	COA 31,935	02/17/16
No. 35,249	Kipnis v. Jusbasche	COA 33,821	02/29/16
No. 35,302	Cahn v. Berryman	COA 33,087	02/29/16
No. 35,349	Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586	03/14/16
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	03/16/16
No. 35,386	State v. Cordova	COA 32,820	03/28/16
No. 35,286	Flores v. Herrera	COA 32,693/33,413	03/30/16
No. 35,395	State v. Bailey	COA 32,521	03/30/16
No. 35,130	Progressive Ins. v. Vigil	COA 32,171	03/30/16
No. 34,929	Freeman v. Love	COA 32,542	04/13/16
No. 34,830	State v. Le Mier	COA 33,493	04/25/16
No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	04/27/16
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	04/27/16
No. 35,297	Montano v. Frezza	COA 32,403	08/15/16
No. 35,214	Montano v. Frezza	COA 32,403	08/15/16

Writ of Certiorari Quashed:

			Date Order Filed
No. 33,930	State v. Rodriguez	COA 30,938	05/03/16

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,869	Shah v. Devasthali	COA 34,096	05/19/16
No. 35,868	State v. Hoffman	COA 34,414	05/19/16
No. 35,865	UN.M. Board of Regents v. Garcia	COA 34,167	05/19/16
No. 35,862	Rodarte v. Presbyterian Insurance	COA 33,127	05/19/16
No. 35,860	State v. Alvarado-Natera	COA 34,944	05/16/16
No. 35,859	Faya A. v. CYFD	COA 35,101	05/16/16
No. 35,851	State v. Carmona	COA 35,851	05/11/16
No. 35,855	State v. Salazar	COA 32,906	05/09/16
No. 35,854	State v. James	COA 34,132	05/09/16
No. 35,852	State v. Cunningham	COA 33,401	05/09/16
No. 35,848	State v. Vallejos	COA 34,363	05/09/16
No. 35,634	Montano v. State	12-501	05/09/16
No. 35,612	Torrez v. Mulheron	12-501	05/09/16
No. 35,599	Tafoya v. Stewart	12-501	05/09/16
No. 35,845	Brotherton v. State	COA 35,039	05/03/16
No. 35,839	State v. Linam	COA 34,940	05/03/16
No. 35,838	State v. Nicholas G.	COA 34,838	05/03/16
No. 35,833	Daigle v. Eldorado Community	COA 34,819	05/03/16
No. 35,832	State v. Baxendale	COA 33,934	05/03/16
No. 35,831	State v. Martinez	COA 33,181	05/03/16
No. 35,830	Mesa Steel v. Dennis	COA 34,546	05/03/16
No. 35,818	State v. Martinez	COA 35,038	05/03/16
No. 35,712	State v. Nathan H.	COA 34,320	05/03/16
No. 35,638	State v. Gutierrez	COA 33,019	05/03/16
No. 34,777	State v. Dorais	COA 32,235	05/03/16

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective August 19, 2016

Unpublished Opinions

No. 35582	5th Jud Dist Lea JQ-14-16, CYFD v TIFFANY V (affirm)	8/15/2016
No. 35393	2nd Jud Dist Bernalillo CR-14-232, CR-14-3911, CR-13-491, STATE v K AVERY (dismiss)	8/16/2016
No. 33832	2nd Jud Dist Bernalillo CR-10-1229, STATE v J SARABIA (affirm)	8/17/2016
No. 34761	2nd Jud Dist Bernalillo CR-13-3265, CR-13-2692, STATE v B KENTON (afffirm)	8/17/2016
No. 35065	1st Jud Dist Santa Fe CV-15-1076, J BORDNICK v M HOYLE (affirm)	8/18/2016

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

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 August 31, 2016

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2016 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
Rule 1-079	Public inspection and sealing of court records	05/18/16
Rule 1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Civil Forms		
Form 4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the District Courts		
Rule 5-123	Public inspection and sealing of court records	05/18/16
Rule 5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the Magistrate Courts		
Rule 6-506	Time of commencement of trial	05/24/16
Rules of Criminal Procedure for the Metropolitan Courts		
Rule 7-506	Time of commencement of trial	05/24/16
Rules of Procedure for the Municipal Courts		
Rule 8-506	Time of commencement of trial	05/24/16
Criminal Forms		
Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Children's Court Rules and Forms		
Rule 10-166	Public inspection and sealing of court records	05/18/16
Rule 10-171	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Form 10-604	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Second Judicial District Court Local Rules		
LR2-400	Case management pilot program for criminal cases	02/02/16

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.

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-022

No. S-1-SC-34667 (filed June 13, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
MUZIWOKUTHULA MADONDA,
Defendant-Appellee.

INTERLOCUTORY APPEAL FROM THE DISTRICT COURT OF QUAY COUNTY
ALBERT J. MITCHELL JR., District Judge

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Opinion

Barbara J. Vigil, Justice

{1} Defendant Muziwokuthula Madonda (Defendant) was interrogated following his arrest for the murders of two men in Tucumcari, New Mexico. At the outset of the interrogation, law enforcement officers advised Defendant of his *Miranda* rights, and he unequivocally invoked his right to remain silent and his right to counsel. However, the officers continued to interrogate Defendant, and Defendant eventually made incriminating statements. Defendant then moved pretrial to have the statements suppressed, arguing that they were obtained in violation of the prophylactic rules announced in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981). The district court granted Defendant's motion to suppress the statements, and the State, in turn, filed this interlocutory appeal. Because we hold that the officers failed to scrupulously honor Defendant's invocation of his *Miranda* rights, we affirm.

I. BACKGROUND

{2} On March 24, 2011, the New Mexico State Police were called to the Tucumcari Inn after a relative found Bobby Gonzales and Gabriel Baca dead in the bathroom of room number 126. The investigation, headed by New Mexico State Police Agent Josh Armijo, led law enforcement to suspect Defendant had committed the murders. Relying in part on information provided by Defendant's former employer, Texas Rangers assisted the New Mexico State Police in locating and arresting Defendant near Houston, Texas, on March 27, 2011. After his arrest, Defendant's van was impounded and he was transported to the Montgomery County Sheriff's Office in Conroe, Texas.

{3} Defendant was questioned by law enforcement on three separate occasions following his arrest. The first interrogation attempt occurred shortly after the arrest, at approximately 1:00 a.m., and was conducted by Texas Rangers Steven Rayburn and Jason Taylor. During this interview, Defendant told the Rangers, "I will not talk," invoking his right to remain silent. At that point, the Rangers did not attempt to further interrogate Defendant concerning the murders but did continue conversing with Defendant about what would happen to his van and other belongings. Ranger Taylor asked Defendant for his consent to search Defendant's hotel room, which Defendant gave. Ranger Taylor then explained that the officers would take an inventory of the contents of Defendant's van and asked if Defendant would give the officers permission to conduct a search of the vehicle. Defendant asked why the officers needed his permission if they were going to search the van anyway, and Ranger Taylor explained that officers conducting a search might "look a little deeper" because they would be looking for evidence of criminal activity, not just creating an inventory of Defendant's belongings. Defendant refused to consent to the search of his vehicle. He did, however, ask the Rangers if he could have his Bible, which was in the van. Ranger Rayburn explained that he would have access to a Bible at the jail, but Defendant expressed that he preferred his own Bible, which was easier to read because it had all his notes and markings in it. Ranger Rayburn explained that he was not sure if Defendant would be allowed to have his own Bible inside the jail and that someone else would make that decision after the inventory of the vehicle. The conversation ended shortly thereafter and Defendant was taken to jail.

{4} Agent Armijo, Sergeant Matthew Broom, and Agent Kevin Massis of the New Mexico State Police arrived at the Montgomery County Sheriff's Office the following day. While the New Mexico officers were en route to Texas, Ranger Taylor secured a search warrant for Defendant's van. After the three New Mexico officers arrived in Texas, Rangers Taylor and Rayburn briefed them regarding the previous interview attempt. Ranger Rayburn specifically advised the New Mexico officers about Defendant's request for his Bible because of the "possible significance" of the notes Defendant had written inside it. Agent Armijo and Sergeant Broom spent approximately thirty minutes discussing their plan for interviewing Defendant. They determined that they needed Defendant's Bible for the interview, so they instructed Agent Massis, who was conducting the search of Defendant's van, to locate and provide it to them prior to the interrogation. The Bible was not included on the search warrant return receipt, nor was it tagged into evidence. It was, however, numbered and photographed so the officers could keep track of it, the photograph showing Defendant's name written on the front page.

{5} After receiving the Bible, Agent Armijo and Sergeant Broom met with Defendant on March 28, 2011. This second attempt to interview Defendant gave rise to the issue we address in this opinion.

{6} The interrogation on March 28, 2011, took place in the same interview room as the meeting between Defendant and the

Rangers the day before. Defendant, Agent Armijo, and Sergeant Broom entered the room together. The officers each carried a notebook and Agent Armijo also had a manila envelope, which he placed on the table as he entered the room. The three men sat at a table in the corner of the room with Defendant seated between the two officers. Less than a minute after entering the room, Agent Armijo advised Defendant of his *Miranda* rights, which Defendant indicated he understood. Then, the following exchange occurred:

Agent Armijo: Okay. Uh, with these rights in mind, do you uh, do you have a problem sittin' here and talking with us?

Defendant: *Oh, I would like a lawyer please.*

Agent Armijo: Okay, that's more than fair.

Defendant: Don't know if you guys can help with that. I've been here two days and no one has told me what's going, what's going to happen or uh, I don't know and what's the wait for, what exactly . . .

Agent Armijo: Okay, okay.

Defendant: Yeah.

Agent Armijo: Okay. Umm, so what, what, what're you saying? What are you asking me?

Defendant: *I would like a lawyer. Talk to, to a lawyer first.*

Agent Armijo: Okay, I understand that. But you said I, if I could help you with something.

Defendant: Uh . . .

Agent Armijo: With explaining to you why you're here?

Defendant: No. I understand why I'm here. I don't know if you guys could help set me up with a lawyer or if it's, falls under a certain department or if you guys can handle that. That's all I'm trying to ask you.

{7} The conversation continued as Defendant and the officers discussed the process for obtaining a lawyer. The officers explained that the court would likely appoint counsel at Defendant's arraignment, but the process would probably take a few days. The exchange about obtaining a lawyer took approximately one minute, after which Agent Armijo confirmed with Defendant, "You don't have anything to say is what you're telling me?" and Defendant responded, "I don't have anything to say." The parties do not dispute that by this point, Defendant had invoked both his right to counsel by saying, "I would like a lawyer," and his right to remain silent by saying, "I don't have anything to say."

{8} Next, Agent Armijo stood up and told Defendant, "Okay, sit tight for me for just a second." Sergeant Broom picked up the manila envelope and, at Agent Armijo's request, handed the envelope to Agent Armijo. Agent Armijo reached into the envelope, pulled out Defendant's Bible, and said to Defendant, "I just wanna double check real quick that this is yours?" Defendant confirmed that it was his Bible and that he had asked the Rangers for it. Agent Armijo then told Defendant that he could not give the Bible to Defendant because it was being seized as evidence. Sergeant Broom confirmed with Defendant that he had received another Bible in jail, but Defendant again explained that he would prefer to have his own Bible because it had all his notes and markings in it. Sergeant Broom assured Defendant that his Bible was "not going anywhere, okay? It's staying with us." Agent Armijo then turned to leave the interrogation room, but Sergeant Broom remained seated at the table with Defendant and Defendant's Bible.

{9} As Agent Armijo walked toward the door, Defendant stopped him to ask "one more question." Defendant asked about having the money the Rangers seized from his wallet and backpack applied to his commissary account at the jail so that he could buy warm clothes because it was very cold in his cell. Agent Armijo told him that he could not make any promises, but that he would "ask and see if they can put a rush on it." Agent Armijo then asked Defendant if there was anything else he would like Agent Armijo to tell the other officers because this would be the last time Defendant would talk to him. Defendant replied, "Mmm, no. If I could get the money so that I can get some warm clothes. That's it. That would be it. Thank you." Agent Armijo again told Defendant, "Sit tight for me," and left the room.

{10} After Agent Armijo's exit, Sergeant Broom remained in the interrogation room with Defendant. A few seconds passed, then Defendant asked Sergeant Broom about the drive from New Mexico, and the two talked briefly about travel. Defendant told Sergeant Broom that his favorite part of the country to drive through was "Spring Colorado [sic]," and Sergeant Broom responded that he would "check it out."

{11} Sergeant Broom then quickly changed the topic of conversation, drawing Defendant's attention back to his Bible by pulling it out of the envelope and asking Defendant, "You do a lot of reading?" Defendant replied, "Yes, I try," while Sergeant Broom set the Bible down on the table and began flipping through the pages. Sergeant Broom asked Defendant what his favorite verse was. Defendant laughed then asked Sergeant Broom about his favorite Bible verse, to which Sergeant Broom responded, "Philippians 4:13." *See Philippians* 4:13 (King James) ("I can do all things through Christ which strengtheneth me.") Defendant then remarked, "that's the verse I need right now," adding that the officers probably thought the case would be a "slam dunk, . . . until [they heard] what happened." Sergeant Broom told Defendant that he "would love to hear what happened" but that he could not because Defendant had requested a lawyer. Defendant said that he wished he had a lawyer already because he knew from watching crime shows on television that "it [was] dangerous to talk to [law enforcement] without a lawyer." Sergeant Broom reiterated that he would love to hear Defendant's story, but he could not unless Defendant said he did not want a lawyer after all, adding that Defendant would "say the same story" anyway, whether or not he had a lawyer present. Defendant indicated that he was conflicted about whether or not to talk to the officers, stating that he "would like somebody to hear [his] side of the story," but he was also concerned because he had heard of cases where suspects had been wrongfully convicted after speaking to police.

{12} Agent Armijo, who had recently reentered the interrogation room, then asked Defendant, "At this point, what damage can the truth do?" Sergeant Broom and Agent Armijo then continued to use references to "the truth" to try to convince Defendant to waive his right to counsel and give them a statement. Sergeant Broom incorporated Defendant's Bible, pointing to it and saying "this right here's the truth . . . . That's what I want, is the truth." Defendant said that he "miss[ed his] Bible" to which Sergeant Broom responded, "I know." Defendant then asked questions about what would happen if he made a statement and whether it would make the process move faster. Sergeant Broom told Defendant that giving a statement would help the officers discover the truth, and Agent Armijo explained that if the truth "sen[t him] in a different direction" he would then have to "deal with" the fact that Defendant was "not [his] guy." Agent Armijo then reiterated that if the truth was that Defendant was not the killer, it did

not "make sense that the truth is gonna hurt [Defendant]." Sergeant Broom then asked Defendant, "So you want to talk to me?" Defendant responded, "I'll talk, I'll talk, and maybe, . . . you know, just put the truth out there, whatever it does." Before Defendant began telling his story, Agent Armijo stopped to "make sure" Defendant understood his rights, and Defendant told the officers, "I understand I have a right not to talk, but I've decided to talk now."

{13} Defendant gave the officers a version of events in which he was being framed for the murders in Tucumcari. The officers did not believe his story and eventually ended the questioning for the day. At this point, the officers secured a promise from Defendant that he would come back and tell them the truth in the morning. The third interview took place the following morning, March 29, 2011. Defendant ultimately confessed to the murders in Tucumcari, as well as two other murders in Ohio. The State of New Mexico charged Defendant with the two Tucumcari murders.

{14} Defendant subsequently filed a motion to suppress his statements made during the March 28 and 29 interviews. The district court held a suppression hearing and ultimately ruled in favor of Defendant, suppressing all statements from the interviews. Because Defendant faces charges for first-degree murder, the State appealed the district court's suppression order directly to this Court. *See State v King*, 2013-NMSC-014, ¶ 2, 300 P.3d 732 (recognizing that "this Court has jurisdiction over interlocutory appeals in cases in which a criminal defendant may be sentenced to life imprisonment"). Following oral argument, we issued an order affirming the district court's suppression of Defendant's statements. We now explain the reasoning underlying our order.

II. DISCUSSION

{15} "The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party." *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted). "The appellate court must defer to the district court with respect to findings of historical fact so long as they are supported by substantial evidence." *Id.* "[W]e review de novo the district court's application of the law to those facts." *King*, 2013-NMSC-014, ¶ 4.

{16} Here, the district court found that during the second interview "Defendant advised the officers that he did not want to speak and requested an attorney," but the "officers continued the interview." Accordingly, the district court concluded, "The continued discussion with . . . Defendant was a violation of both his State and Federal constitutional rights to an attorney and to remain silent. All information obtained in the interviews shall be suppressed." On appeal, the State does not dispute the finding that Defendant invoked his rights to counsel and to remain silent. The State contends that the finding that the interview continued after Defendant's invocation of the right to counsel was not supported by substantial evidence, arguing that "the officers stopped the interview" and "[t]he officers did not ask any questions about the investigation or otherwise engage in any conduct likely to elicit an incriminating response until after [Defendant] brought up the investigation. . . ." We are not persuaded by the State's arguments and affirm the district court's order suppressing the statements.

A. The Officers Failed to Terminate the Interrogation After Defendant Invoked his Right to Remain Silent and Right to Counsel

{17} In *Miranda*, 384 U.S. at 444, the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Those safeguards include the requirement that law enforcement warn every defendant in police custody, prior to any questioning, that the defendant "has a right to remain silent, that any statement [the defendant] does make may be used as evidence against [the defendant], and that [the defendant] has a right to the presence of an attorney, either retained or appointed." *Id*. In addition, *Miranda* requires that if at any point a defendant invokes the right to counsel by indicating that "he wishes to consult with an attorney before speaking" or invokes the right to remain silent by indicating that "he does not wish to be interrogated," all interrogation must cease. *Id*. at 444-45.

> At this point [the defendant] has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut-off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Id. at 474.

{18} In *Edwards*, 451 U.S. 477, the United States Supreme Court "added a second layer of protection to the *Miranda* rules" with respect to the right to counsel. *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). The *Edwards* Court held that when the subject of a custodial interrogation has invoked the right to counsel, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U.S. at 484.

> *Edwards* set forth a "bright-line rule" that *all* questioning must cease after an accused requests counsel. In the absence of such a bright-line prohibition, the authorities through "badger[ing]" or "overreaching"— explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.

Smith v. Illinois, 469 U.S. 91, 98 (1984) (alteration in original) (citations omitted). In other words, the officers must "scrupulously honor" a suspect's rights, once invoked, by ending the interrogation. *King*, 2013-NMSC-014, ¶ 8 (citing *Michigan v. Mosley*, 423 U.S. 96, 104 (1975)). "The interrogator is not at liberty to refuse to discontinue the interrogation or to persist in repeated efforts to wear down the suspect so as to cause the suspect to change his or her mind." *King*, 2013-NMSC-014, ¶ 8. Thus, in order to resolve the instant case, we must determine whether or not the officers scrupulously honored Defendant's rights by ending the interrogation.

{19} "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (footnotes omitted). This includes "repeated efforts to wear down [a suspect's] resistance and make

[the suspect] change his mind" about invoking the rights described in the *Miranda* warnings. *Mosley*, 423 U.S. at 105-06. Further, in determining whether a particular act or question by an officer constitutes interrogation, courts consider evidence of the officer's intent because "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect," especially in light of "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion." *Innis*, 446 U.S. at 301-02, n.7, 8.

{20} The record in this case demonstrates that the officers did not properly terminate their interrogation of Defendant once he invoked his rights. After Defendant made clear that he wanted the assistance of a lawyer and that he "[did not] have anything to say," Agent Armijo brought out Defendant's Bible, which the officers had procured solely for use as an aid in the interrogation. Agent Armijo testified at the suppression hearing that he showed the Bible to Defendant only to determine whether it was in fact Defendant's; however, the officers knew Defendant had asked for his Bible the day before, they knew this was the Bible recovered from Defendant's van, they made plans to use the Bible during their interrogation, and Defendant's name was written on the front page. Based on these facts, it is obvious that clarifying the Bible's ownership was not the actual reason Agent Armijo pulled out the Bible. Rather, it appears that Agent Armijo knew the Bible was Defendant's and showed it to him to keep him talking in hopes he would make incriminating statements. Instead of immediately terminating the interrogation, as required by *Miranda* and *Edwards*, Agent Armijo employed a technique he and Sergeant Broom had specifically "designed to elicit an incriminating response from the accused." *Innis*, 446 U.S. at 301, n.7. This is contrary to the requirement that officers "scrupulously honor" a suspect's invocation of rights by ending the interrogation upon a defendant's invocation of rights. *King*, 2013-NMSC-014, ¶ 8.

{21} After the first introduction of the Bible, Agent Armijo left the room, stating that this would be the last time Defendant would talk to him, which suggested that the interrogation was over. However, Sergeant Broom remained in the interrogation room with Defendant and the Bible. Defendant briefly made small talk with Sergeant Broom about travel. Then, Sergeant Broom immediately brought Defendant's attention back to the Bible, asking him about his favorite verse. Under different circumstances, such a question may be innocuous. But given that the officers knew that Defendant's Bible was important to him and that they had planned to use it in the interrogation, we are convinced that Sergeant Broom instead drew Defendant's attention back to the Bible so that he could keep Defendant talking until he eventually waived his rights and gave an incriminating statement. *See Innis*, 446 U.S. at 302, n.8 ("Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response . . . .").

{22} Following the reintroduction of Defendant's Bible, Sergeant Broom proceeded to try to convince Defendant that he should waive his rights and tell the officers what happened. Though Sergeant Broom's statements that he would love to hear Defendant's side of the story were not inherently coercive, they were followed by direct attempts to convince Defendant to waive his right to counsel by minimizing the importance of the right. Sergeant Broom told Defendant that he would tell "the same story" to officers without a lawyer as he would tell with a lawyer, essentially suggesting to Defendant that it would make no difference in his case whether he waited for the assistance of a lawyer or not, so he might as well just give a statement. This is an example of precisely the type of "subtle overreach" or "badgering" the *Edwards* rule was designed to prevent. *See Smith*, 469 U.S. at 98 (explaining that "all questioning must cease," otherwise through "badger[ing] or overreaching—explicit or subtle, deliberate or unintentional," officers may "wear down the accused and persuade him to incriminate himself" (alteration in original)).

{23} Although Agent Armijo indicated that he would not be talking to Defendant again after Defendant invoked his rights, he reentered the interrogation room once it appeared that Sergeant Broom might get Defendant to waive those rights. Agent Armijo and Sergeant Broom then directed the focus of the conversation to the importance of telling "the truth," using the Bible as a symbol of truth. The officers' statements indicating that telling the truth could not do any harm or that it would be the most beneficial course of action for Defendant to take directly undermined the *Miranda* warnings that any statements Defendant made could be used *against him* in subsequent proceedings. *See Cuervo v. State*, 967 So.2d 155, 164-65 (Fla. 2007) (stating that officers engaged in conduct tantamount to interrogation by instructing a suspect to tell "his side of the story" because it undermined the warning that "*anything* he said could be used *against him* in a court of law").

{24} Here, the officers did not honor Defendant's invocation of his rights when they failed to terminate the interrogation. Right after Defendant indicated that he wanted an attorney and did not want to make a statement, the officers proceeded with techniques they had specifically planned to employ during the interrogation, and then they undermined the very warnings which had prompted Defendant to invoke his rights in the first place. Thus, the district court did not err in finding that the officers failed to terminate the interrogation.

B. The Officers' Failure to 'Scrupulously Honor' Defendant's Rights Warrants Suppression of All Subsequent Statements

{25} The "fundamental purpose [of the *Edwards* rule] is to [p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel." *Maryland v. Shatzer*, 559 U.S. 98, 106 (2010) (second and third alterations in original) (internal quotation marks and citation omitted).

> [O]nce a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect."

Shatzer, 559 U.S. at 104-05 (second alteration in original) (quoting *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)). Thus, after a suspect invokes the right to counsel, "not only must the current interrogation cease, but he may not be approached for further interrogation until counsel has been made available to him," *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991) (internal quotation marks and citation omitted), or there has

been a break in custody of at least fourteen days. *See Shatzer*, 559 U.S. at 105, 110. Otherwise, the statements are "inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *McNeil*, 501 U.S. at 177.

{26} The officers' failure to terminate the March 28 interrogation following Defendant's invocation of the right to counsel mandates suppression of the statements Defendant made during that interview as well as his statements on March 29. Because Defendant was neither provided an attorney, nor released from custody for the requisite fourteen days between his request for an attorney and the subsequent interrogation, the March 29 interview was not cured of its presumptive involuntariness. *See Shatzer*, 559 U.S. at 105, 110. Accordingly, we hold that it was proper for the district court to suppress all statements Defendant made after his initial request for counsel.

III. CONCLUSION

{27} The district court properly concluded that the officers continued to interrogate Defendant after he invoked his right to remain silent and right to counsel in violation of his constitutional rights. We affirm the district court's order suppressing Defendant's oral and video statements.

{28} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
JUDITH K. NAKAMURA, Justice

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-054

No. 34,343 (filed February 9, 2016)

MARTIN BODLEY, as Personal Representative of
the Estate of Carl D. Bodley, deceased, KEVIN BODLEY, and LONA GEARHART,
Plaintiffs/Counter-Defendants/Appellants,
v.
CHRISTOPHER DEREK GOLDMAN, f/k/a CHRISTOPHER BODLEY, and
THERESA LINN BODLEY,
Defendants/Counter-Plaintiffs/Appellees.

APPEAL FROM THE DISTRICT COURT OF CIBOLA COUNTY
JAMES SANCHEZ, District Judge

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Opinion

Michael D. Bustamante, Judge

{1} This case presents a dispute over the distribution of the proceeds of an action brought under the Wrongful Death Act, NMSA 1978, §§ 41-2-1 to -4 (1882, as amended through 2001). The decedent's brother—who acted as the personal representative for purposes of the wrongful death action—argues that the decedent's children are not entitled to any of the proceeds because they "abandoned" their father. The district court disagreed and granted summary judgment in favor of decedent's children. On appeal, the personal representative argues that disputed issues of material fact preclude summary judgment. We disagree and affirm.

BACKGROUND

{2} Carl Bodley (Carl) was killed in a single-car rollover accident in 2010. At the time of his death, Carl was unmarried, having been divorced in 2003 after thirty-four years of marriage. He had two adult children from the marriage, Christopher Goldman (Christopher) and Theresa Bodley (Theresa) (collectively, Children). He was also survived by his siblings Martin Bodley (Martin), Kevin Bodley (Kevin), and Lona Gearhart (Lona) (collectively, Appellants).

{3} Christopher was appointed the administrator under the Uniform Probate Code of his father's estate in January 2011. *See* NMSA 1978, §§ 45-1-101 to -404)1975, as amended through 2011(. In December 2011—in an entirely separate proceeding—Martin was appointed the personal representative of Carl's estate for the purpose of pursuing a wrongful death claim under the Wrongful Death Act. The same month, Martin's attorneys, Gilbert Arrazolo and James B. Ragan, filed suit against Ford Motor Company for Carl's death. The suit was settled in January 2013. After subtracting their fees and expenses, the attorneys deposited the balance of the settlement funds in a trust account. Children assert that they were not notified of the filing or settlement of the wrongful death action when they occurred.

{4} Over a year later, Arrazolo met with Theresa and presented her with a written agreement providing that, in exchange for twenty percent of the settlement amount, Theresa would agree "that [the agreement] is a full and final settlement of the proceeds in this case and hereby settles all her potential claims against Ford Motor Company, Martin Bodley, Gilbert Arrazolo and James Ragan." The agreement also stated that Arrazolo did not represent Theresa, that Theresa could obtain independent counsel, and that "technical[ly]" the Wrongful Death Act entitled Theresa to fifty percent of the settlement amount. However, it also stated that "case[]law suggests adjustments and/or disqualifications for abandonment/estrangement." Attached to the agreement were several New Mexico cases addressing recovery under the Wrongful Death Act. Theresa asserts that she first learned of the wrongful death claim and settlement with Ford at this meeting. The following week, Arrazolo presented the same agreement and material to Christopher. Neither Theresa nor Christopher signed the agreement.

{5} In April 2014, Appellants filed a complaint for declaratory judgment seeking to "determine the rights of statutory beneficiaries under the Wrongful Death [Act]." The premise of the complaint was that Christopher and Theresa had "abandoned the child-parent relationship and [were] not entitled to recover under the Wrongful Death Act" or that, alternatively, the settlement funds should be distributed in equal shares to Christopher, Theresa, and each of Carl's three siblings. As a factual basis for the complaint, Appellants alleged, inter alia, that (1) Christopher and Theresa did not visit their father in the decade prior to his death, (2) neither Christopher nor Theresa attended Carl's funeral service, (3) Christopher told his father to "fuck off" after Carl indicated he wanted to have a relationship with Christopher, and (4) Christopher changed his last name and that of his son from Bodley to Goldman shortly after his parents' divorce, which "shows that not only did he never want anything to do with his father[, h]e also didn't want future generations to have anything to do with his father."

{6} Children filed an answer, as well as a counterclaim against Martin and the other siblings for malicious abuse of process and prima facie tort, and a third-party complaint against the siblings' counsel for disgorgement, breach of fiduciary duty, malicious abuse of process, and prima facie tort.[1] Children then moved for summary judgment on the declaratory judgment action, arguing

[1]The counterclaim and third-party claims were later dismissed.

that the Wrongful Death Act provides a clear structure for disbursement to beneficiaries that does not depend on whether the named beneficiaries were or were not estranged from the decedent. They maintained that, under the Wrongful Death Act, Appellants were entitled to the wrongful death proceeds only "if there is no . . . child or grandchild" of the decedent. *See* § 41-2-3(C), (E).

{7} The district court granted Childrens' motion for summary judgment and entered orders to the effect that Appellants were not entitled to any of the proceeds of the settlement with Ford and that Children were entitled to the settlement funds remaining in the trust account. Appellants timely appealed.

DISCUSSION

{8} Summary judgment is appropriate where there "is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA. "[It] is a drastic remedy to be used with great caution." *Pharmaseal Labs., Inc. v. Goffe*, 1977-NMSC-071, ¶ 9, 90 N.M. 753, 568 P.2d 589. "[S]ummary judgment is improper, if, after resolving all reasonable doubts in favor of the opponent, the evidence adduced by the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits shows that there was a genuine issue as to any material fact." *Id.* The substantive law governing the dispute determines which facts are material. *Farmington Police Officers Ass'n Commc'n Workers of Am. Local 7911 v. City of Farmington*, 2006-NMCA-077, ¶ 17, 139 N.M. 750, 137 P.3d 1204. "An issue of fact is 'material' if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute." *Martin v. Franklin Capital Corp.*, 2008-NMCA-152, ¶ 6, 145 N.M. 179, 195 P.3d 24. Our review of summary judgment is de novo. *Id.*

{9} The Wrongful Death Act, the substantive law applicable here, provides:

> The proceeds of any judgment obtained in any such action . . . shall be distributed as follows:
> . . . .
> C. if there is no husband or wife, but a child or grandchild, then to such child and grandchild by right of representation;
> . . . .
> E. if there is no father, mother, husband, wife, child or grandchild, then to a surviving brother or sister if there are any[.]

Section 41-2-3.

{10} The parties clearly dispute whether Christopher and Theresa "abandoned" their father. The question is whether this dispute precludes summary judgment. While Children "strongly disagree with [Appellants'] categorization of their relationship with their father as 'abandonment' or 'estrangement,' " they argue that the veracity of Appellants' allegations is immaterial because "[w]hether or not [Children] 'abandoned' their father is not a 'material fact' because it does not change the statutorily-mandated distribution scheme." Appellants counter that this Court must construe the facts in the light most favorable to them and that, under that construction, Christopher and Theresa clearly did not support Carl. *Barber's Super Mkts., Inc. v. Stryker*, 1970-NMSC-027, ¶ 7, 81 N.M. 227, 465 P.2d 284 ("A party opposing a motion for summary judgment is entitled to have all reasonable inferences construed in a light most favorable to him.").

{11} We interpret Appellants' argument to be that whether Christopher and Theresa abandoned Carl is a disputed material fact under the Wrongful Death Act because (1) adult children have a common-law duty to "at least provid[e] emotional support" to their parents, (2) New Mexico case law prevents beneficiaries who are estranged from their decedent from recovering proceeds of a wrongful death claim, and (3) the Legislature did not intend the Wrongful Death Act to provide a windfall to adult children who abandoned their decedent parent. The crux of the question before us is whether the Wrongful Death Act's distribution scheme may be altered when the relationship between a decedent and his or her children has deteriorated—or perhaps even evaporated. In other words, assuming that Appellants' allegations are true, should Christopher and Theresa be denied some or all of the proceeds of the Wrongful Death Act claim? Appellants' arguments rely in large part on this Court's opinion in *Perry v. Williams* and we begin with a discussion of that case. 2003-NMCA-084, 133 N.M. 844, 70 P.3d 1283.

{12} Perry (Mother) and Williams (Father) were the natural parents of Curtis, who died from leukemia at the University of New Mexico (UNM) Hospital in 1986 while still a minor. *Id.* ¶ 2. In May 2000 Perry obtained a settlement of $463,332 from UNM Hospital under the Wrongful Death Act. *Id.* Shortly thereafter, Perry petitioned for termination of Williams' parental rights and for a declaration that Williams had no right to the settlement funds because he had abandoned and neglected Curtis. *Id.* ¶ 3. Williams apparently did not contest the district court's findings that Williams "utterly failed to meet the responsibilities of a father during Curtis['s] lifetime," *id.* ¶ 6, because Williams (1) "paid less than a total of $200 as child support" throughout Curtis's life in spite of numerous court orders requiring child support; (2) did not visit Curtis in Albuquerque except for at the time of Curtis's death; (3) "had no contact with Curtis from age two until just days before his death" except for two visits in California initiated by Perry and the paternal grandfather; and (4) "did not write, did not call, did not send cards or gifts" while Curtis was hospitalized four times and "failed to cooperate in the necessary testing for a bone marrow transplant although he was asked to do so" and "was one of only three possible donors." *Id.* ¶ 5. Instead, similar to Children here, Williams argued that "there was no basis in law to terminate his statutory right to benefits pursuant to the Wrongful Death Act." *Id.* ¶ 3.

{13} After first observing that there was a nationwide "consensus that it is bad policy to permit parents who have deserted or abandoned their children to recover for the wrongful death of those children[,]" *id.* ¶ 13, we proceeded to examine the common law as it existed when the Wrongful Death Act was enacted, observing that "it is the common law . . . that establishes the baseline for our analysis." *Id.* ¶ 17. Under the common law, "the right of a parent to the services of the child or the child's earnings was linked to the parent's actual support of the child." *Id.* ¶ 18. This Court concluded that "[w]e do not lightly assume that the [L]egislature intended to alter this common law principle when it enacted the Wrongful Death Act. To the contrary, we believe that the [L]egislature intended to incorporate this common law principle into the Act when it was passed." *Id.* ¶ 20.

{14} Next, the Court examined New Mexico public policy as evinced in statutes addressing parental responsibilities to children. *Id.* ¶¶ 21-22. It concluded that a variety of statutes indicate that New Mexico "disfavors natural parents who do not acknowledge their responsibilities to their children." *Id.* ¶ 21 (internal quotation marks and citation omitted). These statutes include, among others, the Support Enforcement Act, NMSA 1978, §§ 40-4A-1 to -20 (1985, as amended through 2004), the Parental Responsibility Act, NMSA

1978, §§ 40-5A-1 to -13 (1995, as amended through 2015), and certain provisions of the Probate Code, NMSA 1978, § 45-2-114(C) (2011). *Perry*, 2003-NMCA-084, ¶ 21.

{15} Finally, the Court noted that case law indicated that "statutory wrongful death benefits have been determined by common law principles." *Id.* ¶ 24 (citing *Baca v. Baca*, 1963-NMSC-043, ¶ 23, 71 N.M. 468, 379 P.2d 765; *Sanchez v. J. Barron Rice, Inc.*, 1967-NMSC-077, ¶ 4, 77 N.M. 717, 427 P.2d 240; and *Latimer v. City of Clovis*, 1972-NMCA-040, ¶ 46, 83 N.M. 610, 495 P.2d 788). In the cases cited, the "contributory negligence of one of the beneficiaries under the Wrongful Death Act defeat[ed] the right of recovery to the extent of that party's share." *Perry*, 2003-NMCA-084, ¶ 24. The Court also pointed to *Wasson v. Wasson*, 1978-NMCA-092, ¶ 15, 584 P.2d 713, for the proposition that parental rights should be terminated when the parent has abandoned the child, except where termination would negatively affect the child's rights vis-à-vis the parent. *Perry*, 2003-NMCA-084, ¶ 26. Thus, the *Wasson* Court refused to terminate the father's parental rights because to do so would extinguish the child's right to inherit from the father or recover under the Wrongful Death Act, although it observed that if the child's right to inherit was not divested through parental termination, it would otherwise favor termination. *Perry*, 2003-NMCA-084, ¶ 26.

{16} Based on the common law underpinnings of the Wrongful Death Act, the public policy indicated in statutes, and the application of common law principles to wrongful death benefits in other contexts, we concluded in *Perry* that it was consistent with the legislative intent behind the Wrongful Death Act to permit "a personal representative in a wrongful death action [to] present evidence of abandonment and non-support, and even seek to terminate [a parent's] parental rights, particularly in light of the fact that the only remaining one is a right to recover money." *Id.* ¶¶ 16, 28 (internal quotation marks and citation omitted); *see In re Estate of Sumler*, 2003-NMCA-030, ¶ 33, 133 N.M. 319, 62 P.3d 776; *Dominguez v. Rogers*, 1983-NMCA-135, ¶ 20, 100 N.M. 605, 673 P.2d 1338, *superceded by statute on other grounds as stated in Spoon v. Mata*, 2014-NMCA-115, 338 P.3d 113.

{17} In an echo of the reasoning in *Perry*, Appellants first argue that the Wrongful Death Act incorporates the common law principle that "adult children have the legal duty to support their parents." They point to the Elizabethan Poor Laws, which were passed in 1601 and, they argue, incorporated into the common law of New Mexico. *See* Robin M. Jacobson, Note, *Americana Healthcare Center v. Randall: The Renaissance of Filial Responsibility*, 40 S.D.L. Rev. 518, 527 (1995) (discussing the Poor Laws).[2] Filial responsibility laws such as the Poor Laws were predicated on protection of the indigent as well as the public fisc. Jacobson, *supra*, at 527 (stating that "[t]he purpose of the Poor Laws was to relieve the general public from supporting indigent persons whose relatives had the ability to contribute to their support"); Christina Lesher et. al., *Whose Bill Is It Anyway? Adult Children's Responsibility to Care for Parents*, 6 Est. Plan. & Cmty. Prop. L.J. 247, 249 (2014) (stating that the Poor Laws were "based on a theory that relatives were the first and primary source of aid to the indigent, and government assistance was merely a secondary source"); Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & Pol'y 709, 711 (2001) ("The overarching principles of the Elizabethan '[P]oor [L]aws' dictated that blood relatives were the primary source of support for family members, including the elderly, but that public assistance was available for those unable to sustain themselves with private resources."). Notably, they did not require that adult children financially contribute to their parents if the parents were self-supporting, nor did they require adult children to visit, communicate with, admire, love, respect, obey, or otherwise emotionally support their parents.

{18} Here, Appellants' complaint alleges that Christopher and Theresa "abandoned their child-parent relationship" based on their failure to visit Carl, communicate with Carl, invite Carl to Christopher's wedding, attend Carl's funeral, or ask about Carl's ashes. None of these behaviors falls within the reach of the common law as addressed by the Poor Laws. Moreover, Appellants do not allege that Carl was indigent or dependent on government benefits. Thus, even if we assume without deciding that the Poor Laws were adopted by New Mexico and imposed a duty to provide financial support on adult children, we conclude that Appellants have not even alleged, much less shown, that that duty was breached here. *Wallace v. Blanchard*, 1920-NMSC-019, ¶ 21, 26 N.M. 181, 190 P. 1020 (stating that "these [P]oor [L]aws were local to England, and no state, so far as we are aware, has ever held that by the adoption of the common law such [P]oor [L]aws were introduced into the adopting state").

{19} Appellants next argue that the holding in *Perry* applies here and requires reversal. They also argue that it is unfair to permit "ungrateful adult children who have abandoned their parents to pursue their own self[-]interests" to recover a "windfall" through the Wrongful Death Act and that Christopher and Theresa "are no different than the greedy father in *Perry*." In essence, Appellants ask that we simply apply the responsibilities of parents addressed in *Perry* to adult children. But the *Perry* holding was based on an analysis of legislative intent relevant to *child* welfare. *Perry* rested on the Court's conclusion that the Legislature incorporated a duty found in the common law into the Wrongful Death Act and also intended that public policy embodied in other statutes would apply to the distribution of benefits. We have already determined that Appellants have not alleged a breach of a common law duty to financially support indigent parents, if there is one. Appellants also do not identify any statutes indicating that it is public policy in New Mexico to require adult children to support their parents. The closest statute we uncovered is a filial responsibility law passed in 1955. 1955 N.M. Laws, Spec. Sess. ch. 3, §§ 1-7. That statute provided that

> [e]very child in the state who has reached his seventeenth birthday

[2]Jacobson quotes the statute as follows:

[The parents, grandparents, and the children of] everie poore olde blind lame and impotente person, or other poore person not able to worke, beinge of sufficient abilitie, shall at their owne Chardges releive and maintain everie suche poore person, in that manner and accordinge to that rate, as by the Justices of the Peace of that Countie where suche sufficient persons dwell, or the greater number of them, at their generall Quarter-Sessions shalbe assessed; upon paine that everie one of them shall forfeite twenty shillings for everie monthe which they shall faile therein.

Id. n.94; *see* The Poor Relief Act, 1601, 43 Eliz. 1, c. 2, § 6.

> shall support or contribute to the support of his parent or parents if: 1) the parent is unable to support himself and is, or is about to become a public charge, and 2) the child is financially able to furnish partial or complete support.

Id. § 1.

{20} The statute was codified as NMSA 1953, §§ 13-1-45 to -50. Like the Poor Laws, this statute clearly requires only financial support. For example, it directs the department of public welfare to "prepare and publish scales based on the income and primary obligations of the children [to be used] in determining the extent and minimum amount of support recipients are entitled to receive from their children." 1955 N.M. Laws, Spec. Sess. ch. 3, § 3. In 1957, the statute was amended to include a scale of monthly payments to parents based on the adult child's income. 1957 N.M. Laws, ch. 184, §§ 1-2. The statute does not mention any kind of support other than financial. Moreover, even this statute was repealed in its entirety in 1967. 1967 N.M. Laws, ch. 46, § 1 and ch. 109, § 1. Hence, there is no New Mexico statutory authority indicating a public policy requiring adult children to support their parents, either financially or emotionally. *See generally* Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic & International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 Elder L.J. 269, 304 (2013) (table showing which states have filial support laws and indicating no such statute in New Mexico); Lesher, *supra*, at 250-51 (stating that "thirty state codes currently include [filial responsibility] laws" and noting that they are rarely enforced). The lack of such authority distinguishes the analysis here from that in *Perry*. Appellants have failed to provide any authority for the proposition that adult children have responsibilities to their parents corresponding to those of parents to their children. In the absence of such authority, *Perry* is inapplicable here.

CONCLUSION

{21} We conclude that, even if adult children have a common law duty to financially support their parents, Appellants have not alleged conduct breaching that duty. In addition, there is no statutory authority indicating that the Legislature intended to alter the distribution scheme in the Wrongful Death Act based on adult childrens' abandonment of their decedent parent. Consequently, the dispute over whether Christopher and Theresa failed to emotionally support their father is immaterial to the distribution of benefits under the Wrongful Death Act. The district court's grant of summary judgment is affirmed.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
LINDA M. VANZI, Judge

Certiorari Denied, April 15, 2016, No. S-1-SC-35824

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-055

No. 33,451 (filed February 24, 2016)

EARTHWORKS' OIL & GAS ACCOUNTABILITY PROJECT and
NEW MEXICO WILDERNESS ALLIANCE,
Petitioners,
v.
NEW MEXICO OIL CONSERVATION COMMISSION,
Respondent,
and
NEW MEXICO OIL & GAS ASSOCIATION,
Intervenor.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
SHERI A. RAPHAELSON, District Judge

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Opinion

Roderick T. Kennedy, Judge

{1} Petitioners appeal the New Mexico Oil Conservation Commission's (the Commission) order promulgating a 2013 version of 19.15.17 NMAC (6/28/2013) (the 2013 Rule), which is commonly referred to as the "Pit Rule." Petitioners make three arguments. First, they contend that the Commission had no jurisdiction to create the 2013 Rule because a previous version of the rule was the subject of a pending appeal in the courts at the time the 2013 Rule was adopted. Second, Petitioners argue that the Commission's decision to issue the 2013 Rule is arbitrary and capricious because it was contrary to the evidence received and because the Commission did not adequately set forth its reasons for changing the previous version of the Pit Rule. Third, Petitioners assert that the notice the Commission gave of its proposed rulemaking was inadequate. Petitioners request that we either vacate the Commission's order promulgating the 2013 Rule or reverse and remand the 2013 Rule to the Commission for further proceedings.

{2} We conclude that the pending appeals did not deprive the Commission of jurisdiction to promulgate the 2013 Rule. We further conclude that the Commission adequately explained its reasoning for the rule's adoption in the final rule and satisfied the statutory requirements for issuing notice. We affirm.

I. BACKGROUND

{3} In 2008, the Commission approved a version of the Pit Rule (the 2008 Rule). In 2009, the Commission amended a portion of the 2008 Rule (the 2009 Amendment). Both the 2008 Rule and its 2009 Amendment were appealed to the First Judicial District Court by entities affiliated with the oil and gas industry, and the district court certified the appeals to this Court; we stayed our proceedings on these cases. In January 2012, the Commission, acting on petitions from the New Mexico Oil and Gas Association and Independent Petroleum Association of New Mexico, announced its intention to hold hearings on the petitions. Parties who opposed the proposed rule-making secured a writ of prohibition from the First Judicial District Court in February 2012, ordering the Commission to cease proceedings to amend the Pit Rule. That writ was quashed the following month. The Commission issued its notice that it would have a public hearing on the applications, and took evidence, heard argument, deliberated, adopted the rule, and filed an order promulgating the 2013 Rule. Earthworks' Oil and Gas Accountability Project submitted a request for rehearing in an effort to have the Commission reconsider the 2013 Rule. The Commission did not act upon that request within ten days; it was deemed denied pursuant to the New Mexico Oil and Gas Act (Oil and Gas Act), NMSA 1978, Sections 70-2-1 to -38 (1935, as amended through 2015). *See* § 70-2-25(A). Conceding that the Oil and Gas Act, Section 70-2-25 and NMSA 1978, Section 39-3-1.1 (1999), do not provide for an appeal of Commission rulemaking, Petitioners sought a writ of certiorari under Rule 1-075 NMRA in the district court, which the district court granted. The district court subsequently certified the case to this Court. *See* Rule 1-074(S) NMRA.

II. DISCUSSION

A. Commission's Jurisdiction to Amend 2013 Pit Rule

{4} Petitioners assert that the Commission had no authority to amend the Pit Rule because there had not yet been a final order issued in the appeals of the 2008 Rule or the 2009 Amendment and that pending judicial appeals must stay ongoing rulemaking on the particular issue concerned. However, Petitioners direct us to no authority compelling any new rulemaking on a particular subject to be held in abeyance while the appeal of a previous rule is pending. "We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority." *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329. In support of their argument, Petitioners urge us to instead apply the rule that an appeal divests

a lower adjudicatory tribunal of jurisdiction where it is acting in an adjudicatory capacity. Petitioners also have not provided any authority to relate a stay on appeal of agency adjudications to agency rulemaking activity. For reasons that follow, we are unpersuaded by Petitioners' argument.

1. Distinctions Between Rulemaking and Adjudication

{5} Throughout their argument that the Commission had no jurisdiction to issue the 2013 Rule, Petitioners repeatedly conflate an administrative agency's adjudicatory authority with an agency's rulemaking authority. These two types of administrative authority are quite distinct in their application and function. While rulemaking creates generally applied standards to which an agency and individuals are held, adjudication is the resolution of particular disputes involving specific parties and specific problems, by applying such rules. *See Uhden v. N.M. Oil Conservation Comm'n*, 1991-NMSC-089, ¶ 7, 112 N.M. 528, 817 P.2d 721 (holding that acting on petition to create an exception to the Oil Conservation Rule with statewide application that will apply to limited situation and specific parties is "adjudicative rather than rulemaking"); *see Rauscher, Pierce, Fefsnes v. Taxation and Revenue Dep't*, 2002-NMSC-013, ¶ 42, 132 N.M. 226, 46 P.3d 687 (quoting *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994));[1] *Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm'n*, 2014-NMSC-006, ¶ 27, 319 P.3d 639 (citing *In re Application of Timberon Water Co.*, 1992-NMSC-047, ¶ 23, 114 N.M. 154, 836 P.2d 73 (categorizing administrative action as regulatory when it furthers the public interest under the state's police powers and adjudicatory when it is based on adjudicating a private right rather than implementing public policy)).

{6} It is well established that the Legislature can properly delegate rulemaking power to administrative agencies through an enabling statute. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42, 243 P.3d 746 (per curiam). Our Legislature delegated concurrent rulemaking authority under the Oil and Gas Act to the Oil Conservation Division and the Commission. *See* Section 70-2-11(B); Section 70-2-12(B). Given this distinction, we hold that the Commission's actions in promulgating the 2013 Rule were regulatory rather than adjudicatory.

2. Judicial Action May Not Preemptively Stop Administrative Rulemaking That is Otherwise Permissible

{7} We note that Petitioners' action to obtain a writ of prohibition against the Commission to prevent the proceedings that resulted in the 2013 Rule currently on appeal was ultimately quashed, and Petitioners did not appeal the final order. Our Supreme Court's opinion in *Shoobridge*, 2010-NMSC-049, presents an instructive view on nearly identical facts. In *Shoobridge*, parties opposing a rulemaking obtained a preliminary injunction prohibiting the Environmental Improvement Board from conducting the administrative proceedings necessary to adopt a regulation. *Id.* ¶¶ 2-3. The Environmental Improvement Board petitioned our Supreme Court for a writ of superintending control or prohibition to vacate the injunction. *Id.* ¶ 4. The Supreme Court granted the writ, ordering the district court to dissolve the injunction and remanding the case to the agency to conduct its rulemaking proceedings. *Id.* In doing so, our Supreme Court rejected the idea that a court could enjoin the rulemaking process, reasoning that the separation of powers doctrine did not permit such a result:

> When the Legislature lawfully delegates authority to a state agency to promulgate rules and regulations, may a court intervene to halt proceedings before the agency adopts such rules or regulations? This question is one of substantial public interest because court intervention in administrative proceedings before the adoption of rules or regulations may thwart the public's right to participate in such proceedings. We hold that a court may not intervene in administrative rule-making proceedings before the adoption of a rule or regulation[.] . . . [T]he separation of powers doctrine forbids a court from prematurely interfering with the administrative processes created by the Legislature.

Id. ¶ 1.

{8} Petitioners' contention that the Commission lacked authority to promulgate the 2013 Rule because of pending appeals related to the 2008 Rule and 2009 Amendment is similar to the petitioner's argument in *Shoobridge*. To forestall rulemaking in this way would permit the courts to halt agency rulemaking proceedings prior to the issuance of a new rule. *See id.* ("[A] court may not intervene in administrative rule-making proceedings before the adoption of a rule or regulation."). Administrative agencies routinely promulgate superseding rules on various topics. *See, e.g.*, *State ex rel. Stapleton v. Skandara*, 2015-NMCA-044, ¶ 3, 346 P.3d 1191 (discussing 6.69.8 NMAC (08/30/2012), which governs teacher evaluations in public schools and superseded 6.69.4 NMAC (09/30/2003, as amended through 06/15/2009)).[2]

{9} Thus, to the extent that the 2013 Rule changed the 2008 Rule and the 2009 Amendment, the previous rule(s) are repealed by implication. Because the promulgation is final, Petitioners are free to challenge the rule on its merits. *See* Rule 1-075(A) ("This rule governs writs of certiorari to administrative officers and agencies pursuant to the New Mexico Constitution when there is no statutory right to an appeal or other statutory right of review."). However, the doctrine of separation of powers precludes the judicial branch from acting prior to promulgation. *Shoobridge*, 2010-NMSC-049, ¶ 14 ("Because of the necessity to respect the separate branches of government, courts should not intervene to halt administrative hearings before rules or regulations are adopted."). We therefore decline Petitioners' invitation to create a rule allowing an appeal to halt agency rulemaking action and conclude that the preceding appeals of the 2008 Rule and 2009 Amendment

[1]*Rauscher* provides, "Two principal characteristics distinguish rulemaking from adjudication. First, adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals. Second, because adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied."

[2]Similar principles exist in the statutory arena. *See State v. Valdez*, 1955-NMSC-011, ¶ 14, 59 N.M. 112, 279 P.2d 868 ("[W]here two statutes have the same object and relate to the same subject, if the later act is repugnant to the former, the former is repealed by implication to the extent of the repugnancy[.]").

did not preclude the Commission from exercising its authority to promulgate the 2013 Rule, which will now be addressed on its merits.

B. The Commission's Decision to Adopt the 2013 Pit Rule Was Not Arbitrary or Capricious

{10} In reviewing an administrative order on its merits, we conduct the same review as the district court sitting in its appellate capacity. *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806. Thus, we determine: "(1) whether the agency acted fraudulently, arbitrarily, or capriciously; (2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence; (3) whether the action of the agency was outside the scope of authority of the agency; or (4) whether the action of the agency was otherwise not in accordance with law." Rule 1-075(R). Petitioners assert that the Commission's actions in this instance were arbitrary and capricious. An agency's action is arbitrary and capricious if it is "unreasonable or without a rational basis, when viewed in light of the whole record." *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 17, 137 N.M. 161, 108 P.3d 1019 (internal quotation marks and citation omitted); *McDaniel v. N.M. Bd. of Med. Exam'rs*, 1974-NMSC-062, ¶ 11, 86 N.M. 447, 525 P.2d 374 (describing agency action as arbitrary and capricious when it is "willful and unreasonable . . . , without consideration and in disregard of facts or circumstances" (internal quotation marks and citation omitted)).

{11} The party challenging a rule adopted by an administrative agency carries the burden of showing that the rule is arbitrary or capricious by demonstrating that " 'the rule's requirements are not reasonably related to the legislative purpose[.]' " *Old Abe Co. v. N.M. Mining Comm'n*, 1995-NMCA-134, ¶ 10, 121 N.M. 83, 908 P.2d 776 (internal quotation marks and citation omitted); *see also N.M. Att'y Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 9, 309 P.3d 89 (placing the burden on the parties challenging the agency order). When reviewing an agency's rulemaking decision we use a deferential standard:

> An agency's rule-making function involves the exercise of discretion, and a reviewing court will not substitute its judgment for that of the agency on that issue where there is no showing of an abuse of that discretion. Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement.

Wilcox v. N.M. Bd. of Acupuncture & Oriental Med., 2012-NMCA-106, ¶ 7, 288 P.3d 902 (internal quotation marks and citation omitted).

{12} In adopting a new rule, an administrative agency is required to provide a statement of reasons for doing so. Although formal findings are not required, "the record must indicate the reasoning of the Commission and the basis on which it adopted the [rule]." *City of Roswell v. N.M. Water Quality Control Comm'n*, 1972-NMCA-160, ¶ 16, 84 N.M. 561, 505 P.2d 1237. The Commission need not state its reasons for adopting each provision in a rule or respond to all concerns raised in testimony; such a requirement would be "unduly onerous . . . and unnecessary for the purposes of appellate review." *Regents of Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, ¶ 13, 136 N.M. 45, 94 P.3d 788. We require only that "the public and the reviewing courts are informed as to the reasoning behind the [rule.]" *Pharm. Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, ¶ 17, 86 N.M. 571, 525 P.2d 931.

{13} Petitioners contend the Commission's decision to issue the 2013 Rule was arbitrary and capricious for five reasons: (1) the 2013 Rule is radically different from the 2008 Rule, despite being based on largely the same evidence; (2) the Commission did not entirely explain its reason for departing from the 2008 Rule; (3) the Commission did not explain why the 2013 Rule is performance-based, instead of prescriptive; (4) the Commission gave no explanation of its lowered groundwater contamination criteria, and (5) the Commission gave no explanation of how it was able to accomplish more cost saving measures than the 2008 Rule while still protecting water supplies, public health, and the environment. Petitioner's assertions all follow the same line of reasoning. The Commission heard the same evidence in the hearings related to the 2013 Rule as it did in relation to the 2008 Rule, yet the 2013 Rule is so different from the 2008 Rule that it must be arbitrary and capricious. As explained in detail below, Petitioners' assertions of error are not stated in terms of legal standards that indicate a need for reversal, but instead are groundless claims of error based on differences between the old and new versions of the Pit Rule. Petitioners supported the 2008 Rule and the 2009 Amendment; the first appeals of those rules were filed by the entities whose petition then resulted in the 2013 Rule, that Petitioners now appeal. Rules change. For a rule to be invalid, we apply the legal standards enunciated below.

1. Differences Between 2008 Rule and 2013 Rule Do Not Automatically Render the Latter Rule Arbitrary and Capricious

{14} Petitioners assert that the order issuing the 2013 Rule is arbitrary and capricious because it represents a "radical departure" from the 2008 Rule and 2009 Amendment despite being based on "identical" evidence. We decline to follow this interpretation. Petitioners also point out that the Commission took administrative notice of the 2008 proceedings when considering the 2009 Amendment and argue that we should follow suit because the 2013 Rule and 2008 Rule are so interrelated as to require us to take judicial notice of the 2008 Rule proceedings and the 2009 Amendment proceedings. However, during the proceedings below, with which we are presently concerned, the Commission *denied* Petitioners' request that it take administrative notice of the 2008 Rule and 2009 Amendment proceedings.

{15} Petitioners do not argue that the Commission erred when it refused to consider the records from the 2008 and 2009 rulemaking hearings. Instead, Petitioners argue that it is proper for this Court to take judicial notice of those records. Petitioners direct us to nothing that suggests we should expand our review from the record below, or why it would be meet to do so. To act as if a new rule that differs from an old one requires review of more than the record generated by the new rulemaking would be contrary to the well-established rules that "district courts engaged in administrative appeals are limited to the record created at the agency level[,]" *Montano v. N.M. Real Estate Appraiser's Bd.*, 2009-NMCA-009, ¶ 17, 145 N.M. 494, 200 P.3d 544, and "absent a specific statutory provision to the contrary, an appeal from an administrative hearing will be based solely on the administrative record." *Rowley v. Murray*, 1987-NMCA-139, ¶ 16, 106 N.M. 676, 748 P.2d 973; *see also Swisher v. Darden*, 1955-NMSC-071, ¶ 9, 59 N.M. 511, 287 P.2d 73 (stating that in determining whether an agency's decision is arbitrary,

unlawful, unreasonable, or capricious, "the court in its review, is limited to the record made before the administrative tribunal"), *superceded by statute on other grounds as stated in Aguilera v. Bd. of Educ.*, 2006-NMSC-015, 139 N.M. 330, 132 P.3d 587. The Oil and Gas Act limits appeals from rulemaking decisions to the record made by the Commission. Section 70-2-12.2. It is not the function of a court acting in an appellate capacity to admit new evidence or substitute its judgment for that of an administrative agency. *See Groendyke Transp., Inc. v. N.M. State Corp. Comm'n*, 1984-NMSC-067, ¶¶ 17-20, 101 N.M. 470, 684 P.2d 1135 (concluding that the district court acting in appellate capacity was limited to reviewing evidence presented to an administrative agency, and acknowledging that administrative appeals are generally limited to evidence presented to an agency during an administrative hearing). Additionally, we will not be put in the the position of reviewing the appeals of the 2008 Rule and 2009 Amendment; those appeals are not before us here.

{16} In light of Petitioners' failure to provide authority to support their suggestion that we take judicial notice of the record in previous administrative rulemaking hearings, we decline to do so. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2 (acknowledging that where a party cites no authority to support an argument, we may assume no such authority exists). Our review is therefore limited to whether the Commission's order adopting the 2013 Rule was arbitrary or capricious in light of only the evidence presented to it during the 2013 rulemaking hearing.

2. The Reasoning Behind the 2013 Rule Is Adequate

{17} After holding several hearings, the Commission adopted the 2013 Rule that is now on appeal. The Commission enumerated its reasons for adopting the 2013 Rule in a section of its order entitled "ultimate facts and conclusions of law." The Commission gave detailed explanations for the standards and requirements that it created in the 2013 Rule, and we afford agency rules a presumption of validity. *Wilcox*, 2012-NMCA-106, ¶ 7. Generally, the Commission explained that since its issuance, the 2008 Rule has negatively impacted the growth of the oil and gas industry in New Mexico, has been difficult to understand, has created unnecessary paperwork, and has created a cumbersome process that does not promote predictability in the system. In addition, the Commission listed encouraging reuse and recycling of oilfield fluids and reducing surface impacts as additional bases for adopting the 2013 Rule.

{18} The Commission is not required to respond to all concerns raised during rulemaking hearings. For the purposes of appellate review, the reasons listed above, although general, are adequate to support its decision to issue the 2013 Rule, particularly in light of the detailed findings that the Commission provides for each general reason. For example, the Commission's order is divided into eight substantive categories: pit waste constituents, vadose zone modeling, soil transport, construction and design, operation and administration, closure and revegetation, siting, and multi-well fluid management pits. Each section contains detailed summaries of the evidence presented on the subject, including descriptions of the tests, studies, and models presented, as well as the results of those tests, studies, and models. The Commission then compiled that information in its conclusions section to reach results as to acceptable constituent levels, necessary soil depths, revegetation requirements, siting considerations, and tank integrity. In all, the Commission's order spans fifty pages and is replete with the bases for, and reasoning behind, the 2013 Rule. We therefore conclude that the Commission sufficiently stated its reasons for adopting the 2013 Rule.

{19} Petitioners maintain that "[t]he Commission also failed to grapple with the facts and circumstances that were the fundamental bases of the 2008 Rule, but which it rejected without explanation in 2013." Petitioners point to nothing in the statute or regulations to support their assertion that the Commission is required to address the facts giving rise to a previous rule when promulgating a new rule. Our review of the record reveals that the Commission stated sufficient reasons for the creation of the 2013 Rule. Petitioners have not shown any deficiency in the evidence proffered during the 2013 rulemaking to suggest that the Commission's conclusions were arbitrary and capricious. *See Santa Fe Expl. Co. v. Oil Conservation Comm'n*, 1992-NMSC-044, ¶¶ 10-11, 114 N.M. 103, 835 P.2d 819 (assertions must be accompanied by citations to the record); Rule 12-213(A)(4) NMRA (requiring that a brief in chief contain an argument that contains citations to the "record proper, transcript of proceedings or exhibits relied on").

3. Performance-Based Rule vs. Prescriptive Rule

{20} Petitioners' brief asserts that the Commission failed to explain its reason for adopting a more performance-based rule, rather than the prescriptive rule that they allege the 2008 Rule enacted. More specifically, Petitioners complain that the Commission provided no explanation as to why a performance-based rule is required as opposed to a prescriptive one.

{21} Petitioners' insistence on a particular type of rule misstates the Commission's obligation. The Commission is required only to comply with its statutory duties and provide an indication of the reasoning and basis that it used when adopting the rule. Outside of those requirements, the Commission has no obligation to promulgate prescriptive versus performance-based rules or give a detailed explanation of its reasons for issuing a certain type of rule. Nowhere in our review of the Oil and Gas Act, and its accompanying regulations, do we find any requirement that the rules promulgated by the Commission be performance-based or prescriptive; they need only satisfy the purposes set forth in Section 70-2-12(B).

{22} Rather than provide authority that binds the Commission to one type of rule over any other, Petitioners base their challenge on a comparison between the 2008 Rule and the 2013 Rule, given their belief that the 2013 Rule is inferior. Because Petitioners do not discharge their burden to demonstrate that the 2013 Rule is not reasonably related to the Commission's legislative purpose, as is required to demonstrate arbitrary and capricious action, we defer to the Commission's exercise of discretion and presume the 2013 Rule is valid. *Old Abe Co.*, 1995-NMCA-134, ¶ 10 (stating requirements for proving action is arbitrary and capricious); *Wilcox*, 2012-NMCA-106, ¶ 7 (presuming agency rule is valid unless not in accord with statutorily prescribed purpose). As discussed below, the Commission has explained the reasoning and bases it used, and how it has accomplished its statutorily proscribed duties, while Petitioners have made no showing that the 2013 Rule is not reasonably related to the Commission's legislative purpose beyond their belief in its being a less palatable rule to their needs than the one previously adopted.

4. Lowered Groundwater Contamination Standards

{23} Petitioners contend that the Commission failed to justify its departure from

the standards in the 2008 Rule that protected groundwater. As discussed above, the Commission is not required to "justify its departure" from the 2008 Rule; it is only required to explain its reasoning for adopting the 2013 Rule and how the 2013 Rule accomplishes the Commission's statutory duties. *City of Roswell*, 1972-NMCA-160, ¶ 16.

{24} With regard to groundwater contamination, the Commission's order identified evidence detailing the depth and concentration of contamination levels, and how things like soil density, weather, temperature, and moisture affect the speed at which contaminants traveled certain distances. For instance, the Commission acknowledged that, after hundreds of years, chloride, which is used as a non-toxic measurement of contaminant movement, would reach depths at which groundwater generally exists. The Commission then used that information to reach conclusions regarding infiltration of fluids, desirable pit slope angles, and mobility of various compounds. The Commission also considered evidence where samples taken from over thirty pits around the state were analyzed according to EPA methodology, and the resultant contaminant levels were compared to "published regulatory criteria." The Commission used that information to compile a list of contaminants that warranted monitoring as well as their acceptable levels. The Commission then concluded that the levels it specified in the 2013 Rule "provide reasonable protection of fresh water, public health and the environment[,]" and it explained how it reached that conclusion. It detailed the level of contamination permissible when groundwater is found at varying depths, and reasoned that the evidence presented supported its conclusions. In addition, the Commission's order provides citations to portions of the record that it relied on in making its findings and conclusions.

{25} For reasons detailed previously, we do not take up Petitioners' argument that the Commission's adoption of the 2013 Rule is arbitrary and capricious because Petitioners do not explain why the 2013 Rule is different from the 2008 Rule with respect to groundwater standards. That is not the standard that we apply; we instead look to whether the Commission's actions are consistent with the statute it is charged with implementing. *Wilcox*, 2012-NMCA-106, ¶ 7. The Commission is assigned the task of regulating "the disposition of water produced or used in connection with the drilling for or producing of oil or gas . . . in a manner that will afford reasonable protection against contamination of fresh water supplies[.]" Section 70-2-12(B)(15). Not only is the Commission's order consistent with that mandate with regard to groundwater, but the Commission also provided an adequate explanation based on the evidence as to how it arrived at its decision to adopt the provisions that it did.

5. Economic Considerations

{26} Petitioners assert that the Commission acted improperly in promulgating the 2013 Rule because it did so in order to further economic development, and the furtherance of economic development is not part of the Commission's duties under the Oil and Gas Act. The Commission asserts that economic considerations exist as the very core of its statutory obligations. Petitioners' argument is misconceived.

a. Economic Considerations Were Not the Commission's Primary Purpose in Promulgating the 2013 Rule

{27} The Oil and Gas Act intends that all oil fields be allowed to produce and market a share of the oil produced and marketed in the state, "insofar as [that] can be effected economically and without waste." Section 70-2-19(B). The Oil and Gas Act also vests the Oil Conservation Division with the duty to make whatever rules, regulations, and orders that are necessary to carry out the provisions of the Oil and Gas Act, and in so doing, "the division shall give due consideration to the economic factors involved." Section 70-2-19(C). In addition, the Oil Conservation Division must allocate oil production efficiently and economically and must "consider the economic loss caused by the drilling of unnecessary wells[.]" Section 70-2-17(B). Finally, the Legislature empowered the Oil Conservation Division "to make and enforce rules, regulations and orders, and to do *whatever may be reasonably necessary* to carry out the purpose of [the Oil and Gas A]ct, *whether or not indicated or specified in any section*[.]" Section 70-2-11(A) (emphasis added). Further, the Commission is required to minimize the economic impact of its rules on small businesses, and in doing so, consider the complexity of the rule, the complaints and comments received from the public concerning the rule, and the degree to which technology and economic conditions have changed in the area affected by the rules. NMSA 1978, § 14-4A-6(A), (C)(1)-(5) (2005); NMSA 1978, § 14-4A-3(A) (2005) (applying Small Business Regulatory Relief Act to "every department, agency, board, commission, committee or institution of the executive branch of state government").

{28} We do not regard the Commission's mandate so broadly as to accept its contention that economic considerations stand as the basis for its other duties under the Oil and Gas Act. *See* § 70-2-12(B). We agree with Petitioners that economic considerations cannot stand as the sole purpose for creating or amending a rule. *Cf. Pub. Serv. Co. of N.M. v. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, ¶ 10, 89 N.M. 223, 549 P.2d 638 (stating that agency authority should be construed to permit the fullest accomplishment of legislative intent, but acknowledging that where it is not included in the scope of authority delegated to an agency, industrial development should occur as a consequence, not by design). However, the language of the Oil and Gas Act allows for the Commission to include economic considerations in its reasoning when promulgating rules. While economic considerations undoubtedly played some role in the Commission's decision to issue the 2013 Rule, we see no indication that economic considerations were the *primary* purpose behind the rule.

{29} In its order, the Commission stated many reasons that the 2013 Rule was necessary, including the Commission's desire to encourage reuse and recycling of oilfield fluids and reduce surface impacts, which was inspired by changes in oilfield practices. These considerations were enacted to protect the environment and public health in accordance with the Oil and Gas Act. *See* § 70-2-12(B)(21), (22). Additionally, the Commission's order points to its desire to clarify and alleviate the cumbersome process and confusion that resulted from years of the 2008 Rule's application. To illustrate this, the Commission points to interpretations of the 2008 Rule that resulted in unnecessarily restrictive siting requirements and inappropriate application of the rule to fresh water pits and surface features. Simplification of compliance with the Pit Rule is a measure that is reasonably necessary to accomplish the prevention of waste and protection of correlative rights. *See* § 70-2-11(A); *see also* 19.15.2.7(C)(15) NMAC (defining "correlative rights"). These reasons are in addition to the Commission's finding that the 2013 Rule favorably impacts small business by making compliance less costly.

{30} We conclude that the Commission acted within its statutory authority when

including economic considerations in its stated reasons for promulgating the 2013 Rule. Economic development was not the Commission's primary purpose for promulgating the rule, but rather, was properly one of many reasons for it. We further conclude that the Commission's order properly takes into consideration public comments concerning the rule, the rule's complexity, and technological and economic changes. *See* § 14-4A-6.

b. The Commission's Reasoning is Adequate

{31} Petitioners assert that the Commission gave no explanation of how it was able to accomplish more cost saving measures than the 2008 Rule, yet still protect water supplies, public health, and the environment. This argument is based on the order adopting the 2008 Rule, which stated that the Commission made all changes it could to lessen potential effects on small businesses while still protecting fresh water, human health, and the environment. Petitioners argue that because the Commission took all possible measures in 2008, it is implicit that there were no cost-saving measures remaining to be made in the 2013 Rule. Thus, they argue, the decision to include any changes related to cost-saving measures in the 2013 Rule must be arbitrary and capricious. Petitioners state no factual basis for this, and the record does not support their argument. Again, our standard of review does not contemplate a comparison of the old and new rules, but rather requires that we consider whether the Commission has provided an adequate explanation of its reasoning, *see City of Roswell*, 1972-NMCA-160, ¶ 16, and whether its decision is unreasonable in light of the whole record. *See Archuleta*, 2005-NMSC-006, ¶ 17.

{32} Relying on evidence presented during the 2013 proceeding, the Commission made findings regarding misconceptions regarding tank requirements that underlie the 2008 Rule and the 2009 Amendment and the unnecessary costs incurred through compliance with that rule. In addition, the Commission made findings as to the general decline of the oil business in recent years, including reduced number of wells drilled, higher cost of drilling, businesses leaving the state due to increased cost, and operator reluctance in attempting to obtain exceptions from the 2009 Amendment owing to its language and complexity. Based on those findings, the Commission reached the conclusion that the 2013 Rule was necessary to make compliance with the Pit Rule less cumbersome and more understandable for the regulators and regulated community. The Commission's order promulgating the 2013 Rule lists ten reasons for altering the Pit Rule, including making compliance with the rule less costly, more efficient, more consistent, and more understandable. Findings as to correlative rights and economic waste are sufficient to satisfy our requirement that administrative agencies state their reasoning for issuing an order. *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, 1975-NMSC-006, ¶ 18, 87 N.M. 286, 532 P.2d 582 (stating that findings as to correlative rights and economic waste are sufficient to satisfy the requirement that the Commission make basic conclusions of fact or findings); *see also* 19.15.2.7(C)(15) NMAC (defining "correlative rights" as the opportunity afforded to the owner of each property in a pool to produce without waste the owner's equitable share of the oil in the pool, so far as can be practicably obtained without waste).

{33} We conclude that the explanation given was adequate to explain the Commission's reasoning in promulgating the 2013 Rule. In addition, we conclude that Petitioners have not demonstrated that the Commission abused its discretion in concluding that the 2013 Rule's provisions are adequate to protect public health and the environment. We therefore defer to the Commission's discretion and uphold the 2013 Rule as reasonably consistent with the Oil and Gas Act. *See Wilcox*, 2012-NMCA-106, ¶ 7.

C. Notice

{34} The Oil and Gas Act requires the Oil Conservation Division to create rules governing the procedure to be followed in hearings and other proceedings before it. Section 70-2-7. The Commission promulgated separate procedural rules for rulemaking hearings and adjudicatory hearings. *Compare* 19.15.3.9 NMAC *with* 19.15.4.9 NMAC. Before any rule, regulation, or order is adopted, the Commission must first hold a hearing on the matter. Section 70-2-23. The Commission must, no less than ten days prior to the hearing, give "reasonable notice" that a hearing is taking place.[3] *Id.* The right to receive notice and a hearing before the adoption of a rule is a statutory right. *Livingston v. Ewing*, 1982-NMSC-110, ¶ 14, 98 N.M. 685, 652 P.2d 235. The " 'reasonable notice' mandate should circumscribe whatever . . . rules are promulgated for the purpose of notifying interested persons." *Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 23, 127 N.M. 120, 978 P.2d 327.

{35} Notice of rulemaking hearings must be published on behalf of the State of New Mexico, be signed by the Commission's chairman, and bear the Commission's seal. 19.15.3.9(A) NMAC. In addition, it must state the hearing's date, time, and place, as well as the date by which those commenting must submit their written comments. 19.15.3.9(A) NMAC. The notice must be published in four different ways: "(1) one time in a newspaper of general circulation in the state, no less than 20 days prior to the scheduled hearing date; (2) on the applicable docket for the commission hearing . . ., which the commission clerk shall send by regular or electronic mail not less than 20 days prior to the hearing to all who have requested such notice; (3) one time in the New Mexico Register, with the publication date not less than 10 business days prior to the scheduled hearing date; and (4) by posting on the division's website not less than 20 days prior to the scheduled hearing date." 19.15.3.9(A)(1)-(4) NMAC.

{36} The Commission's notice was issued on behalf of the State of New Mexico, was given under the Commission's seal, and was signed by the chairman of the Commission. It also stated the date, time, and place of the hearing, and it gave the date by which written comments were required to be submitted. Notice was published in the Albuquerque Journal, on the Commission docket, which was mailed electronically to those who requested it, in the New Mexico Register, and on the Oil Conservation Division's website. All notices were timely. Given these facts, we conclude that the Commission satisfied all notice requirements prescribed by statute and regulation.

{37} Petitioners' challenge to the adequacy of the Commission's notice focuses on one of the fifteen proposed amendments listed in the notice, namely, the one pertaining to "multi-well fluid management pits." Petitioners assert that the notice was inadequate to reasonably inform the public of the substance of the proposed rules. Petitioners point out that the notice did not describe the purpose of those multi-well pits, their anticipated size, their anticipated operating duration, or their anticipated

[3]The ten-day rule does not apply in cases of emergency. Section 70-2-23.

impacts on air, water, and public health. Petitioners contend that, because the notice was inadequate, they were deprived of an adequate opportunity to prepare expert witnesses or prepare adequate cross examinations of witnesses.

{38} Petitioners cite to 19.15.3.8 NMAC and the New Mexico Administrative Procedures Act (NMAPA) to support their assertion that the Commission's notice was inadequate. Neither authority cited supports Petitioners' argument. First, 19.15.3.8(A)(1) NMAC governs orders initiating rulemaking, and requires that *applications* to initiate rulemaking include "a *brief* summary of the proposed rule change's intended effect[.]" (Emphasis added.) Nowhere in the rule does it address notice requirements, nor does it require a summary of the complexity that Petitioners desire, and Petitioners provide no reason for us to apply such a requirement to the notice procedure. Second, Petitioners suggest that we use the NMAPA as a general guideline for resolving administrative law questions. Petitioners acknowledge that the NMAPA does not apply to all administrative agencies. *See E. Indem. Co. of Maryland v. Heller*, 1984-NMCA-125, ¶ 4, 102 N.M. 144, 692 P.2d 530 (stating that NMAPA only applies to an agency that is specifically placed, by law, rule, or regulation, under the Administrative Procedures Act). They do not cite to any authority applying the NMAPA to the Commission. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2 (stating that we will not review issues raised in appellate briefs which are unsupported by cited authority). Nothing in the Oil and Gas Act applies the NMAPA to the Commission's actions. Thus, we conclude that the Commission complied with the language of the Oil and Gas Act and its associated rules when it issued notice of the rulemaking hearings.

{39} Despite the Commission's compliance with its statutory obligation to issue notice, Petitioners contend that the language in the notice referring to "multi-well" pits was misleading or unintelligible. Notice may be inadequate to fulfill its statutory purpose of notifying interested persons if it is insufficient, ambiguous, misleading, or unintelligible to the average citizen. *Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶ 9, 91 N.M. 455, 575 P.2d 1340; *see also Johnson*, 1999-NMSC-021, ¶ 23 (acknowledging that purpose of "reasonable notice" in the Oil and Gas Act is to notify interested persons). Although it is conceivable that the average citizen might not know what a requirement pertaining to multi-well pits might include, the notice provides more information than simply a cursory reference to a cryptic term. The notice indicates how copies of the proposed amendments to the Pit Rule can be obtained: through the Oil Conservation Division's Administrator—whose phone number is included—or through the Oil Conservation Division's website—which is also included. The proposed amendments include a lengthy definition of what a "multi-well fluid management pit" is, and detail what permit applications for multi-well pits require, where multi-well pits may not be located, and what construction requirements were for multi-well fluid management pits. If Petitioners were, indeed, misled by, or unaware of, the Commission's notice, they could have received significantly more information about multi-well pits and what changes were being considered by reaching out to the Division. We therefore reject Petitioners' argument that the Commission's notice was inadequate. It not only satisfied the statutory and regulatory requirements, but also provided additional information by making the proposed amendments available upon request.

III. CONCLUSION

{40} Petitioners' assertions of error must fail. They point to no legal basis for their assertion that the Commission lacked jurisdiction to issue its order and create the 2013 Rule. In promulgating the 2013 Rule, the Commission satisfied its statutory duties and gave adequate reasons for its actions. As such, we conclude that there was no error, and affirm.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

JAMES J. WECHSLER, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-056

No. 33,859 (filed March 22, 2016)

BARBARA SHERRILL,
Plaintiff-Appellant,
v.
FARMERS INSURANCE EXCHANGE,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
SHERI A. RAPHAELSON, District Judge

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Opinion

M. Monica Zamora, Judge

{1} Plaintiff Barbara Sherrill appeals the district court's grant of summary judgment in favor of Defendant Farmers Insurance Exchange (Farmers) on her claim of retaliatory discharge. The district court determined that neither NMSA 1978, Section 59A-16-20 (1997), nor the implied covenant of good faith and fair dealing, constituted clearly mandated public policies that could support Sherrill's claim of retaliatory discharge. The district court further concluded that Sherrill did not demonstrate the necessary causal connection between her protected actions and her discharge. We affirm in part and reverse in part.

I. BACKGROUND

{2} Sherrill was employed by Farmers as a claims adjuster between 2007 and 2010. Sherrill's employment duties included adjusting personal injury and insurance claims in the first and third party contexts. As part of its liability strategy and standards, Farmers requires that adjusters make early contact with claimants. Farmers also requires its adjusters to contact claimants by telephone within twenty-four to forty-eight hours of receiving a claim, and to set up an early face-to-face meeting with the claimants. The practice of requiring claims adjusters to meet with claimants is referred to as the in-person contact program (IPC).

{3} Another component of Farmers' liability strategy and standards is the requirement that a certain percentage of unrepresented bodily injury claims be settled within sixty days for $1,500 or less. This claims settlement practice is referred to as early claims settlement (ECS). Farmers provides adjusters with ECS objectives, advising adjusters that failure to meet those objectives could result in employee discipline. Sherrill expressed concerns regarding the ECS process to at least one of her supervisors. In March 2010 Farmers informed Sherrill that her claims settlement numbers failed to meet the ECS objectives set for her and terminated Sherrill's employment.

{4} After her termination, Sherrill filed suit against Farmers for retaliatory discharge and prima facie tort. Sherrill also sought a declaratory judgment that Farmers violated Section 59A-16-20 of the Trade Practices and Frauds Act (Article 16) of the Insurance Code, and the New Mexico Mandatory Financial Responsibility Act, NMSA 1978, §§ 66-5-201 to -239 (1978, as amended through 2015). Sherrill requested damages under NMSA 1978, Section 59A-16-30 (1990) and punitive damages. The district court granted Farmers' motion to dismiss Sherrill's declaratory judgment claims and claim for damages under Section 59A-16-20, pursuant to Rule 1-012(B)(6) NMRA. The district court also granted Farmers' motion for summary judgment on Sherrill's claim for prima facie tort.

{5} The parties filed competing summary judgment motions on Sherrill's remaining retaliatory discharge claim. Sherrill argued that Farmers terminated her employment in retaliation for her refusal to carry out unfair and illegal claims practices, including ECS and IPC, which Sherrill claimed violated New Mexico law and public policy. Specifically, Sherrill argued that ECS and IPC violated the Release Act, NMSA 1978, §§ 41-1-1 to -2 (1971), Section 59A-16-20, and the implied covenant of good faith and fair dealing. Farmers argued that its claims practices did not violate New Mexico law, nor did they violate any clear mandate of public policy. Farmers further argued that Sherrill had not expressed any objection to IPC specifically, therefore, IPC could not have been the basis for retaliatory discharge.

{6} The district court granted Farmers' motion for summary judgment. The reasoning employed by the district court regarding Sherrill's claim related to the ECS program is best discerned from its statements at the conclusion of the motion hearing it held. Addressing Sherrill's contention that her discharge resulted from her objection to and refusal to participate in the ECS program, in violation of New Mexico public policy, the district court stated:

> I can't find that there is a clear mandate of New Mexico public policy found in [Section 59A-16-20] or in the covenant of good faith and fair dealing that has been violated. Even looking at everything most favorable to the plaintiff . . . if everything she's saying is true, [it] really just comes down to the legal question of whether there's a clear mandate in those two policies that would make it actionable and my conclusion is there isn't.

Concerning Sherrill's claim regarding IPC as the basis for retaliatory discharge, the district court stated "I don't see anything, looking at all the evidence in the light most favorable to her, I don't see that she ever complained about IPC[,] so there is no way she could have been fired for that." The district court entered an order granting summary judgment in favor of Farmers and dismissing the case with prejudice. This appeal followed.

II. DISCUSSION

{7} In this appeal we consider: (1) whether there are clearly mandated public policies embodied in Section 59A-16-20 and the

covenant of good faith and fair dealing to support a claim for retaliatory discharge, and (2) whether there are questions of fact precluding summary judgment.

Standard of Review

{8} "An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo." *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks and citation omitted); *see* Rule 1-056(C) NMRA. We "view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). "When the district court's grant of summary judgment is grounded upon an error of law, however, the case may be remanded so that the issues may be determined under the correct principles of law." *Centex/Worthgroup, LLC v. Worthgroup Architects, L.P.*, 2016-NMCA-013, ¶ 15, 365 P.3d 037 (alterations, internal quotation marks, and citation omitted).

Retaliatory Discharge

{9} As a general rule, employment at will can be terminated by either the employer or the employee for any reason, or for no reason at all. *See Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 2002-NMSC-004, ¶ 22, 131 N.M. 607, 41 P.3d 333. "A retaliatory discharge cause of action [is] recognized in New Mexico as a narrow exception to the terminable at-will rule[.]" *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.*, 1987-NMSC-045, ¶ 13, 106 N.M. 19, 738 P.2d 513. Under this cause of action, an employee must (1) identify a specific expression of public policy which the discharge violated; (2) demonstrate that he or she acted in furtherance of the clearly mandated public policy; and (3) show that he or she was terminated as a result of those acts. *See Lihosit v. I & W, Inc.*, 1996-NMCA-033, ¶ 7, 121 N.M. 455, 913 P.2d 262; *Maxwell v. Ross Hyden Motors, Inc.*, 1986-NMCA-061, ¶ 20, 104 N.M. 470, 722 P.2d 1192; *Vigil v. Arzola*, 1983-NMCA-082, ¶¶ 29-30, 102 N.M. 682, 699 P.2d 613, *rev'd in part on other grounds,* 1984-NMSC-090, 101 N.M. 687, 687 P.2d 1038, *overruled on other grounds by Chavez v. Manville Prods. Corp.*, 1989-NMSC-050, ¶ 16, 108 N.M. 643, 777 P.2d 371.

{10} In the present case, Sherrill claims that she was discharged in retaliation for her objection to and her failure to comply with two of Farmers' claims processing practices: ECS, which requires adjusters to settle a percentage of unrepresented bodily injury claims within sixty days for $1,500 or less; and IPC, which requires adjusters to contact claimants by telephone within forty-eight hours of receiving a claim, and to set up early face-to-face meetings with the claimants. Because the district court stated different grounds for its grant of summary judgment on Sherrill's retaliatory discharge claim as it pertained to ECS and IPC, we will address Sherrill's retaliatory discharge claim as it relates to each practice separately.

Retaliatory Discharge Related to ECS

{11} Sherrill contends that the ECS program violated New Mexico's clear public policy requiring insurers to act in good faith and deal fairly with insureds and claimants. Sherrill claims that Farmers' program targeted unrepresented claimants from lower economic areas for early claim resolution and limited the settlement amount to $1,500, thereby promoting premature settlements for vulnerable injured claimants. According to Sherrill, Farmers set unfair and arbitrary ECS quotas, which forced adjusters to coerce claimants to settle prematurely for unreasonably low amounts and to put the financial interests of Farmers above the interests of Farmers' insureds and claimants.

{12} Sherrill claims that she was discharged for objecting to and failing to meet the objectives of Farmers' ECS program, contrary to: (1) Section 59A-16-20(E), which defines unfair trade practices to include "not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear"; and (2) the covenant of good faith and fair dealing, which requires that insurance companies "act honestly and in good faith in the performance of the contract" giving "equal consideration to its own interests and the interests of the policyholder." UJI 13-1701 NMRA. The district court determined, as a matter of law, that neither Section 59A-16-20 nor the implied covenant of good faith and fair dealing embodied a clear mandate of public policy on which Sherrill could base her claim for retaliatory discharge. We disagree.

{13} Whether a clear mandate of public policy exists is a question of law, which we review de novo. *See Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 6, 129 N.M. 698, 12 P.3d 960 ("[T]he legal consequences flowing from the historical facts will be subject to de novo review if the question involves matters of public policy with broad precedential value beyond the confines of the particular case." (internal quotation marks and citation omitted)).

{14} In adopting the retaliatory discharge cause of action, New Mexico has "followed the theoretical approach of cases such as *Palmateer v. International Harvester Co.*, [421 N.E.2d 876 (1981)]." *Lihosit*, 1996-NMCA-033, 121 N.M. at 463, 913 P.2d at 270 (Bustamante, J., dissenting); *see Vigil*, 1983-NMCA-082, ¶¶ 19, 25-27; *see also Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶ 17, 121 N.M. 710, 917 P.2d 1382; *Shovelin v. Cent. N.M. Elec. Co-op., Inc.*, 1993-NMSC-015, ¶ 33, 115 N.M. 293, 850 P.2d 996. In *Palmateer*, the Illinois Supreme Court discussed the meaning of "clearly mandated public policy":

> There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the [s]tate collectively. . . . Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other [s]tates involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.

421 N.E.2d at 878-79 (citation omitted); *accord Black's Law Dictionary* 1426 (10th ed. 2014) (defining "public policy" as "[t]he collective rules, principles, or approaches to problems that affect the commonwealth or [especially] promote the general good; [specifically], principles and standards regarded by the [L]egislature or by the courts as being of fundamental concern to the state and the whole of society").

{15} "A clear mandate of public policy sufficient to support a claim of retaliatory discharge may be gleaned from the enactments of the [L]egislature and the decisions of the courts and may fall into one of several categories." *Shovelin*, 1993-NMSC-015, ¶ 25. A statute may: (1) provide both that an employer may not terminate employees on particular grounds and a remedy in the event of such termination, (2) prohibit an employer from firing an employee on specified grounds

without providing a specific remedy for an employee who has been so terminated, or (3) define a public policy that governs the employee's conduct, but does not provide the employee with either a right not to be terminated in violation of that policy, or a remedy for such termination in which case the employee must seek judicial recognition of both the right and the remedy. *See id.* Where no legislative enactment directly addresses the employee's conduct, the judiciary may determine that, based on other relevant statutes or an implicit public policy, both a right and a remedy should be recognized. *See id.*

{16} In the absence of a clearly mandated public policy, the employer retains the right to terminate workers at will. *See Vigil*, 1983-NMCA-082, ¶ 29. The Illinois Supreme Court discussed the importance of requiring retaliatory discharge claims to rest on well-recognized and clear public policies:

> Any effort to evaluate the public policy exception with generalized concepts of fairness and justice will result in an elimination of the at-will doctrine itself. Further, generalized expressions of public policy fail to provide essential notice to employers. The phrase 'clearly mandated public policy' implies that the policy will be recognizable simply because it is clear. An employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations.

Turner v. Mem'l Med. Ctr., 911 N.E.2d 369, 375 (2009) (internal quotation marks and citations omitted). Similarly, in New Mexico, when an employee is discharged, contrary to a clear mandate of public policy, that employee has a cause of action for retaliatory discharge. *Chavez*, 1989-NMSC-050, ¶ 16; *Vigil*, 1983-NMCA-082, ¶ 27.

{17} In order to succeed on a retaliatory discharge claim in New Mexico, the plaintiff "must identify a specific expression of public policy which the discharge violated." *Maxwell*, 1986-NMCA-061, ¶ 20; *see Vigil*, 1983-NMCA-082, ¶ 35 ("A general allegation that the discharge contravened public policy is insufficient; to state a cause of action for retaliatory or abusive discharge the employee must identify a specific expression of public policy."). Where the asserted public policy is too amorphous, the employee fails to state a claim of retaliatory discharge. *See, e.g.*, *Salazar v. Furr's, Inc.*, 629 F. Supp. 1403, 1409 (D.N.M. 1986) (holding that the employee's claim that she was terminated in violation of "the public policies underlying ERISA" was specific enough to state a claim for retaliatory discharge, whereas her claim that her termination violated "the public policy that encourages 'family unity and the maintenance of family discipline' " was not).

{18} In sum, when evaluating whether an expression of public policy constitutes a "clear mandate of public policy" for purposes of a retaliatory discharge claim, we consider: (1) the specificity with which the employee has identified the policy; (2) whether the identified policy promotes the general good and reflects the principles and standards regarded by our Legislature and our courts as being of fundamental importance to the citizens of the state; and (3) whether the policy is well-recognized and clear in the sense that it provides specific guidance and is not overly vague or ambiguous.

{19} Sherrill has identified two specific expressions of public policy, which form the bases for her retaliatory discharge claim: (1) Section 59A-16-20(E), which defines unfair trade practices to include "not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear"; and (2) the covenant of good faith and fair dealing, which requires that insurance companies "act honestly and in good faith in the performance of the contract" giving "equal consideration to its own interests and the interests of the policyholder." UJI 13-1701. Farmers does not dispute that Sherrill has identified these policies with enough specificity to state a claim of retaliatory discharge. Instead, Farmers contends that the policies themselves are too generalized and do not provide guidance as to prohibited conduct. We disagree.

Section 59A-16-20 and the Implied Covenant of Good Faith and Fair Dealing Embody Clear Mandates of Public Policy

Section 59A-16-20

{20} The current version of Section 59A-16-20 is part of the Trade Practices and Frauds Act (Article 16) of the Insurance Code. NMSA 1978, §§ 59A-16-1 to -30 (1984, as amended through 2013). The Insurance Code as a whole is a "comprehensive and public-spirited" legislative effort intended "to protect anyone injured by unfair insurance practices." *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶¶ 18, 19, 135 N.M. 397, 89 P.3d 69. The purpose of Article 16 is "to regulate trade practices in the insurance business" to further the public interest. Section 59A-16-2; *see* 15 U.S.C. § 1011 (1945).

{21} The insurers' statutory duty of good faith is codified in Section 59A-16-20. The insurers' statutory duty of good faith reflects principles and standards regarded by our Legislature and our courts as being of fundamental importance to the citizens of the state and promotes the general welfare. In adopting the current version of the Insurance Code in 1984, the Legislature created a private right of action against insurers that commit the unfair claims practices defined in Article 16. *See* § 59A-16-30 ("Any person covered by [Article 16] who has suffered damages as a result of a violation of that article by an insurer or agent is granted a right to bring an action in district court to recover actual damages.").

{22} Section 59A-16-20(E) also defines unfair insurance claims practices to include "not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear[,]" where the insurer does so "knowingly [and] with such frequency as to indicate a general business practice." This language has been included in the New Mexico Insurance Code since 1975; however, prior versions of the statute did not provide a private right of action for insurers' bad faith. *See* NMSA 1978, § 59-11-13(I) (1973) (repealed in 1984); NMSA 1953, § 58-9-25(I) (1973) (Vol. 8, Repl., Part 2, 1975 Pocket Supp.).

{23} In *Russell v. Protective Insurance Co.*, 1988-NMSC-025, ¶ 22, 107 N.M. 9, 751 P.2d 693, *superseded by statute as stated in Meyers v. Western Auto*, 2002-NMCA-089, 132 N.M. 675, 54 P.3d 79, and *Hovet*, 2004-NMSC-010, ¶ 14, our Supreme Court held that Article 16 should be broadly construed to allow third-party claimants to bring a private action against an insurer for Article 16 violations, including unfair practices and bad faith. In *Russell*, the Court considered whether Section 59A-16-30 allows a private cause of action "against workers' compensation insurers for bad faith refusal to pay compensation benefits to workers." *Russell*, 1988-NMSC-025, ¶ 1. The Court rejected the insurer's argument that only the employer, as the

first party insured, could bring a private right of action under Section 59A-16-30, and concluded that the language of the Legislature intended to expand the notion of insured to "parties other than those who may have signed a written contract of insurance beneath a blank reading 'insured.' " *Russell*, 1988-NMSC-025, ¶ 14.

{24} In *Hovet*, the Court considered whether an automobile accident victim had a cause of action against an automobile liability insurer for unfair claims practices under Article 16. *Hovet*, 2004-NMSC-010, ¶ 9. The Court stated that "the general policy of the Insurance Code [is] to protect anyone injured by unfair insurance practices." *Id.* ¶ 19. The Court outright rejected the insurer's argument that a third-party claimant with a direct interest in fair settlement practices may not sue under Article 16. *See id.* ¶ 18 ("We decline to ascribe such a sterile intent to a legislative effort as comprehensive and public-spirited as the Insurance Code. Therefore, we conclude that the Legislature intended both the insured and the third-party claimant to be protected under Section 59A-16-20."). The Court explained, "[i]n creating a separate statutory action [for those injured by an insurer's unfair claims practices], the Legislature had a remedial purpose in mind: to encourage ethical claims practices within the insurance industry." *Hovet*, 2004-NMSC-010, ¶ 14. "A private right of action for third-party claimants enforces [this] policy." *Id.* ¶ 17. The Court concluded that the intention of the Legislature was to protect both the insured and the third-party claimant. *Id.* ¶ 18.

{25} In 2001, the Legislature broadened the definition of "insurer," for purposes of the unfair trade practices section, "to include entities and individuals that are not within the definition of [the] insurer elsewhere in the Insurance Code." *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 9, 146 N.M. 223, 208 P.3d 443. In *Martinez*, this Court held that the amendment in effect broadened the scope of the private right of action in Section 59A-16-30, such that individual employees of insurance companies could be held personally liable for violations of the unfair trade practices section. *Martinez*, 2009-NMCA-011, ¶ 22. We recognized that the result was "entirely consistent with the express purpose and spirit of the [unfair trade practices section], which is to promote ethical settlement practices within the insurance industry." *Id.* (internal quotation marks and citation omitted). Just as "the private right of action is one means toward the end of encouraging ethical claims practices within the insurance industry[, t]he Legislature's decision to expand the scope of the private right of action by broadening the definition of insurer is just one other means toward that same end." *Id.* (alterations, internal quotation marks, and citation omitted).

{26} Our Supreme Court has provided the following guidance regarding the parameters of an insurers' duty under Section 59A-16-20:

> We . . . emphasize that the Insurance Code does not impose a duty to settle in all instances, nor does it require insurers to settle cases they reasonably believe to be without merit or overvalued. A violation occurs for 'not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear[.]' Section 59A-16-20(E). The insurer's duty is founded upon basic principles of fairness. Any insurer that objectively exercises good faith and fairly attempts to settle its cases on a reasonable basis and in a timely manner need not fear liability under the Code.

Hovet, 2004-NMSC-010, ¶ 29.

{27} In the present case, Farmers contends that because the question of whether an insurer has violated Section 59A-16-20 must be determined subjectively on a case-by-case basis, the statute does not express a clear or well-defined public policy. In support of this argument Farmers relies on this Court's decisions in *Maxwell*, and *Rist v. Design Center at Floor Concepts*, 2013-NMCA-109, 314 P.3d 681. Farmers' reliance on these cases is misplaced. At issue in both *Maxwell* and *Rist* was the sufficiency of the employees' complaints to state a claim for retaliatory discharge. *See Maxwell*, 1986-NMCA-061, ¶¶ 2-3.

{28} In *Maxwell*, the employee's complaint was pending in the district court when this Court issued its decision in *Vigil*, recognizing the tort of retaliatory discharge for the first time. *See Maxwell*, 1986-NMCA-061, ¶¶ 2-3. We held that *Vigil* did not apply retrospectively to provide relief for the employee in *Maxwell*. *Maxwell*, 1986-NMCA-061, ¶ 13. We further held that even if the employee could overcome the prospectivity hurdle, the employee was not entitled to relief under retaliatory discharge. *Id.* ¶¶ 23-24.

{29} The employee's complaint in that case, which was filed one and one-half years prior to the final decision in *Vigil*, alleged that the employee was terminated "willfully, wrongfully, maliciously, and in bad faith, without just cause and for no legitimate business reason." *Id.* ¶¶ 1, 6 (internal quotation marks omitted). The employee argued, for the first time on appeal, that the public policy of full employment expressed in New Mexico's unemployment compensation statute reflected the legislative intent "to limit the ability of an employer to discharge an employee-at-will for no legitimate business reason or without just cause." *Id.* ¶ 27 (internal quotation marks omitted). We rejected that argument, explaining that "[t]he [L]egislature's recognition of the problems of unemployment and that body's commitment to encouraging employers to provide stable employment does not amount to the specific expression of public policy mandated by *Vigil*." *Maxwell*, 1986-NMCA-061, ¶ 26. We concluded that the complaint, which did not allege any conduct on his part that precipitated his termination and did not identify any expression of public policy, which the termination contravened, was insufficient to state a cause of action for retaliatory discharge. *Id.* ¶¶ 23-24.

{30} Similarly, in *Rist*, the employees' complaint did not allege retaliatory discharge. 2013-NMCA-109, ¶ 1. The employees filed suit under the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007), alleging religious discrimination. *Rist*, 2013-NMCA-109, ¶ 1. On appeal, the employees argued that "a violation of the NMHRA is a violation of public policy actionable under *Vigil*." *Rist*, 2013-NMCA-109, ¶ 23. This Court held that this general assertion could not be the basis for reading a retaliatory discharge claim into the complaint, where the complaint did not include such a claim. *Id.* ¶¶ 22-23. The present case is distinguishable from both *Maxwell* and *Rist*, in that the sufficiency of Sherrill's complaint and the specificity with which she identified specific expressions of public policy were not challenged in the district court and are not challenged on appeal.

{31} Farmers also cites *Shovelin* to support its argument that retaliatory discharge claims must be based on an expression of public policy that defines

objectively unlawful conduct. However, we do not agree that *Shovelin* stands for the proposition for which it is cited by Farmers. In *Shovelin*, our Supreme Court discussed categories of statutes that may support a retaliatory discharge claim. 1993-NMSC-015, ¶¶ 25, 28. While the potential sources of clearly mandated public policies included statutes that clearly identify unlawful conduct, *Shovelin* does not limit these sources of public policy to statutes that identify objectively unlawful conduct. *Id.*

{32} To the contrary, *Shovelin* provides examples of several potential sources of clearly mandated public policies, not all of which provide an objective standard for determining prohibited conduct. Our Supreme Court set forth several types of prospective categories from which a sufficiently clear mandate of public policy may be gleaned from enactments of the Legislature and decisions of the courts:

> First, legislation may define public policy and provide a remedy for a violation of that policy. Second, legislation may provide protection of an employee without specifying a remedy, in which case an employee would seek an implied remedy. Third, legislation may define a public policy without specifying either a right or a remedy, in which case the employee would seek judicial recognition of both. Finally, there may, in some instances, be no expression of public policy, and here again the judiciary would have to imply a right as well as a remedy.

Id. ¶ 25 (alteration, internal quotation marks, and citation omitted).

{33} Although analyzing claims under Section 59A-16-20 may require a subjective case-by-case analysis, the language of the statute and cases applying New Mexico law illustrate that the statute embodies a strong public policy in favor of protecting the public from unfair and deceptive insurance claims practices—a policy whose parameters are not too vague or ambiguous to provide guidance on prohibited conduct. *See Hovet*, 2004-NMSC-010, ¶ 22 (holding that by enacting Sections 59A-16-20 and -30 "[o]ur Legislature created both the right and the remedy" for members of the public who "are twice made victims, first by actionable negligence of an insured . . . and then by an insurance company's intransigence"). We conclude that Section 59A-16-20 embodies a clear mandate of the public policy sufficient to support a claim of retaliatory discharge.

The Implied Covenant of Good Faith and Fair Dealing

{34} Under the common law, all insurance contracts include "an implied covenant of good faith and fair dealing that the insurer will not injure its policyholder's right to receive the full benefits of the contract." *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 12, 124 N.M. 624, 954 P.2d 56; *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 1984-NMSC-107, ¶ 11, 102 N.M. 28, 690 P.2d 1022. The common law duty of good faith embodied in the implied covenant is distinct from the statutory duty of good faith imposed by Section 59A-16-20. *See Martinez*, 2009-NMCA-011, ¶ 38. "The key principle underlying the covenant of good faith in an insurance contract is that the insurer treat the interests of the insured equally to its own interests." *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 582 (10th Cir. 1998).

{35} Implying a covenant of good faith in an insurance contract serves to enforce the contractual obligation of the insurer to avoid exposing the insured to personal liability. *See Martinez*, 2009-NMCA-011, ¶ 40. The implied covenant is aimed at making effective the insurer's obligation under the insurance contract and cannot be applied to override express provisions addressed by the terms of an integrated, written contract. *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶¶ 48-51, 133 N.M. 669, 68 P.3d 909. And "[b]ecause the implied covenant of good faith and fair dealing depends upon the existence of an underlying contractual relationship," plaintiffs may not recover for bad faith occurring prior to the existence of the insurance contract. *Id.* ¶ 53.

{36} New Mexico has long recognized an insurer's common law duty to deal in good faith with its insured. *See Dairyland*, 1998-NMSC-005, ¶ 12; *State Farm Gen. Ins. Co. v. Clifton*, 1974-NMSC-081, ¶ 8, 86 N.M. 757, 527 P.2d 798; *Modisette v. Found. Reserve Ins. Co.*, 1967-NMSC-094, ¶¶ 16-17, 77 N.M. 661, 427 P.2d 21; *Chavez v. Chenoweth*, 1976-NMCA-076, ¶ 44, 89 N.M. 423, 553 P.2d 703; *Lujan v. Gonzales*, 1972-NMCA-098, ¶¶ 38-39, 84 N.M. 229, 501 P.2d 673. This duty arises from the nature of the insurance relationship, which is characterized by elements of adhesion, public interest, and fiduciary responsibility. *See Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 37, 127 N.M. 1, 976 P.2d 1; *Dellaira v. Farmers Ins. Exch.*, 2004-NMCA-132, ¶ 14, 136 N.M. 552, 102 P.3d 111 (stating that the "relationship between insurer and insured" is recognized as special and unique due to "the inherent lack of balance in and adhesive nature of the relationship, as well as the quasi-public nature of insurance and the potential for the insurer to unscrupulously exert its unequal bargaining power at a time when the insured is particularly vulnerable" (internal quotation marks and citations omitted)). The common law bad faith action sounds in both contract and tort. *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶¶ 13, 23, 135 N.M. 106, 85 P.3d 230. This reflects New Mexico's public policy in favor of restoring balance to the contractual relationship between the insurer and the insured, and enforcing insurers' public obligation.

{37} New Mexico cases provide guidance concerning the insurers' duty under the implied covenant of good faith and fair dealing in insurance contracts. For example, in *Dairyland*, our Supreme Court held that the "implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty." *Dairyland*, 1998-NMSC-005, ¶ 13 (internal quotation marks and citation omitted). "[W]hen there is a substantial likelihood of recovery in excess of limits, an insurer's unwarranted refusal to settle is a breach of the implied covenant of good faith and fair dealing." *Id.* ¶ 15. The Court explained that "when damages are likely to exceed policy limits, the insurer risks exposing its insured to even greater liability by going to trial rather than settling." *Id.* The Court concluded, "[t]he courts of this state will not permit insurers to profit by their own wrongs." *Id.* "Should an insurer, in violation of its duty of good faith, refuse to accept a reasonable settlement offer within policy limits, it will be liable for the entire judgment against the insured, including the amount in excess of policy limits." *Id.*

{38} In *Ambassador*, our Supreme Court considered whether a common law cause of action against insurers for negligent failure to settle is recognized in New Mexico. 1984-NMSC-107, ¶ 3. The Court determined that negligent failure to settle may evince an insurer's breach of the implied covenant of good faith under the insurance contract, but is not recognized in New Mexico as an independent cause of action. *See id.* ¶ 12. In reaching this conclusion,

the Court considered that "the insurer has, by its insurance contract, taken over the duty to defend a case against the insured." *Id.* ¶ 11.

{39} The Court stated that an insurer's exercise of this duty should be "accompanied by considerations of good faith." *Id.* (internal quotation marks and citation omitted). When determining whether to settle a claim, the duty of good faith requires that the insurer base its decision "upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained." *Id.* (internal quotation marks and citation omitted). Thus, the implied covenant of good faith in an insurance contract requires insurers to properly investigate an insured's claim. *Id.* ¶ 12. In this context, insurer conduct is measured by "basic standards of competency . . . and the insurer is charged with knowledge of the duty owed to its insured." *Id.*

{40} Our Supreme Court has also held that the covenant of good faith and fair dealing can impose upon the insurer an affirmative duty to act where a failure to act would result in a denial of an insured's rights under the insurance contract. *Allsup's*, 1999-NMSC-006, ¶ 35. In *Allsup's*, the insurer and insured agreed to a retrospective premium plan under which the amount of the premium was to be determined at the end of the policy year based on the actual amount of claims paid. *Id.* ¶ 3. The Court determined that since having the premium tied directly to competent claims-handling was a benefit of the contract, the insurer had a duty under the implied covenant of good faith to disclose any mishandling of claims to the insured due to its effect on the insured's premiums. *Id.* ¶¶ 33-36.

{41} This Court has also recognized that the covenant of good faith and fair dealing imposes upon an insurer "[a] duty of disclosure[, which] is premised on the principle of fundamental fairness." *Salas v. Mountain States Mut. Cas. Co.*, 2009-NMSC-005, ¶ 16, 145 N.M. 542, 202 P.3d 801. The good faith duty to disclose "dictates that an insurer must notify a known insured of the scope of available insurance coverage and the terms and conditions governing that coverage." *Id.* "Accordingly, if an insurer fails to disclose to its insured the existence of an exclusionary provision contained in the insurance contract, then the covenant of good faith and fair dealing precludes the insurer from relying on the provision to limit or deny the insured's right to coverage." *Id.* ¶ 13.

{42} In the present case, Farmers argues that *Melnick v. State Farm Mutual Automobile Insurance Co.*, 1988-NMSC-012, 106 N.M. 726, 749 P.2d 1105, and *Kropinak v. ARA Health Services, Inc.*, 2001-NMCA-081, 131 N.M. 128, 33 P.3d 679, stand for the proposition that the implied covenant of good faith and fair dealing is decidedly *not* a clear mandate of public policy sufficient to support a claim for retaliatory discharge. Farmers' reliance on *Melnick* and *Kropinak* is misplaced and improperly expands the holdings of those cases beyond their own language.

{43} In *Melnick*, our Supreme Court declined to "recognize a cause of action for breach of an implied covenant of good faith and fair dealing in an at-will employment relationship." 1988-NMSC-012, ¶ 13. This Court has read *Melnick* to hold "that when parties have entered into a clear and unambiguous at-will employment agreement, it is improper to invoke the implied covenant of good faith and fair dealing to vary the at-will termination provision in the written agreement." *Kropinak*, 2001-NMCA-081, ¶ 11. In *Kropinak*, we reiterated the holding in *Melnick*, acknowledging that where an employer discharges an employee in violation of a clear mandate of public policy the employee may not assert breach of the employment contract, or breach of the implied covenant of good faith and fair dealing, however, the employee *may* assert a tort action for retaliatory discharge. *See Kropinak*, 2001-NMCA-081, ¶¶ 13-14.

{44} These cases are inapposite for two reasons. First, the duty of good faith in an employment relationship is not analogous to the special relationship between insurer and insured. *See Bourgeous v. Horizon Healthcare Corp.*, 1994-NMSC-038, ¶ 17, 117 N.M. 434, 872 P.2d 852 ("[T]he employment relationship is not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies in view of the countervailing concerns about economic policy and stability, the traditional separation of tort and contract law, and finally, the numerous protections against improper termination already afforded employees." (internal quotation marks and citation omitted)). Thus, the public policy served by the implied covenant of good faith and fair dealing in an employment contract differs significantly from the policy furthered by the implied covenant in the insurer/insured context.

{45} Second, neither *Melnick* nor *Kropinak* precluded a retaliatory discharge claim based on the implied covenant of good faith and fair dealing between employer and employee. Rather, it appears from the language in *Kropinak* that the question of whether the covenant of good faith and fair dealing in an employment contract is a clear mandate of public policy sufficient to support a claim for retaliatory discharge is left unanswered by our law. *See* 2001-NMCA-081, ¶ 14 ("[W]hen the termination is based on an express, unambiguous, and clear at-will termination right, such conduct is only actionable to the extent it constitutes the tort of retaliatory discharge[.]").

{46} New Mexico cases analyzing the implied covenant of good faith and fair dealing in insurance contracts reflect a strong public policy in favor of enforcing insurers' public obligation and restoring balance to the contractual relationship between the insurer and the insured. These cases also help define the parameters of the insurers' duty of good faith under the contract of insurance and provide guidance for insurers. We therefore conclude that the implied covenant of good faith and fair dealing is a clear mandate of public policy sufficient to support a claim of retaliatory discharge.

Questions of Fact Preclude Summary Judgment on Retaliatory Discharge Related to ECS

{47} Farmers contends that Sherrill has not raised a factual issue concerning whether she acted in furtherance of public policy. Specifically, Farmers claims that as a matter of law ECS does not contravene either Section 59A-16-20, or the implied covenant of good faith and fair dealing, therefore, Sherrill's objection to and failure to meet the objectives of the ECS program did not further either policy. Farmers also denies that Sherrill was terminated because of her objections to the ECS program. However, with regard to both of these elements of retaliatory discharge the evidence presented at summary judgment raises factual questions.

{48} Attached to her response to Farmers' motion for summary judgment, Sherrill produced memoranda she received from her Farmers supervisor, which showed that Sherrill was formally reprimanded numerous times between July 2009 and March 2010 for failing to meet ECS quotas. Notes from an October 27, 2009, meeting between Sherrill and a Farmers supervisor indicated that Sherill was "boycotting" required ECS reporting. Sherill was placed

on probation on March 5, 2010, in part for her continued failure to meet ECS quotas. The notice of Sherrill's termination cited her failure to show significant improvement in her ECS quotas as one of the reasons for her termination. This is sufficient to raise a factual issue as to whether Sherrill was terminated as a result of her opposition to the ECS program.

{49} Memoranda from Farmers to Sherrill indicate that in March 2010 Farmers' expectation was that forty-eight percent of claims would be settled through the ECS program. In portions of Sherrill's deposition testimony that were provided with her response to Farmers' summary judgment motion, Sherrill testified that she did not meet Farmers' ECS expectations, because to do so would have required her to settle some claims unfairly and in a manner that was not in the best interest of the claimant. Sherrill testified that there were many claims that she was asked to settle under ECS for which the ECS guidelines would have resulted in unfair settlements. She gave one specific example of a claim that she was instructed to settle through ECS for which she believed ECS would have resulted in a premature, undervalued settlement.

{50} Sherrill provided an affidavit of a former Farmers claims supervisor, who worked for Farmers from July 2007 through June 2010. In that affidavit, the former Farmers claims supervisor stated that she worked under the same conditions as Sherrill; when she left Farmers the ECS expectation was to settle fifty-four percent of the claims through ECS. According to the former supervisor, the ECS requirement forces claims adjusters to try to settle claims prematurely.

{51} Sherrill also provided an affidavit of an insurance claims consultant. This claims consultant worked for Farmers, as a claims employee, from June 1987 to August 2001. In his affidavit, the insurance consultant stated that setting quotas for claims to be settled under the guidelines of ECS can result in a conflict between the interests of the insurer and the interests of the insured. According to the consultant, claims that are settled prematurely can be hazardous for accident victims. The consultant stated that when adjusters face pressure to settle a percentage of claims early and for a fixed sum, it increases the potential for adjusters to use undue influence over claimants who are typically financially, physically, and/or emotionally vulnerable. We conclude that this evidence is sufficient to raise a factual question with regard to whether Sherrill's resistance to ECS objectives furthered the policies embodied in Section 59A-16-20, and the implied covenant of good faith and fair dealing.

Questions of Fact Do Not Preclude Summary Judgment on Retaliatory Discharge Related to IPC

{52} To establish the causation element necessary to sustain a claim for retaliatory discharge, the employee must demonstrate the employer had knowledge that the employee engaged in protected activity. *See Lihosit*, 1996-NMCA-033, ¶ 17. An employer, "[a]s a matter of logic and of fact, . . . cannot make an adverse, retaliatory decision based upon information of which [it] is unaware." *Id.* (internal quotation marks and citation omitted).

{53} In the present case, Farmers asserts that Sherrill cannot prove retaliatory discharge based on her opposition to IPC because she did not explicitly complain to Farmers about the IPC program prior to her termination. Sherrill does not dispute Farmers' contention that she did not directly object to IPC prior to her termination. Rather, she argues that her opposition to the IPC program was implicit in her complaints about the ECS program and her general objection to the unfair and inequitable claims practices that Farmers used to obtain ECS settlements. In other words, Sherrill suggests that her objections concerning Farmers' ECS requirements were sufficient to put it on notice of her objections to the IPC program. Sherrill points to no evidence indicating that Farmers had actual knowledge of her opposition to the IPC program prior to her termination, and our review of the record discloses none. *Id.* ¶ 17. "[T]he employer's motive is a key element[.]" *Id.* ¶ 12. "[A] n employer cannot fire an employee in retaliation for actions of which the employer is unaware." *Id.* (internal quotation marks and citation omitted). Because a key consideration in retaliation cases is the employer's *actual* knowledge and motive for the termination, constructive notice is insufficient to "create actual intent to retaliate." *Id.* ¶ 15 (internal quotation marks and citation omitted). Accordingly, we conclude that there is no factual issue regarding the causal link between Sherrill's opposition to the IPC program and her termination.

III. CONCLUSION

{54} For the foregoing reasons, we affirm the district court's determination that Sherrill failed to establish the necessary causal connection between her opposition to the IPC program and her termination. We reverse the district court's determination that Sherrill failed to identify a clearly mandated public policy sufficient to support a claim of retaliatory discharge and remand for proceedings consistent with this Opinion.

{55} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge

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The Second Judicial District Court is accepting applications for Contract Attorneys for the Residential Mortgage Foreclosure Settlement Facilitation Project ("RMFSF"). RMFSF will operate under the direction of the Chief Judge and the Presiding Civil Judge. Attorney will conduct settlement facilitation conferences in residential foreclosures pending before the court between lenders and borrowers. Attorney is independent and impartial and shall be governed by the Rules of Professional Conduct, Mediation Procedures Act, NMSA 1978, § 44-7B-1 to 44-7B¬6, and Mediation Ethics and Standards of Practice. Attorney will be responsible for memorializing settlement agreements and meeting with the designated supervising judge to receive case assignments and discuss RMFSF progress. Attorney agrees to twenty hours of work per week, which is anticipated to be a minimum of eleven settlement conferences per month, subject to adjustment for complex case assignments, maintain records for payment and reporting and statistical purposes as defined by the Court. Attorney will coordinate with assigned Court staff who provide administrative support to RMFSF. Qualifications: Must be a graduate of an ABA accredited law school; possess and maintain a license to practice law in the State of New Mexico; must have experience in settlement facilitation. Experience with residential mortgage foreclosure matters and loss mitigation is a plus. Compensation will be at a rate of $50.00 per hour, inclusive of gross receipts tax. Send letter of interest, resume, proof of education and writing sample to the Second Judicial District Court, Court Administration, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM, 87102. Letters of interest without required material will be rejected. Letters must be received by court administration no later than 4:00 P.M. Friday, September 9, 2016. More information about the contract can be found on the SJDC's website: http:/www/2nddistrictcourtnm.com.

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