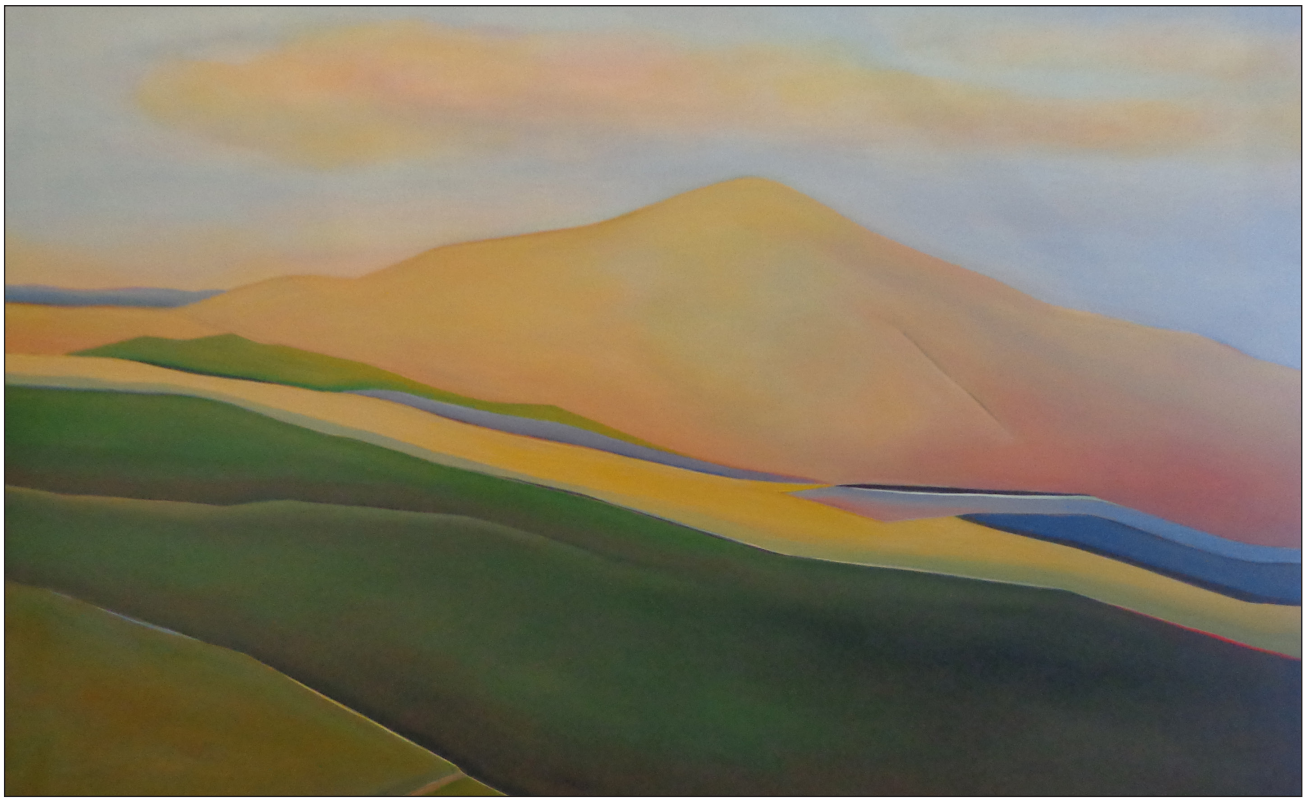
Official Publication of the State Bar of New Mexico

Bar Bulletin

July 5, 2017 • Volume 56, No. 27



Dune, by Gail Factor (see page 3)

ARTWORKinternational, Inc.

Inside This Issue

Modrall Sperling Welcomes Damon Martinez

Damon Martinez

We are honored to announce former U. S. Attorney Damon P. Martinez has joined Modrall Sperling as Of Counsel. Unanimously confirmed by the U. S. Senate in 2014, Damon established a National Security and Anti-Terrorism Section in the office.

New Mexico had one of the highest drug overdose death rates of any state when he began his term. Damon worked with others throughout the community to put together Heroin Opiate Preventive Education (HOPE), which focused on educating students and the community, while also expanding prosecution to focus on those wrongly supplying opiates.

In response to New Mexico being the second most violent state in 2013, he expanded the "Worst of the Worst" program, proactively investigating criminals responsible for a disproportionate amount of crime. Damon prosecuted – and incarcerated – them under federal law.

He now plans to offer his legal services to businesses concerned about cyber-security and other issues relating to national security.

Modrall Sperling is proud to welcome Damon to our firm, and we look forward to his continued contributions to New Mexico law.

Problem Solving. Game Changing.

Modrall Sperling

Lawyers

www.modrall.com

Albuquerque Santa Fe

The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

505-797-6000 • 800-876-6227 • Fax: 505-828-3765
email: address@nmbar.org • www.nmbar.org

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About Cover Image and Artist: Gail Factor (1942–2013) was committed to painting for more than five decades. An obvious artistic interest and aptitude emerged early on, leading her to attend art classes at the Chicago Art Institute at the age of five. Factor pursued ongoing academic achievements with the same enthusiasm, culminating in a BFA from the University of Southern California (*magna cum laude*), an awarded fellowship in Fine Arts from Yale University and independent studies in art and architecture throughout Europe. Over the past two decades Factor had been creating and residing in Santa Fe during which she attended master courses with Wolf Kahn (b. 1927, German-born American) and Wayne Thiebaud (b. 1920, American) at the Santa Fe Institute of Fine Arts. Factor's work has been exhibited in galleries and museums throughout the U.S. In addition, her work is included in numerous prominent public and private collections. More of her work can be viewed at www.gailfactor.com.

Notices

Court News

New Mexico Judicial Compensation Committee

Notice of Public Meeting

The Judicial Compensation Committee will meet at 9 a.m.–noon, July 5, in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe. The Committee will discuss fiscal year 2019 recommendations for compensation for judges of the magistrate, metropolitan and district courts, the Court of Appeals and justices of the Supreme Court. The Commission will thereafter provide its judicial compensation report and recommendation for fiscal year 2019 compensation to the Legislature prior to the 2018 session. The meeting is open to the public. For an agenda or more information call Jonni Lu Pool, Administrative Office of the Courts, 505-476-1000.

First Judicial District Court

Judicial Notice of Retirement

The First Judicial District Court, Division II announces the retirement of Hon. Sarah M. Singleton effective Aug. 31. A Judicial Nominating Commission will be convened in Santa Fe in September to interview applicants for this vacancy. Further information on the application process can be found at lawschool.unm.edu/judsel/index.php along with updates regarding this vacancy and the news releases.

Second Judicial District Court

Children's Court Abuse and Neglect Brown Bag

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held at noon, July 21, in the Chama Conference Room at the Juvenile Justice Center, 5100 2nd Street NW, Albuquerque, NM 87107. Attorneys and practitioners working with families involved in child protective custody are welcome to attend. Call 505-841-7644 for more information.

Sixth Judicial District Court

Notice of Right to Excuse Judge

Governor Susana Martinez appointed Timothy L. Aldrich to fill the vacant position and to take office on June 19 in Division I of the Sixth Judicial District Court. All pending and reopened civil, domestic, domestic violence, guardianship, lower court appeals, abuse and neglect and adoption cases previously assigned to the Hon. Henry R. Quintero, District Judge, Division I, shall be assigned to Hon. Aldrich. All pending criminal, juvenile, mental and probate cases previously assigned to the Hon. Quintero shall be assigned to Hon. J.C. Robinson, District Judge, Division III. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Aldrich or Judge Robinson.

Professionalism Tip

With respect to the courts and other tribunals:

I will voluntarily withdraw claims or defenses when they are superfluous or do not have merit.

Eighth Judicial District Court

Notice of Destruction of Exhibits

Pursuant to the Supreme Court retention and disposition schedule, the Eighth Judicial District Court, Taos County, will destroy the following exhibits by order of the court if not claimed by the allotted time: 1) all unmarked exhibits, oversized poster boards/maps and diagrams; 2) exhibits filed with the court, in civil cases for the years 1994–2010 and probate cases for the years 1989–2010. Counsel for parties are advised that exhibits may be retrieved through July 31. For more information or to claim exhibits, contact Bernabe P. Struck, court manager, at 575-751-8601. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

12th Judicial District Court

Judicial Vacancy

A vacancy on the 12th Judicial District Court will exist as of Sept. 4 due to the retirement of Hon. Jerry H. Ritter effective Sept. 1. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the Court. Alfred Mathewson, chair of the 12th Judicial District Court 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 can be found at lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m. July 13. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the office of the Secretary of State. The 12th Judicial District Court Judicial Nominating Commission will meet at 9 a.m. on Aug. 3, to interview applicants for the position at the Otero County Courthouse located at 1000 New York Avenue in Alamogordo. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

Bernalillo County Metropolitan Court

Volunteer for Bernalillo County Metro Court Clinic

The Bernalillo County Metropolitan Court Legal Clinic takes place on the second Friday of each month. The YLD is co-sponsoring the Clinic from 10 a.m.-1 p.m. on July 14 on the Court's ninth floor and seeks volunteers to help pro se individuals with civil legal advice including: landlord/tenant, consumer rights, trial preparation, employee wage, debts/bankruptcy, discovery and more. Volunteers are also needed to provide this service electronically at the Court to New Mexico residents outside of Albuquerque. Contact Renee Valdez at metrrmv@nmcourts.gov for more information and to volunteer.

State Bar News

Attorney Support Groups

- July 10, 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#.
- July 17, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- Aug. 7, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.) For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Board of Bar Commissioners

Compensation Survey Results

Visit www.nmbar.org/nmbardocs/pubres/reports/2017LawyerCompensationSurvey.pdf to read the summary results of the recent membership compensation survey conducted by Research & Polling. In addition to income, billing rates and methods for various types of practice, the recent results provide information regarding what services are generally charged to clients, perceived barriers to practicing law in New Mexico and career satisfaction. Six lucky survey takers won the drawing for several $200 and $100 gift certificates! For more information about the survey and the results, email rspinello@nmbar.org.

Lawyers and Judges Assistance Program

Stress and Your Heart Workshop

Stress impacts health and the heart. Men Go Red NM and the Lawyers and Judges Assistance Program invite all members to attend an informative session on the subject from 5:30–7 p.m., July 12, at the State Bar Center. For more information or to R.S.V.P., contact Hailey Smith at 505-485-1332.

Legal Services and Programs Committee

Breaking Good Video Contest Seeks Sponsor

The LSAP Committee will host the third annual Breaking Good Video Contest for 2017-2018. The Video Contest aims to provide an opportunity for New Mexico high school students to show their creative and artistic talents while learning about civil legal services available to their communities. The LSAP Committee would like to invite a member or firm of the legal community to sponsor monetary prizes awarded to first, second, and third place student teams and the first place teacher sponsor. The Video Contest sponsor will be recognized during the presentation of the awards, to take place at the Albuquerque Bar Association Law Day Luncheon in early May, and on all promotional material for the Video Contest. For more information regarding details about the prize scale and the Video Contest in general, or additional sponsorship information, contact Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division

Wills for Heroes in Farmington

YLD is seeking volunteer attorneys for its Wills for Heroes event in Farmington. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Join the YLD from 9 a.m.-noon, July 8, at the 11th Judicial District Attorney's Office located at 335 S Miller Ave in Farmington. Volunteers should arrive at 8 a.m. for breakfast and orientation. Contact YLD Region 1 Director Evan Cochnar at ecochnar@da.state.nm.us to volunteer. Indicate if you are able to bring a Windows laptop or if you will need one provided for you. Paralegal and law student volunteers are also needed to serve at witnesses and notaries.

UNM

Law Library

Hours Through Aug. 20

Building & Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.

Public Citator Notice

As of July 1, UNM's University Libraries will no longer provide LexisNexis Academic, a publicly accessible version of Lexis that includes Shepard's citator. The UNMSOL Library will continue to provide Westlaw PRO on select library computer terminals. Westlaw PRO is a public patron version of Westlaw that includes KeyCite.

Other Bars

Albuquerque Bar Association

Membership Luncheon CLE and Mayoral Candidate Forum

The Albuquerque Bar Association's next membership luncheon will be July 11 at the Hyatt Regency Albuquerque. The luncheon will be from noon-1 p.m. (arrive at 11:30 a.m. for networking). Jason Bousliman, Weinstein & Riley, PS, will moderate the "Albuquerque Mayoral Candidate Forum." Afterwards from 1:15-3:15 p.m., Rodey's David Buchholtz will present "Business Associations and Liability" (2.0 G). For more information and to register, visit www.abqbar.org.

New Mexico Criminal Defense Lawyers Association

CLE in Farmington

Coming to your neck of the woods, the New Mexico Criminal Defense Lawyers Association is hosting a special regional CLE on DWI, native culture, cross-examination and digital evidence in Farmington on July 14. This CLE will also include a criminal case law update as well as a question and answer session with some current sitting judges. This seminar provides 6.0 total CLE credits including 1.0 ethics credit. Visit www.nmcdla.org to register for this CLE today.

Submit announcements

for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

New Mexico Defense Lawyers Association

Nominations for Annual Awards

The New Mexico Defense Lawyers Association is now accepting nominations for the 2017 NMDLA Outstanding Civil Defense Lawyer and the 2017 NMDLA Young Lawyer of the Year awards. Nomination forms are available on line at www.nmdla.org or by contacting NMDLA at nmdefense@nmdla.org or 505-797-6021. Deadline for nominations is July 28. The awards will be presented at the NMDLA Annual Meeting Luncheon on Sept. 29, at the Hotel Chaco, Albuquerque.

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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 June 23, 2017

PUBLISHED OPINIONS

No. 34640	WCA-02-60949, D BACA v RISK MANAGEMENT (reverse and remand)	6/21/2017
No. 35175	2nd Jud Dist Bernalillo CR-14-4088, STATE v J SANTOS (affirm)	6/21/2017

UNPUBLISHED OPINIONS

No. 34119	2nd Jud Dist Bernalillo CR-10-1276, STATE v J MALDONADO (other)	6/19/2017
No. 36124	5th Jud Dist Eddy CR-16-242, STATE v A BOONE (affirm)	6/19/2017
No. 36128	2nd Jud Dist Bernalillo CR-15-2612, STATE v B GURULE (affirm)	6/19/2017
No. 36225	4th Jud Dist San Miguel CR-16-32, STATE v C SAAVEDRA (affirm)	6/19/2017
No. 34941	12th Jud Dist Otero CR-13-370, STATE v M GARNER (affirm in part, reverse in part and remand)	6/20/2017
No. 35789	2nd Jud Dist Bernalillo LR-15-36, STATE v E WUDARZEWSKI (affirm)	6/20/2017
No. 35920	2nd Jud Dist Bernalillo LR-15-29, STATE v M CORDOVA (affirm)	6/20/2017
No. 36195	9th Jud Dist Curry CR-12-47, STATE v A SANCHEZ (affirm)	6/20/2017
No. 35447	13th Jud Dist Valencia JQ-14-39, CYFD v ROSENDO M (affirm)	6/22/2017

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

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New Mexico Women's Bar Association

Annual Meeting and Presentation

The New Mexico Women's Bar Association with hold its annual meeting at 1:30 p.m., July 14, at the State Bar Center in Albuquerque. At noon, the same day, the Women's Bar will host a luncheon presentation by Elizabeth Lynch Phillips. Phillips is a member of the State Bar and a certified personal coach. She will talk about how to learn to recognize the three primary internal voices we all use to tell about and relate to, the circumstances in our lives. She will explain how we can become aware of which voice has the microphone in each of our stories and how to consciously choose to speak from the most powerful and effective voice – that of an empowered adult. More information about Phillips can be found at lawyersevolving.com. Contact Sharon Shaheen at 505-986-2678, sshaheen@montand.com, to register for the presentation. There is no charge to attendees who register by July 10.

New Mexico Lawyers and Judges Assistance Program

Tip of the Month

Reap the Benefits of Simple Breathwork

Read other tips from the Judges and Lawyers Assistance Program in the first issue of each month. For more support, visit www.nmbar.org/JLAP.

Many people probably remember being told to "take a deep breath" as a child when agitated or upset. Some may even tell that to their children today and notice it actually does help with the calming practice. According to yoga teacher Jean Hall, "the breath is a barometer to our internal state of being. What we feel, the breath registers and responds to accordingly."[1] Likewise, the breath directly affects the functioning of the heart, brain, digestion and immune system.

By establishing a practice of conscious breathwork, we can improve our physical and emotional health as well as our performance. And—it takes no extra time, special equipment or intense training!

Here are just some of the benefits you can expect when you make conscious breathing part of your daily routine:

- **Enhanced Clarity and Focus:** Slow, conscious breathing fully oxygenates the brain, preparing it for optimal functioning. Next time you have a major decision to make, take three deep breaths first.[2]
- **Reduced Anxiety, Anger and Tension:** Deep breathing activates the parasympathetic nervous system, which initiates the natural relaxation response.
- **Detoxification:** Your body is designed to release the majority of its toxins through breathing and deep breathing is the most efficient way to do this.[3]
- **Strengthened Immune System:** Oxygen travels through the bloodstream by attaching to hemoglobin in your red cells and that, in turn, helps your body metabolize nutrients and vitamins.[4]
- **Improved Digestion:** A relaxed body supports organ activities associated with digestion, absorption and elimination.
- **Reduced Cravings:** Because most cravings typically last a few minutes, deep breathing can help by diverting your attention to your breathing.
- **Reduced Pain:** Studies show "target breathing" effectively diminishes pain by rewiring the signals connected with the pain. Practice target breathing by inhaling deeply into the belly and visualizing the breath as a ball of energy that upon exhaling, can flow to the area of the body that needs healing.[5]

Conscious breathwork can involve different techniques based on the issue and/or the desired results (as with the target breathing described above), but any deliberate practice of deep abdominal breathing will produce relaxation and increase focus. Experts recommend a balanced approach in which the inhalation and exhalation are done for the same count. To start, inhale through the nose for a count of four and then exhale through the nose or mouth for a count of four. Repeat this sequence six to 10 times. To maximize the benefits, practice this daily for five to 10 minutes. As you become more proficient, aim for six to eight counts per breath.

Endnotes

[1] Hall, J. Breathe: Simple breathing techniques for a calmer, happier life. London: Quadrille Publishing, 2016

[2] Sima, B. (2014, November 1) 10 Health Benefits of Conscious Breathwork [Web log post]. Retrieved June 21, 2017, from https://www.bobsima.com/my-blog/10-health-benefits-conscious-breathwork/

[3] DiMauro, L. (2010, October 10) 18 Benefits of Deep Breathing and How to Breathe Deeply? One Powerful Word. Retrieved from http://www.onepowerfulword.com/2010/10/18-benefits-of-deep-breathing-and-how.html

[4] Ibid.

[5] Vail, L. Breath-Taking Wisdom: Six Ways to Inhale Energy and Exhale Stress. Natural Awakenings. October 2014.

Hearsay

Carpenter Hazlewood Delgado and Bolen announces **Melissa Brown** as its Albuquerque office's managing partner. Brown graduated from the University of New Mexico, *summa cum laude*, and Baylor Law School in 2006. She has been licensed in New Mexico since 2007. Her current practice focuses on community association law, insurance defense and business law.

Lisa M. Alter, J.D., received a of Bachelor of Business – Accountancy degree from Western Illinois University on May 13. Alter is a member of Beta Gamma Sigma, an honor society recognizing business excellence, and Beta Alpha Psi, the international honor organization for financial information students and professionals. Alter previously earned Illinois CPA certification by exam on Oct. 23, 2013.

Rodey, Dickason, Sloan, Akin and Robb, PA

Chambers USA 2017 Firm Rankings: corporate/commercial, labor and employment, litigation: general commercial and real estate.

Chambers USA 2017 Individual Rankings: **Mark K. Adams** (environment, natural resources and regulated industries; water law), **Rick Beitler** (litigation: medical malpractice and insurance defense), **Perry E. Bendicksen III** (corporate/commercial), **David P. Buchholtz** (corporate/commercial), **David W. Bunting (**litigation: general commercial**), Jeffrey Croasdell (**litigation: general commercial**), Nelson Franse** (litigation: general commercial; medical malpractice and insurance defense), **Catherine T. Goldberg** (real estate), **Scott D. Gordon** (labor and employment), **Alan Hall** (corporate/commercial), **Bruce Hall** (litigation: general commercial), **Justin A. Horwitz** (corporate/commercial), **Jeffrey L. Lowry (**labor and employment**), Donald B. Monnheimer** (corporate/commercial), **Sunny J. Nixon** (environment, natural resources and regulated industries: water law), **Theresa W. Parrish** (labor and employment), **John N. Patterson** (real estate), **Debora E. Ramirez** (real estate), **John P. Salazar** (real estate), **Andrew G. Schultz** (litigation: general commercial), **Tracy Sprouls** (corporate/commercial: tax), **Thomas L. Stahl** (labor and employment), **Aaron C. Viets** (labor and employment) and **Charles J. Vigil** (labor and employment).

Stephen B. Waller has entered solo practice as the Law Office of Stephen B. Waller, LLC (www.wallernm.com). Waller focuses on civil litigation and appeals, creditor representation, and providing briefing and project support to other attorneys.

Lewis Roca Rothgerber Christie

Chambers USA 2017 Individual Rankings: **Jeffrey Albright** (environment, natural resources and regulated industries) and **Dennis Jontz** (corporate/commercial law).

Modrall Sperling Roehl Harris and Sisk PA

Chambers USA 2017 Firm Rankings: **Nationwide** (Native American Law) and **New Mexico** (corporate/commercial environment, natural resources and regulated industries, labor and employment, litigation: general commercial, Native American law and real estate).

Chambers USA 2017 Individual Rankings: **Daniel M. Alsup** (corporate commercial), **Jennifer G. Anderson** (labor and employment, litigation: general commercial), **Larry P. Ausherman** (environment, natural resources and regulated industries), **Deana M. Bennett** (nationwide Native American law), **Stuart R. Butzier** (environment, natural resources and regulated industries), **John R. Cooney** (environment, natural resources and regulated industries), **Peter L. Franklin** (corporate commercial), **Karen L. Kahn** (labor and employment: employee benefits and compensation), **George R. McFall** (labor and employment), **Margaret L. Meister** (real estate), **Chris Muirhead** (corporate/commercial), **Brian K. Nichols** (nationwide and New Mexico Native American law), **Maria O'Brien** (environment, natural resources and regulated industries), **James M. Parker** (labor and employment: employee benefits and compensation), **James M. Parker** (corporate/commercial: tax), **Marjorie A. Rogers** (corporate/commercial: tax), **Ruth M. Schifani** (real estate), **Lynn H. Slade** (nationwide and New Mexico Native American Law, environment, natural resources and regulated industries), **Walter E. Stern** (nationwide and New Mexico Native American Law, environment, natural resources and regulated industries) and **R. E. Thompson** (litigation: general commercial).

In Memoriam

Kim Posich, executive director of the New Mexico Center on Law and Poverty for 14 years between 2002 and 2016, died on May 28 peacefully at home. His family, the Center staff, and the community mourn the loss of such a tremendous social justice advocate. During his time at the Center, Posich increased the organization's budget by more than $1 million, grew the size of the Center's staff by more than 300 percent and expanded the issue areas in which the Center was engaged—all while staying true to the Center's history and core values. Under his direction, the Center attained numerous improvements in access to the public benefits programs; increased access to healthcare for indigent, uninsured patients at the main hospitals in the state; vastly expanded resources for the state's civil legal services system; and won a landmark lawsuit extending workers' compensation to New Mexico's agricultural laborers for the first time, among numerous other accomplishments. Prior to joining the New Mexico Center on Law and Poverty, Posich worked for many years at the Center for a New American Dream. In his time there, Posich served as both managing director and

chief program officer, spearheading significant growth in the organization, conducting education and outreach among youth and faith-based organizations, and leading national communications campaigns and web-based action and advocacy programs. From 1993 to 2000, Posich worked with RESULTS and RESULTS Educational Fund in various capacities, including as managing director, chief operations officer, chief financial officer, and director of U.S. initiatives. He directed the organization's leadership role in several campaigns, such as promoting the "Hunger Has a Cure Act," which eventually contributed to the reinstatement of vulnerable legal immigrants' eligibility for food stamps, and, as part of a coalition, successfully increasing funding for Head Start. Locally, Posich volunteered his time on various boards. He was a member of the Board of Equal Access to Justice, which raises funds to support four key civil legal service organizations, between 2002 and 2015. From 2003 to 2006, Posich served as a member of the board of directors for Albuquerque Health Care for the Homeless. He also volunteered as a participant of the Legal Services and Program Committee of the State Bar of New Mexico. Posich was diagnosed with ALS in January 2015. During these past few years, as his body steadily shut down, his mind, his humor, his grace, his patience, his kindness and his appreciation of life did not. He continued to be a wonderful partner, parent, grandfather, friend, and colleague, and contributed to the Center's work until very recently.

Fred H. Hennighausen died on May 4 surrounded by loving family. Hennighausen was born May 21, 1924, to Frederick H. Hennighausen and August Hennighausen in Baltimore, Md. He attended Duke University in Durham, N.C., where he participated in lacrosse, was co-captain of the swim team, a member of Beta Theta Pi Fraternity and the Battalion Sub-Commander of the Navy ROTC unit. Upon graduation, Hennighausen received a B.S. in General Engineering and a commission in the U.S. Navy. He served abroad the Battleship New Jersey in the South Pacific during World War II. After the war, he returned to Duke for one semester and received a B.S. in Mechanical Engineering. In 1948, Hennighausen began a 32 year career with the New Mexico State Engineer Office, the majority of that time serving as district supervisor of the Roswell office in charge of water rights administration for Southeastern New Mexico. Hennighausen attended law school at the University of Tulsa. Upon his return to Roswell he opened his law office with a concentration in water law. He was one of the first in the state to receive certification as a water law specialist. In 1985, Hennighausen and his good friend, A.J. Olsen, co-founded the firm of Hennighausen and Olsen. Hennighausen was the first water master appointed for the Roswell Artesian Basin during the basin adjudication. During his legal career, Hennighausen served as general counsel to the Pecos Valley Artesian Conservancy District and was instrumental in the implementation of the Pecos River Settlement Agreement. Hennighausen was recognized statewide as a foremost expert and leader in the field of water law. Henninghausen has been a member of the Roswell Jaycees, the ZIA Girl Scout Council, member of the Roswell City Council, and President of the South Eastern New Mexico Chapter of Professional Engineers. He served as both board member and president of the Roswell Rotary Club, the United Way of Chaves County and the Chaves County Bar Association. Hennighausen received a number of awards throughout his career, including the Historical Society and Foundation for Southeast New Mexico Heritage Award, in November 2000, for his unselfish dedication in protecting the water for the community of Roswell and the surrounding areas. He also received the Pecos Valley Artesian Conservancy Perseverance award in 2015. Hennighausen was honored by Mayor Dennis Kintigh, who proclaimed Jan. 29 as Fred H. Hennighausen Day in honor of his distinguished career of public service to the state of New Mexico, and as outstanding practitioner in the area of water law over six and a half decades.

Stanley P. Zuris of Albuquerque died on May 27. Zuris was born on Jan. 17, 1926, to Pius Jonas Zuris and Biruta Lukassus Zuris in Cleveland, Ohio. He earned the Purple Heart during the Battle of the Bulge in WWII. After recovering from battle injuries that temporarily blinded him and required more than a dozen surgeries, Stanley went on to study law at Ohio State University. Upon graduation from law school in 1949, Zuris traveled to Mexico City where he learned Spanish and worked as an editor for an international newspaper. In June 1950, while hitchhiking back to Ohio to begin practicing law, Stanley passed through Albuquerque. He entered Verl's Cafe to inquire if he could wash dishes in exchange for a hot meal. There he met Verl's niece, Patricia Rae Young. Zuris and Pat were married in Washington Island, Wisconsin on August 26, 1950. Zuris practiced law in Oberlin, Ohio, for nine years before packing his young family into a green rambler station wagon and heading to Albuquerque on Route 66. He served as deputy city attorney until October 1961 when he entered into private law practice. He served as special counsel to the airport and was instrumental in converting the Albuquerque Army Air Base into the Albuquerque Sunport. He also helped establish the Albuquerque Metropolitan Arroyo Flood Control Authority and subsequently served as the Authority's general counsel for many years. In addition to his busy law practice, Zuris built a wonderful home and small farm for his growing family. Time was made for family road trips, camping, and restoring an old cabin in the Jemez Mountains. He was proud of his Lithuanian heritage and like many of Baltic descent, was an avid mushroom hunter. He spent many summer days in the mountains collecting boletus edulis. Stan and Pat also loved spending winters in Kino Bay, Mexico, after his retirement, where he enjoyed fishing for yellowtail and rockfish. Stan was also a voracious reader and spent a good portion of his morning immersed in *New York Times*. Zuris is survived by his wife of 66 years, Patricia; son, Edward Zuris; daughters, Suzanne Levy (Paul), Nancy Zuris Slater, Stephanie Collins (Brian), Carol Peacock (Bruce); sister, Dorothea Denninger; eight grandchildren, and five great-grandchildren. He was preceded in death by his parents; his brother, Victor Zuris, and his daughter Peggy Anne Zuris.

Legal Education

July

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1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

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2.0 G
Live Seminar, Albuquerque
Albuquerque Bar Association
www.abqbar.org

12 **Technical Assistance Seminar**
6.0 G
Live Seminar, Albuquerque
U.S. Equal Employment Opportunity Commission
602-640-4995

14 **DWI, Native Culture, Cross-Examination, & Digital Evidence CLE**
5.0 G, 1.0 EP
Live Seminar, Farmington
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

18 **Techniques to Restrict Shareholders/LLC Members: The Organizational Opportunity Doctrine, Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Natural Resource Damages**
10.0 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

20 **Default and Eviction of Commercial Real Estate Tenants**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Annual Rocky Mountain Mineral Law Institute**
13.0 G, 2.0 EP
Live Seminar, Santa Fe
Rocky Mountain Mineral Law Foundation
www.rmmlf.org

21 **Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Commercial Paper: Drafting Short-Term Notes to Finance Company Operations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Current Developments in Employment Law**
17.5 G, 1.0 EP
Live Seminar, Santa Fe
ALI-CLE
www.ali-cle.org

27 **Evidence and Discovery Issues in Employment Law**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27-29 **24th Annual Advanced Course: Current Developments in Employment Law**
17.5 G, 1.0 EP
Live Webcast/Live Seminar, Santa Fe
American Law Institute
www.ali-cle.org/CZ002

27–29 **2017 Annual Meeting—Bench & Bar Conference**
12 total CLE credits (with possible 8.0 EP)
Live Seminar, Mescalero
Center for Legal Education of NMSBF
www.nmbar.org

August

4 **Drugs in the Workplace (2016)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Effective Mentoring—Bridge the Gap (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2017 ECL Solo and Business Bootcamp Parts I and II**
3.4 G, 2.7 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2016 Trial Know-How! (The Reboot)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Lawyers Ethics in Employment Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Tricks and Traps of Tenant Improvement Money**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

August

9 **Gross Receipts Tax Fundamentals and Strategies**
6.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

11 **Diversity Issues Ripped from the Headlines (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **New Mexico DWI Cases: From the Initial Stop to Sentencing (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **Human Trafficking (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **Traffic Law**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davidmiles.com

17–18 **10th Annual Legal Service Providers Conference**
10.0 G, 2.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Use of "Contingent Workers"—Issues for Employment Lawyers**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **The Law and Bioethics of Using Animals in Research**
6.2 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

September

8 **Practical Succession Planning for Lawyers**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Techniques to Avoid and Resolve Deadlocks in Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **What Notorious Characters Teach About Confidentiality**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **The Ethics of Representing Two Parties in a Transaction**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Ethical Considerations in Foreclosures**
1.0 EP
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

19 **How to Make Your Client's Estate Plan Survive Bankruptcy**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Concealed Weapons and Self-Defense**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

Clerk's Certificates

From 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

Clerk's Certificate of Suspension

Effective June 20, 2017, for non-compliance with Rule 18-301 NMRA, governing minimum continuing legal education for compliance year 2016:

Ron (Ronnie) Sanchez
503 Slate Avenue, NW
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Clerk's Certificate of Reinstatement to Active Status

Effective June 19, 2017:
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Beaverton, OR 97003

Clerk's Certificate of Name Change

As of June 16, 2017:
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575-546-0336 (fax)
smcdowell@da.state.nm.us

Clerk's Certificate of Admission

On June 13, 2017:
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Silver City, NM 88061
575-538-2945
575-388-5498 (fax)
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Clerk's Certificate of Change to Inactive Status

Effective June 20, 2017:
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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 June 28, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information andindictment	07/01/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017
5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-703	Appeal	07/01/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-506	Time of commencement of trial	07/01/2017
7-703	Appeal	07/01/2017

Rules of Procedure for the Municipal Courts

8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017

Children's Court Rules and Forms

10-166	Public inspection and sealing of court records	03/31/2017

Rules of Appellate Procedure

12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-307.2	Electronic service and filing of papers	07/01/2017*
12-314	Public inspection and sealing of court records	03/31/2017

Disciplinary Rules

17-202	Registration of attorneys	07/01/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

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.

Certiorari Denied, February 13, 2017, No. S-1-SC-36221

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-037

No. 32,241 (filed November 14, 2016)

ROBERT CIOLLI and MARY LOU CIOLLI,
Plaintiffs-Appellees,
v.
McFARLAND LAND & CATTLE COMPANY, INC.,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF QUAY COUNTY
GARY CLINGMAN, District Judge, by designation

JACQUELYN ARCHULETA-STAEHLIN
CHARLOTTE H. HETHERINGTON
CUDDY & MCCARTHY, LLP
Santa Fe, New Mexico
for Appellees

DONALD C. SCHUTTE
SCHUTTE LAW OFFICE, LLC
Tucumcari, New Mexico
for Appellant

Opinion

Roderick T. Kennedy, Judge

{1} Plaintiffs, owners of a landlocked ranch in Quay County, sued an adjacent ranch to compel the recognition of an easement across that ranch to the public highway. The district court entered a judgment recognizing an implied easement by necessity for the benefit of Plaintiffs' ranch. Defendant appealed. We affirm the district court.

I. BACKGROUND

A. Introduction

{2} The dispute in this case is over whether the Ciolli Ranch, owned by Plaintiffs, Robert and Mary Lou Ciolli (the Ciollis), is entitled to an easement across the McFarland Ranch, owned by Defendant McFarland Land & Cattle Co., Inc. (McFarland Land). The district court initially concluded that the Ciollis were entitled to an easement. For reasons best left to our previous order in this case, we reversed and remanded for further clarification by the district court as to how the history of the two ranches might come to support recognizing a type of easement that is cognizable under our law.

{3} Following remand and a hearing on competing summary judgment motions, the district court (with a different judge) set out what it considered were undisputed findings of fact and conclusions of law followed by an order granting the Ciollis' motion for summary judgment, recognizing the existence of an implied easement by necessity across the McFarland Ranch being appurtenant to and for the benefit of the Ciolli Ranch as the dominant estate. McFarland Land appealed this judgment. We ordered the parties to brief the issues as reflected in the latest judgment entered by the district court for our consideration on the merits.

B. Facts

{4} The facts are undisputed by the parties. Prior to 1970, Benton Hodges owned both what are now referred to in this case as the McFarland Ranch and the Ciolli Ranch as portions of one parcel of land. Before the two ranches were severed and sold, the larger parcel of land abutted a public road—QR 46—on its southern end. In 1970 Hodges sold what is now the McFarland Ranch to Shine McFarland and retained the remaining parcel of land, including the portion now known as the Ciolli Ranch. The new McFarland Ranch (and now owned by McFarland Land) still abutted QR 46 on its southern end.

{5} The 1970 warranty deed from Hodges to Shine McFarland and his wife did not reserve an easement across the McFarland Ranch to the county road. After 1970, Hodges accessed what is now the Ciolli Ranch through its northeast corner from State Highway 278, entering his property by crossing the property of other landowners. This route is known as the "Latham Route." Shine McFarland thereafter leased Hodges' property for a period of time, grazing his (and apparently Hodges') cows on what is now the Ciolli Ranch. Shine McFarland accessed Hodges' ranch using the Latham Route from State Highway 278 through the northeast corner of Hodges' property. After tending to his cattle, Shine McFarland would then pass south through the present Ciolli Ranch onto and across the McFarland Ranch at its eastern border, exiting to QR 46 via what has since become known as the "feed road" on the McFarland Ranch. The use of State Highway 278 to access what is now the Ciolli Ranch via the Latham Route by Hodges, Shine McFarland, or both, continued from the early 1960s through the late 1970s. McFarland Land acknowledges that the Latham Route is now impassable.[1] The district court found that at some time prior to 1997, permission to use the Latham Route was withdrawn by other persons than the parties to this suit and that the route was "gated, locked and closed as a means to access the Ciolli Ranch."

{6} In 1980 Shine McFarland filed a quiet title suit encompassing the parcel of the McFarland Ranch where the feed road is located. The court quieted title to the McFarland Ranch in favor of Shine McFarland and against all named and unknown claimants, including Hodges' heirs. While the judgment quieted title in R.M. McFarland and Elsie S. McFarland, barring and estopping all named and unknown claimants, including James Ray Hodges and Nancy Hodges as named defendants from having or claiming any "right, title or interest in or lien upon" the McFarland Ranch, the suit did not specifically concern any possible easements or other rights of access from the Hodges' property south through the McFarland Ranch to QR 46.

{7} In 1993, what is now the Ciolli Ranch, was purchased from heirs of the Hodges. Since 1997 access for the Ciollis to their ranch has been solely by the feed road, by permission of McFarland Land, who had no legal obligation to provide it, though permission to use the road has never been withdrawn by McFarland Land. In

[1]We observe mention made of another route, now blocked, to the Hodges' property through the property of another land owner identified in the record as "Beck" who is not a party to this case.

1997 the ranch was sold to the Ciollis. A map given to the Ciollis by their seller directed them to use the feed road across the McFarland Ranch for access. Without an easement, the Ciollis have no legally enforceable access to their ranch.

{8} The Ciollis requested a written easement for the feed road from Shine McFarland in 2003, because the Ciollis were selling their property and could not do so without a written easement of record. McFarland Land refused and told the Ciollis that it would not give a "written easement" and that "everybody uses everybody else's property." The district court found that "[w]ithout a legally enforceable right of access, the Ciolli Ranch is unusable and unsaleable."

C. Trial, Reversal, and Remand

{9} In 2011 the Ciollis filed this action seeking a prescriptive easement or, in the alternative, a "private implied easement" across the McFarland Ranch. Following a trial on the merits, the district court found clear and convincing evidence that the Ciollis' permissive right to cross the McFarland Ranch has never been in dispute. The district court's conclusions stated that the word of McFarland Land was more binding than any written contract, but also concluded that, "in today's world[,] a written easement is required."[2] The district court concluded that the use of the road "is a reasonable, limited easement based upon historical needs and usage as testified to by both [the Ciollis'] witnesses and [McFarland Land's] witnesses."

{10} Without relating the meaning of "reasonable, limited easement" to the types of easements the Ciollis sought in their complaint, the district court stated that the use of the road is an appurtenant easement crossing one section of the McFarland Ranch. Having found that an easement existed, the district court ordered an easement to be drafted and filed as part of its judgment. McFarland Land appealed the judgment to this Court. Because we believed that neither the findings by the district court nor its judgment were sufficient to establish an easement under law, we reversed the judgment and remanded for further proceedings to clarify the status of the parties and their properties.

1. Proceedings on Remand

{11} On remand, the parties filed competing motions for summary judgment, in which the Ciollis requested the recognition of an easement by necessity and to which McFarland Land responded. The parties filed requested findings of fact and conclusions of law. The district court entered findings of fact and conclusions of law but recognizing that the Ciolli Ranch is landlocked as a result of Hodges' partition of his land and that these circumstances required "[a]n easement of necessity [that] exists from the nearest public roadway (QR 46) across the McFarland Ranch via the [f]eed [r]oad to the Ciolli Ranch." The district court declared such an easement to exist for the benefit of, and appurtenant to, the Ciolli Ranch as the dominant estate ruling that "[t]he McFarland Ranch, the servient estate, is burdened by said easement."

II. DISCUSSION

{12} "Few things are as certain as death, taxes and the legal entanglement that follows a sale of landlocked real estate." *Bob Daniels & Sons v. Weaver*, 681 P.2d 1010, 1013 (Idaho Ct. App. 1984). The record below demonstrates that substantial evidence exists to support the undisputed facts found by the district court on remand and that they constitute clear and convincing evidence that an easement by necessity is proper. "If the facts are undisputed and only a legal interpretation of the facts remains, summary judgment is the appropriate remedy." *Bd. of Cty. Comm'rs v. Risk Mgmt. Div.*, 1995-NMSC-046, ¶ 4, 120 N.M. 178, 899 P.2d 1132. We apply a de novo standard of review to the legal conclusions. *Wood v. Cunningham*, 2006-NMCA-139, 140 N.M. 699, 147 P.3d 1132.

{13} McFarland Land argues that the district court erred in granting an easement, arguing that the facts do not support the creation of dominant and servient estates from Hodges' division of his ranch, nor elements of an implied easement by necessity that benefits the Ciolli Ranch as the dominant estate. McFarland Land also claims that any easement by necessity is precluded by the 1980 quiet title suit that "quieted title" to the McFarland Ranch against the Ciollis' predecessors in title.

{14} We first consider whether the elements of an implied easement by necessity have been met. We then turn to whether the 1980 quiet title suit precludes the district court's finding an easement by necessity.

A. Easement by Necessity: Three Elements and a Presumption

{15} Easements by necessity are implied by law because conveyance of land carries with it a presumption that neither of the resulting parcels severed by a conveyance will be deprived of certain implied rights, including an implied right of access. "[W]hen a grantor conveys property, absent a clear indication to the contrary, a court is allowed to presume that the conveyance was done with the intention to reserve to himself, or convey to his grantees a way to access the property so it can be beneficially utilized. *Herrera v. Roman Catholic Church*, 1991-NMCA-089, ¶ 10, 112 N.M. 717, 819 P.2d 264. Restatement (Third) of Property: Servitudes § 2.15 (2000), explains the application of this rule: "A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights."

{16} To establish an easement by necessity, three elements must be met:

> (1) unity of title, indicating that the dominant and servient [parcels] were owned as a single [parcel] prior to the separation . . . ; (2) that the dominant [parcel had] been severed from the servient [parcel], thereby curtailing access of the owner of the dominant [parcel] to and from a public roadway; and (3) that a reasonable necessity existed . . . at the time the dominant parcel was severed from the servient [parcel].

Id. (internal quotation marks and citation omitted). As noted below, an easement

[2]McFarland Land stood on the quality of its word that permission for the Ciolli Ranch would not be revoked by them. Even assuming their good will, the duration of such a promise cannot be infinite, nor is it irrevocable. The lack of irrevocability for such a promise—particularly to enable its enforcement by the Ciollis or their successors as to McFarland Land or its successors with regard to the feed road—would require a recorded easement. As the district court noted in the first proceedings, times are changing, as proven by the fact that without the irrevocability of an easement granting access for the Ciolli Ranch to the sole available public road, the Ciolli Ranch was not able to be sold. This, plus the fulfillment of the legal elements for an easement by necessity, combine to provide the weight of inevitability to our ruling today.

by necessity generally lasts as long as the necessity that created it. *See Sitterly v. Matthews*, 2000-NMCA-037, ¶ 30, 129 N.M. 134, 2 P.3d 871.

{17} We must examine the facts in light of the elements required to establish an easement by necessity.

1. Unity of Title

{18} Hodges owned the single piece of land from which the Ciolli Ranch and McFarland Ranch were created at different times. Servitudes by necessity arise on severance of rights held in a unity of ownership; the requirement is fulfilled, as here, "when a grantor divides a single parcel into two or more parcels, and it can take place when a grantor conveys less than full ownership in a single parcel." *Hurlocker v. Medina*, 1994-NMCA-082, ¶ 11, 118 N.M. 30, 878 P.2d 348 (internal quotation marks and citation omitted). The element of unity of title between the ranches is undisputed in this case and supports an easement by necessity.

2. Legal Access Was Curtailed by the Severance

{19} Selling the McFarland Ranch to Shine McFarland created a landlocked property owned by Hodges that had no legal access to a public road. An easement by necessity "can only arise where an owner of property severs a portion of his property and the portion retained or sold is cut off from access to a public route by the land from which it was severed." *Amoco Prod. Co. v. Sims*, 1981-NMSC-115, ¶ 13, 97 N.M. 324, 639 P.2d 1178; *Hurlocker*, 1994-NMCA-082, ¶ 5 (citing *Herrera*, 1991-NMCA-089, ¶ 10); s*ee Brooks v. Tanner*, 1984-NMSC-048, ¶ 25, 101 N.M. 203, 680 P.2d 343; *Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC*, 2014-NMCA-017, ¶ 28, 317 P.3d 842. The basis for the easement must exist at the time of the initial severance. *Herrera*, 1991-NMCA-089, ¶ 14. No legal access to a public road existed from the Hodges' parcel of the severed property. The evidence cited by McFarland Land shows that Shine McFarland entered the Hodges' property via the Latham Route to tend to cattle on that ranch and then used the feed road to access QR 46 through his ranch prior to 1993 when the current Ciolli Ranch was first sold. There is no doubt that Shine McFarland was actually aware both of the Latham Route and that the only direct access to QR 46 from the Hodges' property was through the McFarland Ranch prior to the creation of what is now the Ciolli Ranch. Because Hodges had reserved no rights to access QR 46 at the time of the McFarland sale, we conclude that the element of curtailment from access to a public road was properly established.

3. Reasonable Necessity for Access to QR 46 Was Established

{20} An easement by necessity arises when, "prior to the conveyance, the property did enjoy such rights [of access] and that, absent the implied servitude, the conveyance would deprive it of such rights." Restatement, *supra*, § 2.15 cmt. c. Hodges owned the complete tract of property from which the McFarland Ranch parcel was then severed. At all times material to Hodges' ownership of the complete tract, QR 46 was its only legally enforceable access to a public highway. These facts satisfy the requirement that a reasonable necessity for the road existed at the time the dominant parcel was severed from the servient parcel. *See Los Vigiles Land Grant*, 2014-NMCA-017, ¶ 28. This is so because there must only be a *reasonable* necessity for the use of the servitude at the time of the severance. *See id.* ¶ 32. Accordingly, "necessity" connotes an understanding that, while more than mere convenience is involved, there can be no other reasonable way of enjoying the dominant tenement without the easement. *Venegas v. Luby*, 1945-NMSC-045, ¶ 17, 49 N.M. 381, 164 P.2d 584. The facts establish that the necessity for the easement existed at the time of severance. It existed from the time Shine McFarland bought the property from Hodges.

{21} McFarland Land incorrectly argues that because other permissive uses existed at the time of severance, necessity for an easement was defeated. It is undisputed that the only public road Hodges' original property abutted was QR 46 and that other access to the property resulted from permissive transit over others' land. Under *Herrera*, revocable permission to cross other land is "irrelevant" and is "no barrier to the finding of an easement by necessity that the benefitted parcel is accessible under." 1991-NMCA-089, ¶ 14. Here, as in *Herrera*, alternative means of access over others' property had been revoked.

{22} McFarland Land also asserts that there "was no evidence that [the Ciollis'] predecessor had even used the feed road or that it was even in existence at the time of the conveyance to [McFarland Land's] predecessor in interest." That is an incorrect view of the law. Hodges curtailed direct access to the only adjacent public road to his property (including the as yet unsevered Ciolli Ranch) when he sold the McFarland Ranch to Shine McFarland. It is the right of access to the public road that is a necessity, not where the access might be located or its prior use or disuse. *See id.* ¶ 16 ("[T]he easement need not be put to continuous use but may lie dormant through successive grantees so as to be available to a subsequent grantee.").

{23} The parties have no dispute that QR 46 is the only public road by which the original Hodges property can be directly accessed. Regardless of how necessary the feed road is today for the Ciollis, the reasonable-necessity requirement is met because access to QR 46 was reasonably necessary for Hodges, such that Hodges is presumed to have intended to reserve an easement in the sale to Shine McFarland. *Id.* ¶ 10 ("An easement by necessity arises from an implied grant or reservation of a right of ingress and egress to a landlocked parcel.").

{24} Therefore, we hold the requirement satisfied that "a reasonable necessity existed for such right of way at the time the dominant parcel was severed from the servient [parcel]." *Los Vigiles Land Grant*, 2014-NMCA-017, ¶ 28 (internal quotation marks and citation omitted); *Hurlocker*, 1994-NMCA-082, ¶ 11. The district court's finding the existence of an easement by necessity is supported by substantial evidence. We agree that, based on the creation of the easement by implication from Hodges' severance of the McFarland Ranch property from his own, the easement is appurtenant to the dominant estate, the property now known as the Ciolli Ranch, and the McFarland Ranch is the servient estate. Because the easement is a right that is tied to ownership of the Ciolli Ranch property, for which it is necessary, it is an appurtenant easement. Restatement, *supra*, § 1.5(1).

B. Preclusive Effect of the 1980 Quiet Title Suit on an Easement by Necessity

{25} Next, we address McFarland Land's assertion that any easement to which the McFarland Ranch was subjected by means of the conveyance by Hodges was extinguished by the quiet title action of 1980.

{26} The district court held that a quiet title suit on behalf of a servient estate could not extinguish an easement by necessity when it runs with the land and is appurtenant to the dominant estate. Alternatively, the district court held that, because of the necessity for access to the Ciolli Ranch, the easement was immediately revived

or could not be terminated because the necessity for the easement existed, and easements can only terminate when the necessity for them also terminates.

{27} The implied intent of the grantor to create an easement by necessity depends on the existence of the necessity for the easement at the time of the original conveyance creating the landlocked property, which at the time of severance creates dominant and servient estates. *Herrera* points out that the easement—the right to use the servient estate—would exist from the time of its creation irrespective of whether it was used. 1991-NMCA-089, ¶ 16. Also, as we noted in *Herrera*, an easement by necessity does not require exercise of the right conferred to remain valid. *See id.* ¶ 10.

{28} We have previously indicated that a quiet title action to a servient estate is not capable of extinguishing an implied easement by necessity belonging to a dominant estate absent its specific inclusion for adjudication and a specific ruling addressing adjudication in the quiet title suit. In *Los Vigiles Land Grant*, we commented on incongruity of the owner of the Rebar Haygood Ranch's specifically quieting title to an ingress/egress easement by necessity as to servient estates to the south of his property without addressing that properties to the north had similar easements over his land. 2014-NMCA-017, ¶¶ 42-43. Ultimately, we held that the quiet title action could not "reasonably be construed to preclude [the northern neighbors'] easement by necessity claims" where the owner had not specifically included the easement to which his land was servient in the complaint for quiet title. *Id.* ¶ 44. The evidence in this case demonstrates that the necessity for access of the Hodges' property to its only adjacent public road was known to Shine McFarland, who himself used the permissive access to get into the Hodges' property and the feed road to get to QR 46.

{29} We cannot find in the record before us, and it is not argued, that the quiet title suit in 1980 in any way specifically concerned itself with the use of the road now claimed to be an easement because, when Shine McFarland filed the quiet title action, the use of the feed road by Hodges apparently was not, and could not have been in question, since the Latham Route was still available. The existence of the easement by necessity was dormant. Additionally, though the quiet title suit might have established the boundaries of the McFarland properties against all possible claimants, it did not seek to eliminate all uses to which the property was servient. Moreover, most of the ways by which easements by necessity might be extinguished—merger of the dominant or servient estate, abandonment, or relinquishment—are not issues here. Nor is the cessation of the underlying purpose for the easement, *see Sitterly*, 2000-NMCA-037, ¶ 23, since the initial necessity to connect with QR 46 still exists.

{30} We affirm the district court. The Ciollis' rights under the easement by necessity were not extinguished or otherwise affected by the quiet title suit.

III. CONCLUSION

{31} We conclude that, based on the evidence presented during the summary judgment proceedings and the district court's findings of fact, the district court was correct in its judgment that the Ciolli Ranch is entitled to an implied easement by necessity as to the feed road across the McFarland Ranch, along the northeast border of the McFarland Ranch, terminating at QR 46. The easement by necessity is not precluded by the 1980 quiet title action because the easement by necessity was a property right appurtenant to the dominant estate that burdened the servient estate and could not be extinguished.

{32} We affirm the judgment of the district court and remand for further proceedings as may be needed to effect the judgment of the district court.

{33} IT IS SO ORDERED.
RODERICK T. KENNEDY, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
TIMOTHY L. GARCIA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-038

No. 33,852 (filed January 10, 2017)

KENNETH M. ROBEY
Plaintiff-Appellee/Cross-Appellant,
v.
LLOYD G. PARNELL,
Defendant-Appellant/Cross-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
DENISE BARELA SHEPHERD, District Judge

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Opinion

J. Miles Hanisee, Judge

{1} The district court entered a judgment in favor of Plaintiff, Kenneth M. Robey, in his action for breach of contract against Defendant, Lloyd G. Parnell, after a bench trial. Defendant appeals, raising six issues. Plaintiff cross-appeals the district court's dismissal of his claims for unfair and unconscionable trade practices. We reject the arguments of both parties, except as to the district court's award of consequential damages to Plaintiff in the amount of $2,500. We reverse as to that amount of damages only and affirm the judgment in all other respects.

BACKGROUND

{2} Plaintiff owns a farm in Lemitar, New Mexico. After nearly fifty years of use, the irrigation well on Plaintiff's property stopped producing water and he contacted Defendant about designing and constructing a replacement well. Defendant provided Plaintiff with two estimates: an initial written estimate and, after some discussion, a final written estimate. The latter estimate indicated the well would be 120 feet deep, and would include, among other things, an annular seal installed to protect the well from biofouling[1] and other contaminants. The replacement well was anticipated to cost $37,876.64. Prior to construction, Plaintiff asked Defendant for a written contract, but Defendant told Plaintiff that "he didn't do business that way," and they could proceed based on the estimate, their verbal agreement, and a handshake. Plaintiff agreed. Plaintiff's understanding of the agreement, as told to him by Defendant, was that Defendant would construct a well that would be fully adequate for Plaintiff's irrigation purposes, that it would be capable of producing 2,500 to 3,000 gallons of water per minute, and that it would last at least as long as Plaintiff's prior well, approximately fifty years.

{3} In September 2007 Defendant completed work on the well. The final invoice Defendant submitted to Plaintiff totaled $37,334.04. The invoice indicated the well was not 120 but 115 feet deep, and included an added item—a concrete pad— but did not include an annular seal. Defendant told Plaintiff that the shallower depth would "not make any difference[,]" and that the concrete pad was required by the state and would serve the function of an annular seal, which was unnecessary. The absence of an annular seal was contrary to Defendant's verbal representation regarding the well Plaintiff understood would be constructed.

{4} Plaintiff was initially satisfied with the well, but by March 2011, three-and-a-half years after its completion, the well failed to produce anything but a surge of sediment-filled water before it began sucking air. Plaintiff contacted Defendant about the well's failure and Defendant recommended the well be cleaned out. But in order for the well to be cleaned out, the concrete pad first had to be removed. Plaintiff again discussed the annular seal with Defendant, who told Plaintiff that an annular seal was not required when Plaintiff's well was constructed but that he could add one, although it really was not necessary. Following the well's clean-out, its performance did not improve.

{5} After some further unproductive communications with Defendant, Plaintiff filed suit in August 2011. At the bench trial, Plaintiff testified that instead of being 120 feet deep as described in the estimate, or 115 feet deep as described in the invoice, the well was less than 105 feet deep. Additionally, Plaintiff testified that he discovered that the concrete pad was not required by the state, and that it was his belief that the pad was actually used to conceal the fact that an annular seal had not been installed as promised. Plaintiff's expert testified to numerous issues with the well, including Defendant's failure to install the annular seal described in the estimate, a component Plaintiff's expert explained was required by state regulation. Plaintiff's expert further testified that the well was not constructed to a workmanlike standard, and ultimately concluded that the failure of the well was caused by a number of factors, including Defendant's negligent design and construction and biofouling attributable to Defendant's failure to install the annular seal or sanitize his tools and materials. Defendant's expert disputed the cause of the biofouling and the failure of the well. In Defendant's expert's view, the biofouling of the well was caused by naturally occurring bacteria, and could have been prevented through routine maintenance, which was the responsibility of the well owner.

{6} After a three-day bench trial, the district court entered its findings of fact and conclusions of law. Crediting Plaintiff's testimony, the district court found that Defendant told Plaintiff the new well would last at least as long as the old one, or for about fifty years, and concluded that, as a matter of law, this statement amounted to an express warranty. The district court further concluded, based on the Plaintiff's expert's testimony, that Defendant failed to design and construct

[1]The term "biofouling" is defined as "the gradual accumulation of waterborne organisms (as bacteria and protozoa) on the surfaces of engineering structures in water that contributes to corrosion of the structures and to a decrease in the efficiency of moving parts." Merriam–Webster Dictionary, http://www.merriam-webster.com /dictionary/biofouling (last visited on Nov. 11, 2016).

the well in a workmanlike manner with the ordinary skill of those who undertake such work. Additionally, based on the estimate provided by Defendant, Plaintiff's testimony, and Plaintiff's expert's testimony, the district court concluded Defendant failed to perform all contracted-for obligations and breached his contract with the Plaintiff. The district court also found that Defendant negligently made numerous false or misleading material representations to Plaintiff regarding the well's specifications and capabilities and the state's requirements for the well, and determined that Defendant negligently represented, by omission, "reductions in quantity and changes in quality of the materials provided," as compared to what was originally specified in the estimate.

{7} The district court entered judgment for Defendant on Plaintiff's claims for unfair and unconscionable trade practices, finding that Plaintiff failed to demonstrate that Defendant knowingly made false or misleading statements and that Defendant's acts and practices constituted an unconscionable trade practice. The district court also denied Defendant's request for attorney fees, determining that Plaintiff's unfair trade practices claim was not groundless. The district court concluded that Plaintiff was entitled to compensatory damages in the amount of $37,334.04, the total amount Plaintiff paid to Defendant for design and construction of the well, and consequential damages in the amount of $14,997.74.

{8} Defendant appeals the district court's judgment, raising the following issues: (1) The district court erred in finding that an express warranty was created, (2) The district court erred in finding Defendant breached the contract based upon differences in the estimate and the well as built, (3) The district court erred in finding Defendant to be in breach of contract for failure to design and construct the well in a workmanlike manner with the ordinary skill of those who undertake such work, (4) The district court erred in determining Plaintiff was entitled to consequential damages based on negligent misrepresentation, (5) The district court erred in awarding consequential damages, and (6) The district court erred in finding that Plaintiff's unfair trade practices claim was not groundless.

{9} Plaintiff cross-appeals, raising the following claims of error: (1) The district court erred in denying Plaintiff's claim for unfair trade practices; and (2) The district court erred in denying Plaintiff's claim for unconscionable trade practices.

DISCUSSION

Standard of Review

{10} Plaintiff and Defendant disagree as to the appropriate standard of review for the district court's findings of fact. Yet, this Court has definitively stated the standard that "the judgment of the trial court will not be disturbed on appeal if the findings of fact entered by the court are supported by substantial evidence, are not clearly erroneous, and are sufficient to support the judgment." *Bank of New York v. Romero*, 2011-NMCA-110, ¶ 7, 150 N.M. 769, 266 P.3d 638, *rev'd on other grounds*, 2014-NMSC-007, 320 P.3d 1. "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Landavazo v. Sanchez*, 1990-NMSC-114, ¶ 7, 111 N.M. 137, 802 P.2d 1283. In reviewing a claim of insufficient evidence, we resolve "all disputes of facts in favor of the successful party and indulge[] all reasonable inferences in support of the prevailing party." *Las Cruces Prof'l Fire Fighters & Int'l Ass'n of Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. "Findings of fact may properly be given a liberal interpretation if the interpretation is supported by the evidence." *Herrera v. Roman Catholic Church*, 1991-NMCA-089, ¶ 14, 112 N.M. 717, 819 P.2d 264. Lastly, this court "will not reweigh the evidence nor substitute our judgment for that of the fact[-]finder." *Las Cruces Prof'l Fire Fighters*, 1997-NMCA-044, ¶ 12.

{11} Regarding the parties' challenges to the district court's conclusions of law, we apply de novo review. *See Gallegos v. State Bd. of Educ.*, 1997-NMCA-040, ¶ 11, 123 N.M. 362, 940 P.2d 468.

Defendant's Claims of Error

1. The District Court Did Not Err in Finding an Express Warranty

{12} Defendant first challenges the district court's conclusion that Defendant's statements to Plaintiff created an express warranty and that Defendant breached his contract with Plaintiff when the well failed to meet that warranty. Specifically, Defendant states the district court's conclusion that an express warranty was given is "contrary to well[-]established New Mexico law" and "unsupported by substantial evidence." We disagree.

{13} Our Uniform Commercial Code states that "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise[.]" NMSA 1978, § 55-2-313(1)(a) (1961). Further, "[i]t is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty[.]" Section 55-2-313(2). Finally, "[a]ll of the circumstances of a sale are to be considered when determining whether there was an express warranty or a mere expression of opinion." *Lovington Cattle Feeders, Inc. v. Abbott Laboratories*, 1982-NMSC-027, ¶ 11, 97 N.M. 564, 642 P.2d 167.

{14} As grounds for his claim that no express warranty existed, Defendant presents three arguments. First, Defendant states that "in a contract for drilling a water well, there is no implied undertaking that water will be obtained or that the well will be a success as to the quantity or quality of the water obtained[.]" *Davis v. Merrick*, 1959-NMSC-084, ¶ 6, 66 N.M. 226, 345 P.2d 1042. While it is true that New Mexico law imposes no implied warranty in a contract for the drilling of a producing well, *see id.*, that does not mean that Defendant's statement to Plaintiff did not constitute an express warranty under our law. *See Perfetti v. McGhan Med.*, 1983-NMCA-032, ¶ 24, 99 N.M. 645, 662 P.2d 646 (setting forth the elements of an express warranty). There is substantial evidence in the record to support the finding that Defendant told Plaintiff that the well would last fifty years, and thus supports the district court's determination that Defendant made the sort of affirmation that, in these circumstances, amounts to an express warranty.

{15} To support his second proposition that it is not customary business practice for well drillers to provide express warranties, Defendant cites UJI 13-826 NMRA, which states that "[a] custom in the trade is any manner of dealing that is commonly followed in a place or trade so as to create a reasonable expectation that it will be followed with respect to the transaction between the parties." *Id.* However, that instruction explicitly states that it should be used in conjunction with UJI 13-825 NMRA, which deals with ambiguity of the terms of the contract. *See* UJI 13-826. Use Note. There is no claim of ambiguity here. It appears Defendant is attempting to argue that because the custom in well drilling is not to make express warranties, none were made here. But again, substantial evidence supports the district court's finding that

Defendant did indeed tell Plaintiff that the well would last fifty years, which in turn supports the district court's conclusions of express warranty and breach. "A custom or usage which is repugnant to the terms of an express contract is not permitted to operate against it, and evidence of it is inadmissible; for while usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain." *Gooch v. Coleman*, 1916-NMSC-057, ¶ 12, 22 N.M. 45, 159 P. 945 (internal quotation marks and citation omitted). Here, Defendant attempts to use evidence of custom to negate any warranty; however, Defendant's representation to Plaintiff created a clearly stated express warranty, which evidence of custom cannot defeat.

{16} Third, Defendant contends that the statute of frauds applies to this case and thus any warranty must have been in writing to be enforceable. But this argument is made for the first time on appeal and was not presented to the district court for the proposition now asserted. While Defendant did raise the absence of a written warranty below, he did so to point out Plaintiff's lack of documentary evidence for the warranty and did not argue such evidence was required. Now on appeal, Defendant argues that any warranty must have been in writing in order to satisfy the statute of frauds. *See* NMSA 1978, § 55-2A-201 (1992). In order "[t]o preserve an issue for review on appeal, it must appear that an appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717. We find nothing in the record to show, and Defendant points to no place in the record to demonstrate, that Defendant sought a ruling from district court on the basis that the express warranty issue failed on statute of frauds grounds, and thus hold that this argument was not properly preserved. *See Crutchfield v. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 (holding that "on appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue.").

{17} Even so, Defendant's argument fails on the merits. Our Supreme Court, in *Salazar v. D.W.B.H., Inc.*, 2008-NMSC-054, ¶ 8, 144 N.M. 828, 192 P.3d 1205, stated, "[c]ommon to all . . . types of express warranty is the requirement that an express warranty must be made as part of the basis of the bargain. This does not mean, however, that an express warranty must be specifically bargained for or even included as part of a written contract." It is clear that our caselaw and the governing statute, Section 55-2-313, do not require express warranties to be in writing, however, there is substantial evidence to show that the representations made to Plaintiff by Defendant do meet the requirements of an express warranty.

{18} "It is fundamental that a judgment cannot be sustained on appeal unless the conclusion upon which it rests finds support in one or more findings of fact." *Thompson v. H.B. Zachry Co.*, 1966-NMSC-017, ¶ 3, 75 N.M. 715, 410 P.2d 740. Here, the district court's conclusion does find support in its finding that Defendant told Plaintiff the well would last fifty years, a finding which is in turn supported by substantial evidence. Therefore, because the district court's conclusion is factually supported, and because evidence of custom does not apply when the meaning of the agreement is plain, and because our law does not require express warranties to be in writing, we find no error in the district court's conclusions that Defendant created an express warranty by his representations to Plaintiff, and breached that warranty when the well failed to last as expected.

2. The District Court Did Not Err When it Found Defendant to Have Breached the Contract Based Upon Differences Between the Estimate and the Well Defendant Constructed

{19} Defendant contends that his failure to install all the features of the well as described in the estimate does not amount to a breach of contract. We disagree.

{20} As grounds for his appeal, Defendant disputes a number of the district court's findings. On review of the record, we conclude that these findings are supported by substantial evidence. Expert testimony, Defendant's own testimony, Defendant's second estimate, and Defendant's invoice all support the district court's findings. Specifically, the evidence demonstrated that the well was shallower than was agreed to, constructed differently than was agreed to, and that it failed after approximately three-and-a-half years, considerably sooner than Defendant assured Plaintiff it would. In regard to these findings, "[i]t is not error for a trial court to credit one expert's testimony over another's." *Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 2013-NMSC-017, ¶ 39, 301 P.3d 387. "When the trial court's findings of fact are supported by substantial evidence . . . refusal to make contrary findings is not error." *Griffin v. Guadalupe Med. Ctr., Inc.*, 1997-NMCA-012, ¶ 22, 123 N.M. 60, 933 P.2d 859.

{21} Defendant also disputes the district court's conclusion that "Defendant failed to perform all contracted-for obligations to the expected workmanlike standard and with the ordinary skill of those who undertake such work." Defendant argues that the estimate, the basis for determining the "contracted-for obligations," does not constitute an agreement between the parties that the well would be constructed according to those exact specifications. Defendant states that he was "not bound to build the well to the exact specifications set forth in the [e]stimate." For three reasons, we reject Defendant's argument.

{22} First, Defendant does not challenge the district court's finding that the parties "entered into a contract based on Defendant's second estimate and oral statements[,]" nor does Defendant challenge the finding that both parties agreed to proceed without further written agreement based on the estimate. "An unchallenged finding of the trial court is binding on appeal." *Seipert v. Johnson*, 2003-NMCA-119, ¶ 26, 134 N.M. 394, 77 P.3d 298.

{23} Second, Defendant argues that Plaintiff was "fully cognizant of what the differences between an '[e]stimate,' an '[i]nvoice' and a '[c]ontract' are in the normal course of business practices," but points to nothing in the record to support this assertion. As we have stated previously, "[t]his court will not search the record to find evidence to support" a party's claim. *In re Estate of Heeter*, 1992-NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990. It appears that by stating Plaintiff knew the differences between an estimate and a contract, Defendant attempts to argue that Plaintiff had reason to know that the well's final specifications would differ from the estimate. However, the evidence shows that Plaintiff's understanding of the agreement between the parties was that Defendant would construct the well based on the specifications in the estimate, since Defendant refused to provide Plaintiff with a written contract when asked to do so, leading to the parties' agreement to proceed based on the written estimate.

{24} Third, Defendant states that he reviewed the estimate with Plaintiff, and that Plaintiff understood there were items in it

that might or might not appear on the final invoice. However, examination of the testimony demonstrates that this discussion was limited to the fact that the amounts billed on the final invoice might deviate from the estimate, not that the specifications of the well would be different.

{25} "When a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts, viewing them in a manner most favorable to the prevailing party[.]" *Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.*, 1991-NMSC-097, ¶ 8, 113 N.M. 9, 820 P.2d 1323. Because the oral contract between the parties was based on the specifications found in the estimate, we conclude that the district court correctly applied the law to the facts of this case in its conclusion that Defendant breached his contract with Plaintiff when he failed to build the well to the specifications described by the estimate.

3. The District Court Did Not Err When it Found Defendant to Have Breached the Contract By Failing to Design and Construct the Well in a Workmanlike Manner With the Ordinary Skill of Those Who Undertake Such Work

{26} Defendant next contends that the district court erred in determining that he failed to construct the well in a workmanlike manner. As grounds for his claim, Defendant challenges many of the same findings of fact he challenged for his claim that the district court erred when it found him in breach of contract. We do not reconsider factual findings we have previously determined are supported by substantial evidence, but do examine the additional disputed findings and the district court's conclusion of law regarding the manner and skill with which the well was constructed by Defendant.

{27} Defendant challenges the finding that the well "substantially failed [in] March[] 2011." However, there is substantial evidence in the record to support the finding that the well had indeed failed by March 2011. Plaintiff testified that as of that date, the well ceased to produce anything more than a sandy surge of water. "[W]e review the evidence in the light most favorable to support the trial court's findings, resolving all conflicts and indulging all permissible inferences in favor of the decision below." *Jones v. Schoellkopf*, 2005-NMCA-124, ¶ 8, 138 N.M. 477, 122 P.3d 844. In reviewing the evidence according to this standard, we conclude that the district court had a sufficient basis for its finding that the well had substantially failed. Plaintiff's testimony, credited by the district court, alone is sufficient to establish a basis for the district court's conclusion that the well failed in March 2011.

{28} Defendant next disputes the trial court's finding that the well's ultimate failure was caused by "Defendant's inadequate design and construction of the well." To support his argument, Defendant states that the causes of failure assigned by the district court are "contrary to the fact that the well was producing according to its design for nearly four years" and are "based upon speculation and conjecture . . . not supported by substantial evidence." We disagree. The finding was not based upon speculation or conjecture, but rather on evidence that included expert testimony. The record is replete with testimony that, in several respects, Defendant failed to meet workmanlike standards and customary practices. For example, Defendant, among other things, failed to install an end cap as customarily used in well drilling, failed to use the proper size of gravel, failed to adhere to state engineer standards, and failed to construct the well in such a way as to keep certain biofouling materials out. This evidence was substantial in demonstrating that the failure of the well was caused by Defendant's failure to construct the well to a workmanlike standard, and was cited by the district court to support its finding that Defendant did not design and construct the well to a workmanlike standard. We will "not disturb such findings, weigh the evidence, resolve conflicts or pass on the credibility of witnesses where the evidence substantially supports the findings made by the trial court." *Baker v. Benedict*, 1978-NMSC-087, ¶ 17, 92 N.M. 283, 587 P.2d 430.

{29} Defendant also challenges the district court's conclusion that he failed to design and construct the well in a workmanlike standard with the ordinary skill of those who undertake such work. "Unlike express warranties, implied warranties are not bargained for; they are imposed by law." *Salazar*, 2008-NMSC-054, ¶ 14. The implied warranty in a contract for drilling a water well is that "the work shall be done in a workmanlike manner with the ordinary skill of those who undertake such work." *Davis*, 1959-NMSC-084, ¶ 6. Defendant asserts that he constructed the well according to his experience and common practices and that "[n]one of [the] differences between the [e]stimate and the [i]nvoice demonstrates the well was not constructed in a workmanlike manner with the ordinary skill of those who undertake such work." However, as discussed above, the record is replete with evidence demonstrating that Defendant's construction and design of the well was not completed in a workmanlike manner. Expert testimony concluded the well was not designed or constructed to this standard. Nor was the well constructed with the ordinary skill of those who undertake such work, given, for example, that Defendant varied his work from applicable state regulations and used materials that were incompatible with workmanlike construction.

{30} "[I]t is not the function of an appellate court on review to weigh the testimony and evidence presented below, but rather to ascertain whether there is substantial evidence to support the trial court's findings of fact and conclusions." *Newcum v. Lawson*, 1984-NMCA-057, ¶ 30, 101 N.M. 448, 684 P.2d 534. Here, there is substantial evidence to support the challenged findings of fact which in turn support the challenged conclusions of law. Therefore, we find no error in the district court's conclusion that Defendant failed to design and construct the well in a workmanlike standard with the ordinary skill of those who undertake such work.

4. Any Error by the District Court in Using Negligent Misrepresentation as a Basis For Its Award of Consequential Damages Was Harmless

{31} Defendant next argues that the district court did not have a sufficient basis to award damages based upon negligent misrepresentation. Specifically, Defendant asserts that "the [district c]ourt expressly found [Plaintiff] failed to establish two of the four requisite elements of a negligent misrepresentation claim" and thus there was no basis to award damages for negligent misrepresentation. To recover under a theory of negligent misrepresentation, a plaintiff must show that: (1) the defendant made a material representation to plaintiff, (2) the plaintiff relied upon the representation, (3) the defendant knew the representation was false or made it recklessly, and (4) the defendant intended to induce reliance by the plaintiff. *Saylor v. Valles*, 2003-NMCA-037, ¶ 17, 133 N.M. 432, 63 P.3d 1152. Here, the district court found that Plaintiff failed to establish that Defendant's misrepresentations were made recklessly or with knowledge they

were false, and that they were made with the intent to deceive Plaintiff. Defendant argues that because the district court explicitly found against Plaintiff on two necessary elements of negligent misrepresentation, negligent misrepresentation should not have been a basis for Plaintiff's recovery. While we agree with Defendant that Plaintiff's claim for negligent misrepresentation fails for lack of necessary elements, on appeal the aggrieved party "[has] the burden of demonstrating that [it was] prejudiced by the claimed error." *Scott v. Brown*, 1966-NMSC-135, ¶ 20, 76 N.M. 501, 416 P.2d 516. Defendant makes no claim that he was prejudiced by the inclusion of negligent misrepresentation as a basis for recovery and thus has not met his burden.

{32} Even allowing that the district court erroneously included negligent misrepresentation as a basis for Plaintiff's recovery, we find no prejudice in the error. Under well-established law, "[a]n appellate court does not correct harmless error." *Id*. While it is well-accepted that "[d]uplication of damages or double recovery for injuries received is not permissible," *Hood v. Fulkerson*, 1985-NMSC-048, ¶ 12, 102 N.M. 677, 699 P.2d 608, there is no claim of duplicative damages in this case. Negligent misrepresentation was simply one of two alternative theories the district court determined justified awarding Plaintiff consequential damages in the amount of $14,997.74. "Where there are different theories of recovery and liability is found on each, but the relief requested [is] the same, namely compensatory damages, the injured party is entitled to only one compensatory damage award." *Id*. Here, there is no argument, nor evidence in the record, that Plaintiff received more than one compensatory damage award, and Defendant does not argue that the district court was unjustified in awarding consequential damages based on the breach of contract aside from the arguments we have already rejected above. Accordingly, we conclude that the district court appropriately awarded consequential damages, and given the lack of prejudice to Defendant, conclude also that its error regarding the inclusion of negligent misrepresentation as a basis for recovery was harmless.

5. The District Court Erred in Awarding $2,500 in Consequential Damages for an Estimated Future Expense, but Did Not Err in Other Aspects of Its Award of Consequential Damages

{33} Defendant next challenges the district court's finding "concerning compensatory damages" and asks this Court to overturn the award of "compensatory damages." However, it appears from the remainder of Defendant's argument that his intent is to challenge the district court's award of consequential damages to Plaintiff in the amount of $14,997.74. Specifically, Defendant contends that (1) there is not substantial evidence to support the district court's awarding of consequential damages, (2) absent a showing of "special circumstances" there can be no award of consequential damages, and (3) the district court's failure to make an explicit finding that the damages were objectively foreseeable is grounds for reversal. We address each argument in turn.

{34} First, Defendant argues that the consequential damages are not supported by substantial evidence. In particular, Defendant contends that the $2,500 estimated cost of plugging the well was not supported by any evidence other than Plaintiff's testimony and is "wholly speculative." As we explain below, our review of the record indicates that Defendant is correct in this regard.

{35} "[W]hen it is possible to present accurate evidence on the amount of damages, the party upon whom the burden rests to prove damages must present such evidence." *First Nat'l Bank in Albuquerque v. Sanchez*, 1991-NMSC-065, ¶ 18, 112 N.M. 317, 815 P.2d 613. We have not allowed damages to stand when they are speculative or based on "no more than mere estimates." *Id.* In this case, Plaintiff's future cost of having to plug Defendant's well was based only on an estimate that Plaintiff developed himself and had not yet paid. Therefore, we agree with Defendant that the district court's award of $2,500 for the estimated future cost of plugging the well was unsupported by substantial evidence and thus it was error for the district court to award these damages.

{36} As to the additional consequential damages, Defendant challenges that these too are unsupported by substantial evidence. We disagree. There is evidence in the record, including Plaintiff's testimony and admitted exhibits, to support the district court's finding that Plaintiff did suffer the remaining consequential damages. These included the cost of filing the application for the well, the cost of publishing the required legal notice for the application for the well, the fees paid for the well clean-out, the fees paid for well evaluation reports, and the fee paid for a video survey of the well to determine the cause of the well's problems. Because each of these damages is supported by testimony and admitted exhibits, including receipts and invoices, we leave these awards intact and undisturbed.

{37} Second, Defendant argues that absent a showing of "special circumstances," there can be no award of consequential damages. As support for this proposition, Defendant cites *Sunnyland Farms*, *Inc.* in which our Supreme Court stated that it "would expect the trial court to find special circumstances, beyond the ordinary course of events" to support a finding that the plaintiff's damages were foreseeable to defendant. 2013-NMSC-017, ¶ 17 (internal quotation marks and citation omitted). In *Sunnyland Farms*, the plaintiff sued its electric provider, alleging that it suffered consequential damages from a fire at its facility as the result of the defendant's wrongful termination of service. *Id.* ¶ 1. When a fire broke out at the plaintiff's facility, employees and firefighters were unable to extinguish the fire since its fire suppression systems were powered by electricity. *Id.* The plaintiff argued that but for the defendant's conduct, the facility could have been saved. *Id.* The district court found that the defendant was liable to the plaintiff for consequential damages that resulted from the fire. *Id.* ¶ 7. Our Supreme Court reversed the award of consequential damages, holding that the cause of the fire was so attenuated from the water shut off that, absent special circumstances demonstrating the defendant knew of the plaintiff's particular vulnerability to fire or its dependence on electricity for fire suppression, there could be no finding that the plaintiff's damages were foreseeable to the defendant. *Id.* ¶ 24.

{38} Defendant would have us read *Sunnyland Farms* as requiring special circumstances in all cases with consequential damages. We decline to extend *Sunnyland Farms* to the degree requested. Here, the consequential damages awarded to Plaintiff for Defendant's conduct are much less attenuated than those awarded and reversed in *Sunnyland Farms* and thus there is no need for a finding of special circumstances. In *Sunnyland Farms*, the court stated that "[i]n a contract action, a defendant is liable only for those consequential damages that were objectively foreseeable as a probable result of his or her breach when the contract was made." *Id.* ¶ 16. The court looked for special circumstances in that case only because the resulting damages were so far removed

from the defendant's actions that, absent special circumstances, the defendant could not have been expected to anticipate them. *Id.* ¶¶ 21, 24.

{39} In this case, the following consequential damages were awarded: the cost of filing the application for the well, the cost of publishing a legal notice for the well application, the costs of the well clean out, and the costs of the engineer's evaluation of the well. All of these fall within the "ordinary course of events," that could foreseeably flow from Defendant's breach, thus relieving Plaintiff of the need to prove "special circumstances." *Id.* ¶ 17 (internal quotation marks and citation omitted).

{40} For his final argument on this issue, Defendant contends that the district court's failure to make an explicit finding that the damages were objectively foreseeable is grounds for reversal. Notably, Defendant does not appear to argue that Plaintiff's consequential damages were in fact not foreseeable, rather that the district court's alleged error in failing to make an explicit finding that such damages were foreseeable precludes Plaintiff from recovery. However, Defendant cites no case law to support his assertion that such an explicit finding is required. It is well established that this Court will not consider propositions that are unsupported by citation to authority. *See ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969.

{41} Although we decline to address whether our law requires an explicit finding of objective foreseeability, because the underlying issue is whether the district court's conclusion of law that Plaintiff is entitled to consequential damages is supported by its findings, we do address that question here. The district court found that Plaintiff "suffered additional recoverable consequential damages, beyond the amounts paid directly to Defendant." As discussed above, that finding was supported by substantial evidence, with the exception of damages in the amount of $2,500 for the future cost of filling the well. While "[i]t is basic that a judgment cannot be sustained on appeal unless the conclusion upon which it rests finds support in the findings of fact," *Galvan v. Miller*, 1968-NMSC-139, ¶ 7, 79 N.M. 540, 445 P.2d 961, "findings are sufficient if a fair construction of all of them, taken together, justif[ies] the trial court's judgment." *H.T. Coker Constr. Co. v. Whitfield Transp., Inc.*, 1974-NMCA-002, ¶ 9, 85 N.M. 802, 518 P.2d 782. Here, the district court's conclusion rested on its findings of fact, and considering those findings collectively we can reasonably infer that implicit in the district court's finding that Plaintiff suffered consequential damages is that those consequential damages were indeed foreseeable. "If, from the facts found, the other necessary facts may be reasonably inferred, the judgment will not be disturbed." *Herrera*, 1991-NMCA-089, ¶ 14.

{42} We conclude that the district court's findings of consequential damages are supported by substantial evidence, with the one exception of the $2,500 in damages for the future cost of plugging the well. We are not persuaded by Defendant's arguments that consequential damages must be supported by a finding of special circumstances and here required an explicit finding of objective foreseeability. Consequently, we reverse the district court's award of consequential damages in the amount of $2,500, but leave the remainder of its consequential damages award intact.

6. The District Court Did Not Err in Determining That Plaintiff's Unfair Trade Practices Act (UPA) Claim Was Not Groundless and in Denying Defendant an Award of Attorney Fees

{43} For his final claim of error, Defendant challenges the district court's "Conclusion No. 70" that Plaintiff's UPA claim was not groundless and that Defendant was not entitled to attorney fees.[2] We reject Defendant's arguments as to these issues.

{44} Under the UPA, a party who prevails against a UPA claim is entitled to recover attorney fees if the court finds that the opposing party brought a groundless claim. NMSA 1978, § 57-12-10(C) (2005). "In interpreting Section 57-12-10(C), however, we do not read the statute to authorize an award of attorney[] fees to [the d]efendants merely because they successfully prevailed against the claims asserted by [the p]laintiff." *G.E.W. Mech. Contractors, Inc. v. Johnston Co.*, 1993-NMCA-081, ¶ 23, 115 N.M. 727, 858 P.2d 103. A claim is considered groundless, which we have held is synonymous with frivolous, *id.* ¶ 24, when "there is no arguable basis in law or fact to support the cause of action and the claim is not supported by a good-faith argument for the extension, modification, or reversal of existing law." *Id.* ¶ 23.

{45} Defendant's only basis for this challenge is that Plaintiff did not "make a good faith argument for the extension, modification or reversal of well-established existing law . . . ," *see Davis*, 1959-NMSC-084, ¶ 6, that a well driller cannot warrant the performance or longevity of a well. Defendant mischaracterizes the text of *Davis*, however. We have already noted that while Davis does not impose an implied warranty in a contract for the drilling of a producing well, there is nothing in *Davis* to support Defendant's contention that a well-driller cannot offer an express warranty. Plaintiff never claimed an implied warranty, but rather that Defendant told him the well would last fifty years. The district court concluded that this statement created an express warranty between the parties. Thus, Plaintiff had no obligation to make an argument for the extension, modification, or reversal of established law because the law cited by Defendant had no application to this case. Because Defendant offers no argument other than his conclusory assertion that Plaintiff failed to make a proper argument, we hold that the district court did not err in finding Plaintiff's claim was not groundless.

{46} Defendant further challenges the district court's conclusion that he is not entitled to attorney fees. Our Supreme Court has stated numerous times in this regard that "[c]onclusions of law must be supported by findings of ultimate fact." *Torres v. Plastech Corp.*, 1997-NMSC-053, ¶ 13, 124 N.M. 197, 947 P.2d 154. Here, the district court's finding that Plaintiff's claim was not groundless provides sufficient support for its conclusion. For Defendant to prevail on his claim for attorney fees, "it is not enough to show that [the p]laintiff did not prevail on such claims. The party must also establish that, at the time such claim was filed, the claim was initiated in bad faith or there was no credible evidence to support it." *Jones v. Beavers*, 1993-NMCA-100, ¶ 23, 116 N.M. 634, 866 P.2d 362. Other than his conclusory assertion that Plaintiff failed to make an argument for the extension, modification, or reversal of existing law, Defendant makes no argument

[2]Given the rest of Defendant's argument and that there is no "Conclusion No. 70," we assume that Defendant's intent is to challenge the district court's finding that Plaintiff's UPA claim was not groundless, along with its conclusion that Defendant was not entitled to attorney fees.

that Plaintiff initiated his claim in bad faith or without evidentiary support. "It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence[.]" *Chan v. Montoya*, 2011-NMCA-072, ¶ 9, 150 N.M. 44, 256 P.3d 987 (internal quotation marks and citation omitted).We therefore conclude that the district court did not err in finding that Defendant is not entitled to attorney fees.

Plaintiff's Claims of Error

7. The District Court Did Not Err in Denying Plaintiff's Claim for Unfair Trade Practices

{47} In his cross-appeal, Plaintiff first argues that the district court erred in denying his claim for unfair trade practices. As grounds for this appeal, Plaintiff challenges several of the district court's findings of fact and its conclusion that "Plaintiff did not demonstrate Defendant engaged in any unfair or deceptive [trade] practice that violated New Mexico's Unfair [Trade] Practices Act." Plaintiff argues that the remaining findings of fact demonstrate that Plaintiff in fact did satisfy the elements of a UPA claim, and thus the district court erred in denying his claim.

> Under the UPA, an unfair trade practice is:
> a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of the person's trade or commerce, that may, tends to or does deceive or mislead any person.

NMSA 1978, § 57-12-2(D) (2009). We agree with Plaintiff that the first element, that Defendant made false or misleading representations, is supported by the district court's unchallenged findings. We disagree, however, with Plaintiff's assertion that the false or misleading representations were knowingly made. Because the second element required for a claim under the UPA is not satisfied, we decline to address the third element.

{48} Plaintiff argues that the district court's findings of multiple negligent misrepresentations "must" lead to the conclusion that those representations were knowingly made. We disagree. Our Supreme Court has said that a "knowingly made" statement is made when the "party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading." *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 17, 112 N.M. 97, 811 P.2d 1308 (internal quotation marks omitted). Under our case law, " 'knowingly made' is an integral part of all UPA claims and . . . must be the subject of actual proof." *Atherton v. Gopin*, 2015-NMCA-003, ¶ 47, 340 P.3d 630. A negligent misrepresentation is made when a party fails to exercise reasonable care or competence in communicating information. *W. States Mech. Contractors, Inc. v. Sandia Corp*., 1990-NMCA-094, ¶ 15, 110 N.M. 676, 798 P.2d 1062. Plaintiff argues that the reasonableness standard is implicated in both negligently made and knowingly made misrepresentations, and thus the " 'knowingly' requirement should be established when representations are made negligently about material facts that are within the expected knowledge of [D]efendant." We are not persuaded. If we adopt Plaintiff's view of the UPA, a negligent representation would always be knowingly made and there would be no distinction between the two standards.

{49} Plaintiff's assertion regarding his conclusion that negligently made representations are ipso facto knowingly made appears to be based on his theory that knowingly is a lesser standard than that of negligence. To support his argument, Plaintiff cites *Cotter v. Novak*, 1953-NMSC-093, 57 N.M. 639, 261 P.2d 827. In *Cotter*, the plaintiff, a young child, was injured when another child discharged a nail into the child's eye using a dart gun. *Id.* ¶ 1. The plaintiff brought suit against the property owner, alleging that by "knowingly permitt[ing]" cans of nails to remain on the premises, the defendant had acted negligently. *Id.* Our Supreme Court held that because there was nothing inherently dangerous about nails, and because a reasonable person could not foresee an injury resulting from the nails being left on the premises, the plaintiff failed to state a claim for which relief could be granted. *Id.* ¶¶ 7, 9. Unlike Plaintiff, we see nothing within our Supreme Court's ruling that leads us to conclude knowingly and negligently are now to be interchangeably used terms or elements, and certainly nothing to indicate that which is negligently or improperly constructed was therefore knowingly so.

{50} Plaintiff furthers argues that Defendant "certainly had knowledge of such circumstances that would ordinarily lead to knowledge of the actual facts concerning his various statements." However, in findings not disputed by Plaintiff, the district court found that Defendant failed to keep sufficient records about the well and the work performed constructing it, and could not state with any certainty what work was performed on the well. This would seem to contradict the idea that Defendant "knowingly" made representations to Plaintiff because at the time they were made, Defendant did not have knowledge one way or another regarding their truth or falsity.

{51} Finally, we believe that if the Legislature intended to allow claims under the UPA to proceed under a negligence standard, it would have indicated as much in the language of the UPA. "In interpreting statutes, [the appellate courts] seek to give effect to the Legislature's intent, and in determining intent we look to the language used[.]" *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 13, 121 N.M. 764, 918 P.2d 350. Because the language used by the UPA requires a "knowingly made" misrepresentation, rather than a negligent misrepresentation, we conclude that the Legislature intentionally chose the higher "knowingly" standard over the negligence standard. *See* § 57-12-2(D). Because Plaintiff has failed to point to evidence in the record to demonstrate that Defendant's misrepresentations satisfy this standard, and because he has not persuaded this court that knowingly is a lesser standard than negligently, we conclude that the district court did not err in finding that Defendant did not knowingly make misrepresentations to Plaintiff.

8. The District Court Did Not Err in Denying Plaintiff's Claim for "Unconscionable Trade Practice"

{52} Plaintiff's second issue is whether the district court erred in effectively denying his claim for unconscionable trade practice by finding that "Plaintiff failed to establish Defendant's acts and practices constituted an unconscionable trade practice." Plaintiff contends that this finding is more accurately categorized as a legal conclusion and thus warrants de novo review. "Findings of fact and conclusions of law are often indistinguishable, and a reviewing court is not bound by a designation as a finding." *Miller v. Bank of Am., N.A.*, 2015-NMSC-022, ¶ 27, 352 P.3d 1162 (alterations, internal quotation marks and

citation omitted). Further, "[t]o the extent that [the p]laintiff contends that there are errors of law in the trial court's conclusions or in those findings that function as conclusions, we apply a de novo standard of review." *Jones*, 2005-NMCA-124, ¶ 8. We agree with Plaintiff that what constitutes an unconscionable trade practice is a question of law, dependent on the factual circumstances present. We therefore apply de novo review.

> The UPA defines an unconscionable trade practice as:
>
> [A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:
>
> (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
>
> (2) results in a gross disparity between the value received by a person and the price paid.

Section 57-12-2(E). Here, Plaintiff contends that the value he received from the contract is grossly disproportionate to the price he paid. As grounds for this claim, Plaintiff bases his determination of value on the longevity of the well. Plaintiff was told by Defendant that Plaintiff could expect the well to last about fifty years, and instead it lasted less than four before it "substantially failed."

{53} The leading case on unconscionability is *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, 329 P.3d 658. In that case, our Supreme Court declared certain payday loans to be unconscionable, the least expensive of which carried a 1,147.14 percent interest rate. *Id.* ¶ 36. The Court held that the loans were objectively low-value products which were "grossly disproportionate to their price." *Id*. The primary consumers of the payday loans were those in poverty, the unbanked and underbanked members of society who are particularly vulnerable to the practices of payday loan companies. *See id.* ¶ 6. The district court had considered "value" in subjective terms, which our Supreme Court stated was the same as saying "the more desperate a person is for money, the more 'value' that person receives from a loan." *Id.* ¶ 35. The Court further stated that "[u]nder that erroneous reading of the statute, consumer exploitation would be legal in direct proportion to the extent of the consumer's desperation[.]" *Id*. The Court, considering value in objective terms, found that when the values received, for example, $100 or $200, were compared to the prices paid, $999.71 or $2,160.04 respectively, there was a gross disparity between the price paid and value received. *Id.* ¶¶ 7, 8, 38. The Court further stated:

> The UPA is a law that prohibits the economic exploitation of others. The language of the UPA evinces a legislative recognition that, under certain conditions, the market is truly not free, leaving it for courts to determine when the market is not free, and empowering courts to stop and preclude those who prey on the desperation of others from being rewarded with windfall profits.

Id. ¶ 34.

{54} In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity. *See Lenscrafters, Inc. v. Kehoe*, No. 28,145, 2010 WL 4924992, at *8 (Oct. 15, 2010) (non-precedential), *aff'd in part, rev'd in part on other grounds*, 2012-NMSC-020, 282 P.3d 758. In this case, Plaintiff has not met that burden, as he has summarily offered an argument for unconscionability without having provided evidence that the value received was grossly disproportionate to the price paid, other than to state that because the well lasted for less than four years, he received less than 10 percent of the longevity he was promised. Plaintiff conflates longevity and value without offering the court evidence as to how longevity determines value in this case. Under Plaintiff's view of *B&B Investment Group*, any time a defendant breaches a contract, the plaintiff's subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.

{55} Under *B&B Investment Group*, we do not look to a breach to determine whether there exists a disparity that is disproportionate. Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate. We conclude that is not the case here. Plaintiff bargained for a well with an implied warranty of a workmanlike standard and an express warranty of fifty years of use for just under $38,000. Other than that it failed to perform as expected, Plaintiff points to nothing in the record to demonstrate that what he bargained for was disproportionate to that price. Put another way, Plaintiff provides this court with no evidence that the well, as bargained for, was not worth $38,000, nor did he offer evidence to show that, even taking into account the fact the well lasted only a fraction of the time promised, the value received for the well as bargained for was grossly disproportionate to the price he paid.

{56} Given Plaintiff's potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff. *See B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 34. We find no exploitation beyond the breach of warranty, upon which claim Plaintiff has already recovered against Defendant. Plaintiff's unconscionability claim is grounded solely on the basis that the well did not last as long as Defendant said it would and thus there must be a gross disparity between the price paid and value received. However, whether the Defendant breached the parties' agreement and whether the well lasted as long as Defendant assured Plaintiff it would were issues appropriately considered and disposed of by the district court under Plaintiff's other causes of action. Therefore, we hold that the district court did not err in denying Plaintiff's claim for unconscionable trade practice.

CONCLUSION

{57} We reverse the district court's award of consequential damages in the amount of $2,500, and affirm the district court's judgment in all other respects.

{58} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
M. MONICA ZAMORA, Judge

Certiorari Denied April 6, 2017, No. S-1-SC-36346

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-039

No. 34,375 (filed February 14, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
NOE JIMENEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
FERNANDO R. MACIAS, District Judge

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Opinion

J. Miles Hanisee, Judge

{1} Defendant, a self-represented litigant who was assisted by standby counsel at trial, was charged with and convicted of being a felon in possession of a firearm in violation of NMSA 1978, Section 30-7-16 (2001), and resisting, evading, or obstructing an officer in violation of NMSA 1978, Section 30-22-1(B) (1981). Defendant appeals both convictions and proffers myriad arguments to support reversal. He asserts: (1) his Sixth Amendment right under the United States Constitution to confront witnesses was violated, (2) the State failed to present sufficient evidence to sustain his convictions, (3) the district court committed fundamental error when it failed to properly instruct the jury on the relevant law for constructive possession, (4) the district court erred when it allowed the State to introduce evidence of Defendant's pending civil lawsuit against the City of Las Cruces, and (5) the State committed prosecutorial misconduct. We affirm in part, reverse in part, and remand for resentencing in accordance with this opinion.

BACKGROUND

{2} On February 25, 2012, Defendant went to the Arid Club in Las Cruces, New Mexico. The Arid Club is a place where Alcoholics Anonymous and Narcotics Anonymous meetings are held. Defendant was a member of the Arid Club and went to the club that day because he was having a bad day and wanted to talk to someone. Defendant donned a black bandana, a black shirt, Army pants, biker boots, and a bulletproof vest which was worn underneath his shirt. According to Defendant, this was his normal attire except for the bulletproof vest, which he wore that day because he felt his life was in danger. Defendant was also carrying nunchucks.

{3} Only three people were at the Arid Club when Defendant arrived. One was Brandon Chandler, a volunteer at the club who was running the snack bar that day. Another was someone who identified himself to police as Chandler's case manager. The third person was never identified in the record. At some point after Defendant had entered the Arid Club, the Las Cruces Police Department responded to a call at the club. It is unclear exactly who called the police, what was reported, and to what kind of incident police believed they were responding.

{4} Wallace Downs, a detective with the Las Cruces Police Department at the time of the incident, testified at trial that he went to the Arid Club in response to a call from another officer, Sergeant Ronnie Navarrete, who had been "flagged down" at the club. After briefly speaking with Sergeant Navarrete, who did not testify at trial, Detective Downs began interviewing people at the scene to try to determine if there were any witnesses who could describe what was going on inside the club. Detective Downs spoke with the person who identified himself as Chandler's case manager. The case manager said he had a phone number for Chandler, with whom Detective Downs was then able to make telephonic contact.

{5} According to Detective Downs, Chandler "was talking very low as if he were scared or concerned." There was conflicting testimony regarding whether Chandler was being held against his will inside the Arid Club, but Detective Downs testified that Chandler told him that there was a person inside with a gun and that he did not think he could leave. Defendant testified that Chandler was free to leave at any time. Everyone agreed that once Chandler gave Defendant the phone and Detective Downs asked Defendant to let Chandler leave the club, Chandler walked out within minutes.[1]

{6} Detective Downs spent approximately one hour on the phone with Defendant, first building a rapport with him and then asking that Defendant surrender to police. Defendant stated that he was armed with a gun, did not want to "go on . . . living," and wanted to have the police shoot him. Detective Downs requested at least three to five times that Defendant put down his weapon and come out with his hands up to surrender to police. Detective Downs recalled that Defendant agreed to surrender a couple of times but never did. Eventually, the call ended because the battery in the phone Defendant was using died.

{7} Soon after, a tactical team that had assembled on scene, consisting of SWAT officers and a K-9 unit, entered the Arid Club and apprehended Defendant. According to Joshua Savage, an officer assigned to the Las Cruces Police Department's K-9 unit, Defendant did not immediately surrender, and application of force was necessary to bring him into custody.

{8} Following Defendant's arrest, police searched the Arid Club and obtained a

[1]The State called Chandler to testify at trial; however, Chandler was an uncooperative witness and informed the jury that he subscribed to the "code" that ex-convicts, like himself, do not testify in criminal cases.

search warrant for the car that Defendant drove there. Inside the club, police recovered a gun that contained six bullets, two of which were live rounds, and a bullet on the floor. Another forty-five rounds of ammunition were located in a bag found inside the vehicle driven by Defendant.

{9} Defendant appeals both counts of conviction. Additional facts are provided as necessary to our discussion.

DISCUSSION

{10} First we take up the ammunition's admissibility, which hinges on Defendant's Confrontation Clause argument, then discuss whether there was sufficient evidence to support Defendant's convictions. Next, we address whether the district court erred in instructing the jury and allowing evidence of Defendant's pending lawsuit against the City of Las Cruces before turning to Defendant's claim of prosecutorial misconduct.

I. The Trial Court Did Not Violate Defendant's Right of Confrontation When it Admitted Evidence Seized From Defendant's Car Without Defendant Having an Opportunity to Confront the Officers Who Prepared and Executed the Search Warrant

{11} Defendant argues that his Sixth Amendment right to be confronted with the witnesses against him was violated when the State presented physical evidence seized from his car without calling certain witnesses. The central thrust of Defendant's argument on appeal is that he had the right to confront officers that searched his car and the officer that arrested him. Absent such opportunity, Defendant contends, the district court erred by denying his motion to suppress evidence, including the ammunition recovered from his car. Defendant also makes a perfunctory argument that his right of confrontation was violated because the officer who prepared the search warrant for his car was not present at trial. Defendant misunderstands the scope of the Confrontation Clause, and we take this opportunity to address evidence and testimony to which it does not apply.

{12} The Sixth Amendment's Confrontation Clause entitles a criminal defendant to "be confronted with the witnesses against him[.]" U.S. Const. amend. VI. Challenges under the Confrontation Clause must be resolved as a matter of law, which we review de novo. *See State v. Huettl*, 2013-NMCA-038, ¶ 16, 305 P.3d 956. The Confrontation Clause "prohibits the introduction of testimonial hearsay unless the accused has had the opportunity to cross-examine the declarant." *State v. Carmona*, 2016-NMCA-050, ¶ 15, 371 P.3d 1056 (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). It "applies to witnesses against the accused who provide testimony for the purpose of establishing or proving some fact." *Huettl*, 2013-NMCA-038, ¶ 16. "[A] person is a witness for Confrontation Clause purposes when that person's statements go to an issue of guilt or innocence." *State v. Aragon*, 2010-NMSC-008, ¶ 8, 147 N.M. 474, 225 P.3d 1280, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. "Testimonial statements" include those that convey information about evidence that was gathered after an "emergency has been resolved and the police have turned their attention to collecting evidence for use in a criminal prosecution against a known criminal perpetrator." *Carmona*, 2016-NMCA-050, ¶¶ 17, 19. "[B]asis evidence," which includes out-of-court-statements that form the basis for a testifying witness's conclusion, whether expert or lay, is testimonial and "therefore must be subjected to Confrontation Clause scrutiny." *Id.* ¶ 37; *see also State v. Navarette*, 2013-NMSC-003, ¶¶ 13-14, 294 P.3d 435 (discussing *Williams v. Illinois*, ___ U.S. ___, 132 S. Ct. 2221 (2012)). However, where a witness testifies from personal knowledge and neither makes a statement nor draws a conclusion that is based on hearsay, the Confrontation Clause is not implicated at all. *See Crawford*, 541 U.S. at 51-52 (holding that the Confrontation Clause is intended to bar the admission of testimonial hearsay); *United States v. Ibarra-Diaz*, 805 F.3d 908, 919-20 (10th Cir. 2015) (explaining that testimony that communicates no hearsay "is generally of no concern to the Confrontation Clause").

{13} We apply these principles to Defendant's argument that the district court erred by admitting evidence seized from Defendant's car when Defendant did not have the opportunity to confront particular officers involved in the seizure and his arrest.[2] Atypically given our consideration of the merits of the issue on appeal, Defendant did not contemporaneously object to the admission of either State's Exhibit 34, the forty-five rounds of bullets, or State's Exhibit 35, the black bag in which the ammunition was found. Rather, after the evidence had been admitted and after the State rested, standby counsel moved to suppress Exhibits 34 and 35, arguing that the State had failed to lay the proper foundation for their discovery and seizure. Standby counsel also argued that the State had failed to present evidence regarding the evidence's chain of custody. The district court denied Defendant's motion to suppress, which it considered a right-of-confrontation challenge.[3] The district court relied on *State v. Lopez*, 2013-NMSC-047, ¶ 26, 314 P.3d 236 (holding that the Sixth Amendment right of confrontation does not apply in pretrial hearings) to reach its decision. While we believe the district court's reliance on *Lopez* was misplaced, as we explain below, we agree with the conclusion reached and affirm on other grounds. *See State v. Ruiz*, 2007-NMCA-014, ¶ 38, 141 N.M. 53, 150 P.3d 1003 (explaining that as a general rule, we will uphold the decision of a district court if it is right for any reason).

[2]We cannot help but observe that Defendant's own missteps in preparing for trial are what actually deprived him of an opportunity to confront the officers he wished to question. On the morning of trial, Defendant told the trial judge that he had attempted to subpoena certain officers whom he wished to call as witnesses. But Defendant—acting pro se with standby counsel—had failed to do so properly. We also note that Defendant was fully warned about the challenges of representing himself but chose to proceed pro se anyway. *See Newsome v. Farer*, 1985-NMSC-096, ¶ 18, 103 N.M. 415, 708 P.2d 327 (explaining that "a pro se litigant, having chosen to represent himself, is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar" (emphasis omitted)).

[3]Given the absence of timely objection by Defendant to the admission of the complained-of evidence and Defendant's failure to directly evoke the Confrontation Clause as the basis for his motion to suppress, we could conclude that this issue simply was not preserved, in which case we would review for fundamental error only. *See State v. Dietrich*, 2009-NMCA-031, ¶ 51, 145 N.M. 733, 204 P.3d 748 (providing that preserved *Crawford* Confrontation issues are analyzed under a harmless error standard, while un-preserved *Crawford* issues are reviewed for fundamental error only). However, because Defendant is pro se and the question presented is of constitutional magnitude, we exercise our prerogative to directly address the issue presented.

{14} On appeal, Defendant asserts, without providing support from the record, that the testifying officers "would have had to rely on the out-of-court testimonial hearsay statements of the officer who signed the affidavit and conducted the search and the officer who arrested [Defendant]." Defendant thus appears to argue that the testifying officers offered improper, testimonial "basis evidence" regarding the origin of the ammunition. We disagree.

{15} In *Carmona*, this Court held that an expert's testimony stating that the defendant's DNA was found on swabs taken from the victim was inadmissible because it violated the Confrontation Clause. 2016-NMCA-050, ¶ 37. In that case, the state argued that its expert relied on the swabs themselves, not on the unavailable Sexual Assault Nurse Examiner's hearsay statement that the swabs were taken from the victim, to reach her conclusion. We rejected the state's argument, reasoning that the swabs, and particularly the information accompanying them, were utilized to establish or prove facts that "reflect[ed] directly on [the d]efendant's guilt or innocence[,]" *id.* ¶ 38 (internal quotation marks, and citation omitted), thus making statements regarding the circumstances of their use testimonial. Because the expert had based her opinion on an unavailable witness's testimonial hearsay (i.e., that the swabs were taken from the victim and from specific locations on her body), we concluded that the defendant's right of confrontation was violated when he was deprived of an opportunity to cross-examine the person who collected the evidence. *Id.* ¶ 42.

{16} The pertinent testimony in this case is distinguishable from *Carmona*. Stella Carbajal, the evidence custodian and crime scene technician with the Las Cruces Police Department who was called to the incident at the Arid Club, was the only witness who testified regarding acquisition of the complained-of evidence. Although not one of the sworn police officers involved in the search, Ms. Carbajal's testimony was eventful: she personally collected evidence from Defendant's vehicle, including State's Exhibits 34 and 35. She likewise testified regarding the procedures used to ensure the evidentiary chain of custody and verified that State's Exhibits 34 and 35 were in the same condition as when she collected the evidence.

{17} Unlike in *Carmona*, where the defendant was denied the opportunity to cross- examine the person who collected and documented the DNA swabs from the victim, here, Defendant had, and indeed exercised, the opportunity to confront Ms. Carbajal regarding her collection and handling of the evidence in question. Defendant asked about how and where Ms. Carbajal photographed the black AARP bag that contained the forty-five bullets. He asked whether she moved that evidence. Ms. Carbajal verified for Defendant that the bag containing the ammunition was in the car when the search began and that the 45 bullets were found there. Our review of Ms. Carbajal's testimony reveals that she offered no testimonial hearsay regarding the origin or seizure of the ammunition or any other item of evidence from Defendant's car.

{18} What Defendant really seems to challenge on appeal is the fact that he did not have an opportunity to confront the additional officers who "conducted the search" of his car in order to explore a speculative theory that the bullets were planted in his car. Insofar as Defendant complains that the chain of custody for admitting the evidence is deficient, which is how he presented his argument to the district court, we reject this argument. "The admission of real or demonstrative evidence does not require the [s]tate to establish the chain of custody in sufficient detail to exclude all possibility of tampering." *State v. Rodriguez*, 2009-NMCA-090, ¶ 24, 146 N.M. 824, 215 P.3d 762. "Admission of evidence is within the district court's discretion and there is no abuse of discretion when the evidence is shown by a preponderance of the evidence to be what it purports to be." *Id.* Defendant concedes that Ms. Carbajal "was present and took pictures" of the evidence found in his car but infers that her testimony fails because she "is not a law enforcement officer[,]" a legal proposition for which he fails to provide authority or support. Defendant's claim that "[t]he trial court admitted evidence seized by officers not present at trial and therefore violated [Defendant's] right to confrontation" ignores the fact that Ms. Carbajal, while not a sworn officer but rather the evidence technician that actually seized the evidence from Defendant's car, was qualified as a fact witness to testify regarding the origin of the evidence. We cannot say that the district court abused its discretion in admitting the bullets and the bag, which contained them, into evidence given that Ms. Carbajal testified and was subjected to cross examination regarding the evidence she collected.

{19} With respect to the State's other witnesses, Defendant argues that "[t]he two officers who testified at trial did not witness the search and could not have possibly known that the bullets were seized from [Defendant's] car." But Defendant fails to demonstrate that either officer made any statement regarding the ammunition specifically found in Defendant's car. Our review of the record leads us to conclude that Defendant points to no specific examples of testimonial hearsay statements about the complained-of evidence because none exist.

{20} Officer Savage, the K-9 officer who was involved in the actual apprehension of Defendant, did not testify at all regarding the ammunition found in Defendant's car. And while Detective Downs testified that he assisted with the post-arrest search and in securing evidence, and saw the ammunition that was found in the case,[4] he did not testify that the ammunition was seized from Defendant's car, suggest that he had personal knowledge of that fact, or rely on testimonial hearsay regarding that fact. *See Crawford*, 541 U.S. at 51-52 (holding that the Confrontation Clause is intended to bar the admission of testimonial hearsay); *Ibarra-Diaz*, 805 F.3d at 919-20 (explaining that testimony that communicates no hearsay "is generally of no concern to the Confrontation Clause").

{21} We conclude that Defendant's Sixth Amendment right to confront the witnesses against him was not violated because no witness's testimony included testimonial hearsay. The district court did not err by denying Defendant's motion to suppress State's Exhibits 34 and 35.

II. Sufficiency of the Evidence to Sustain Defendant's Two Convictions

{22} Defendant argues that the State failed to present sufficient evidence to sustain his convictions for resisting, evading, or obstructing an officer and for being a felon in possession of a firearm. We

[4]While the record is not clear as to whether Detective Downs specifically participated in the search of the car and was personally involved in seizing the ammunition from Defendant's car, Defendant had the opportunity to confront this witness but failed to explore the matter on cross examination.

agree that there was insufficient evidence to convict Defendant of fleeing, evading, or attempting to evade a peace officer, but we disagree with respect to the felon-in-possession of a firearm charge.

A. Standard of Review

{23} "To determine whether the evidence presented was sufficient to sustain the verdict, we must decide whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Brietag*, 1989-NMCA-019, ¶ 9, 108 N.M. 368, 772 P.2d 898. We "view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "We do not reweigh the evidence and may not substitute our judgment for that of the fact finder, so long as there is sufficient evidence to support the verdict." *Brietag*, 1989-NMCA-019, ¶ 9. "Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

B. There Was Insufficient Evidence For the Jury to Convict Defendant of Resisting, Evading, or Obstructing an Officer in Violation of Section 30-22-1(B)

{24} For reasons that are not clear, the State elected to charge, and the grand jury indicted, Defendant under Subsection (B) of Section 30-22-1. Subsection (B) defines "[r]esisting, evading[,] or obstructing an officer" as consisting of "intentionally fleeing, attempting to evade[,] or evading an officer of this state when the person committing the act of fleeing, attempting to evade[,] or evasion has knowledge that the officer is attempting to apprehend or arrest him[.]" Section 30-22-1(B). The State opted not to charge Defendant under Subsection (D), which defines the prohibited conduct as consisting of "resisting or abusing any judge, magistrate[,] or peace officer in the lawful discharge of his duties." Section 30-22-1(D). As we explain below, our reading of Section 30-22-1 as a whole leads us to conclude that the State lacked sufficient evidence to convict Defendant under Subsection (B).

{25} Our Legislature chose to differentiate the manner by which a defendant can violate Section 30-22-1 by employing language indicative of action, related to flight from arrest, and separate language that involves immediate interaction between a subject and an arresting officer when the subject is non-compliant with being arrested. *Compare* § 30-22-1(B), *with* § 30-22-1(D). Regarding the language chosen by the Legislature, rules of statutory construction require that we "construe the entire statute as a whole so that all the provisions will be considered in relation to one another." *Am. Fed'n of State, Cnty. & Mun. Emps. (AFSCME) v. City of Albuquerque*, 2013-NMCA-063, ¶ 5, 304 P.3d 443 (internal quotation marks and citation omitted). Furthermore, we construe statutes "so that no part of the statute is rendered surplusage or superfluous[.]" *Id.* (internal quotation marks and citation omitted). Therefore, the Legislature's use of the term "evading" in the title and body of the statute, as well as its inclusion of a provision that makes "intentionally fleeing, attempting to evade[,] or evading an officer" a distinguishable crime under Section 30-22-1(B), is significant and, we must assume, not mere surplusage.

{26} In previously interpreting this statute, we explained that "[t]he crime of resisting, evading[,] or obstructing an officer as set forth in Section 30-22-1, contains several alternative means by which the offense may be committed." *State v. Hamilton*, 1988-NMCA-023, ¶ 14, 107 N.M. 186, 754 P.2d 857. "A defendant's act of fleeing, attempting to evade[,] or evading an officer constitutes one of the alternative methods of committing the offense proscribed under Section 30-22-1." *Id.*; *see* § 30-22-1(B). Another distinct way of violating the statute is by "resisting or abusing" an officer. Section 30-22-1(D).

{27} There is nothing to prevent the State from charging a defendant under multiple subsections if it is not clear which charge the evidence will ultimately support. *See Benavidez v. Shutiva*, 2015-NMCA-065, ¶ 24, 350 P.3d 1234 (illustrating that it is possible to charge both fleeing and resisting in violation of Section 30-22-1); *State v. Padilla*, 2006-NMCA-107, ¶ 25, 140 N.M. 333, 142 P.3d 921 (explaining that the resisting/evading instruction that the jury received allowed the jury to convict under either "fled, attempted to evade[,] or evaded" or the "resisted or abused" alternative), *rev'd on other grounds by* 2008-NMSC-006, 143 N.M. 310, 176 P.3d 299. "[T]he prosecutor is free to select the statute and the charges to be brought against [a d]efendant." *State v. Archie*, 1997-NMCA-058, ¶ 11, 123 N.M. 503, 943 P.2d 537. However, where a statute provides distinct and alternative offenses and the state chooses to charge under only a particular part of the statute, "the prosecution is limited to proving what it has charged." *State v. Leal*, 1986-NMCA-075, ¶ 14, 104 N.M. 506, 723 P.2d 977. Additionally, in order to convict, the state must present sufficient evidence of "guilt beyond a reasonable doubt *with respect to every element essential to a conviction*." *State v. Carter*, 1979-NMCA-117, ¶ 6, 93 N.M. 500, 601 P.2d 733 (emphasis added).

{28} Our uniform jury instructions reinforce the structure of Section 30-22-1 and our conclusion that a violation of one subsection cannot necessarily establish a violation of another. UJI 14-2215 NMRA contains four elements that the State must prove in order to establish violation of Section 30-22-1. Three of the elements are common to all cases, regardless of which of the "alternative methods" the state alleges a defendant used to violate the statute. The State must prove the first, second, and fourth elements contained in UJI 14-2215 in every case. *See* UJI 14-2215 ("[T]he state must prove . . . each of the following elements of the crime[.]"). Those common elements are that (1) the person being resisted, evaded, or obstructed was a peace officer, judge, or magistrate in the lawful discharge of duty; (2) the defendant knew that the person was a peace office, judge, or magistrate; and (3) the incident in question happened in New Mexico on or about a particular date. *Id.*

{29} Also under UJI 14-2215, one of four alternative actions must be proven to satisfy the third element of the offense. *See* UJI 14-2215, Use Note 3 ("Use only the applicable alternative."). *See Benavidez*, 2015-NMCA-065, ¶ 24 (confirming that a defendant can be charged under multiple subsections of the statute; in such a case, multiple applicable alternatives for the third element of UJI 14-2215 would be given, as appropriate). The four alternatives for the third element correspond to the four subsections of Section 30-22-1. Thus, when the state charges a defendant under Subsection (B) of Section 30-22-1, it would have to prove the second alternative—that "[t]he defendant . . . fled, attempted to evade[,] or evaded (*name of officer*)"; whereas when the state charges under Subsection (D), it must prove the fourth alternative—that "[t]he defendant resisted or abused (*name of officer*)[.]" UJI 14-2215.

{30} In this case, the district court instructed the jury on the essential elements of "resisting, evading, or obstructing an officer" in the following manner:

For you to find [D]efendant guilty of resisting, evading[,] or obstructing an officer as charged in Count 2, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [Detective] Downs or [Officer] Savage was a peace officer in the lawful discharge of duty;
2. [D]efendant knew Wallace Downs or Joshua Savage was a peace officer[;]
3. [D]efendant, with the knowledge that Wallace Downs or Joshua Savage was attempting to apprehend or arrest [D]efendant, *fled*, attempted to evade[,] *or evaded* Wallace Downs or Joshua Savage; and
4. This happened in New Mexico on or about the 25th day of February, 2012.

(Emphasis added.) This instruction was consistent with the way Defendant was charged in the grand jury indictment, and the third element was the appropriate alternative to give in light of Defendant being specifically charged under Subsection (B) of the statute. *See Leal*, 1986-NMCA-075, ¶ 15 ("A defendant may not be convicted of a crime for which he was not charged or tried."). The question is whether the State presented evidence to prove the third essential element: that Defendant "fled, attempted to evade[,] or evaded" Detective Downs or Officer Savage before they were able to arrest him.

{31} Defendant argues that the ordinary meaning of "evade" is "to stay away from someone or something or to slip away." The State urges us to define "evade" as "to avoid doing (something required)." Because the term "evade" is susceptible of multiple meanings, as evidenced by the parties' competing definitions that they urge us to adopt, we turn to rules of statutory construction to determine how the Legislature intended to define "evade" in Section 30-22-1. *See Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923) (explaining that rules of statutory construction "have no place . . . except in the domain of ambiguity").

{32} A "plain meaning" analysis is not appropriate here because of the facial ambiguity of the term "evade." *See Padilla*, 2008-NMSC-006, ¶ 7 ("If the language of the statute is doubtful[or] ambiguous . . . the court should reject the plain meaning rule in favor of construing the statute according to its obvious spirit or reason." (internal quotation marks and citation omitted)). Therefore, we start by applying the interpretive maxim of *noscitur a sociis*, which expresses the notion that "a word may be known by the company it keeps." *Russell Motor Car Co.*, 261 U.S. at 519.

{33} "The maxim *noscitur a sociis* applies and confines the word to a meaning kindred to that of the words with which it is associated." *City of Albuquerque v. Middle Rio Grande Conservancy Dist.*, 1941-NMSC-021, ¶ 33, 45 N.M. 313, 115 P.2d 66 (Salder, J., dissenting). This canon of statutory construction instructs that, when interpreting an unclear or ambiguous term within a statute, we "look[] to the neighboring words in a statute to construe the contextual meaning of a particular word in the statute." *In re Gabriel M.*, 2002-NMCA-047, ¶ 19, 132 N.M. 124, 45 P.3d 64; *see United States v. Williams*, 553 U.S. 285, 294 (2008) (explaining that words that are "susceptible of multiple and wide-ranging meanings" can be "narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated").

{34} In this case, Subsection (B) of Section 30-22-1 associates "attempting to evade or evading" with "fleeing." We think the fact that these terms are collocated within the same subsection evinces the Legislature's intent to liken an act of evasion or attempted evasion to fleeing. "Flee" as a transitive verb, as it is used in Section 30-22-1, is commonly defined as "to run away from." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/flee (last visited on Dec. 9, 2016). Reading "evade" and "flee" as kindred terms leads us to conclude that the Legislature intended that "evade" be understood by the common definition that most closely connects "evade" to "flee." We believe the correct way to define the term "evade" as used in Section 30-22-1 is as meaning "to elude by dexterity or stratagem" or, more simply, "to be elusive to[.]" *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/evade (last visited on Dec. 9, 2016). This definition of "evade" most closely parallels our understanding of the term "flee" as meaning "to run away from" because it shares the common characteristic of connoting the stealing away of oneself by affirmative, intentional conduct.

{35} In order, however, to not render "evade" mere surplusage, we note that these terms, while associated, are not identical or synonymous. What distinguishes them is the nature of the conduct and how evasion is achieved: "flee" being conduct that is open and obvious, and "evade" including conduct that is surreptitious. *See State v. Gutierrez*, 2005-NMCA-093, ¶ 20, 138 N.M. 147, 117 P.3d 953 (evaluating circumstances where an officer asked the defendant to stop, the defendant ignored the officer, went inside a house claiming that he needed to use the bathroom, walked out the back door of the house, then jumped over a backyard fence), *aff'd in part, rev'd in part on other grounds by* 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156. In *Gutierrez*, we described a charge under Section 30-22-1(B) as being "evading and eluding." 2005-NMCA-093, ¶ 20. While the statute does not use the term "elude," *Gutierrez*'s interpretation of the term "evade" to also mean "elude" is an interpretation that too is consistent with flight.

{36} We cannot say the same about equating "evade" with "avoid." While we acknowledge that the State correctly points to one definition of "evade" as being "to avoid doing (something required)", *see Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/evade (last visited on Dec. 9, 2016), we conclude that this is not the definition that the Legislature intended to be used in the context of Section 30-22-1(B). While one who "evades" or "eludes" is necessarily also avoiding, the inverse is not true. One can avoid (doing something required) without necessarily evading or eluding. The Legislature made "evade" the "linguistic neighbor," *Bullock v. BankChampaign, N.A.*, ___ U.S. ___, ___, 133 S. Ct. 1754, 1760 (2013), of "flee" in subsection (B), which means we are to give "evade" the meaning that most closely and logically associates it with its neighbor, "flee."

{37} This interpretation is consistent with our cases that construe Subsection (B). What all of our Subsection (B) cases have in common is that the defendant's conduct that supported conviction under Subsection (B) involved an affirmative physical act to move and/or stay away from an officer in order to avoid capture altogether (i.e., fleeing or evading), rather than the mere forestallment of being arrested (i.e., resisting or refusing to comply

with commands to surrender). *See, e.g.*, *State v. Akers*, 2010-NMCA-103, ¶¶ 1, 9-10, 149 N.M. 53, 243 P.3d 757 (describing a situation where the defendant, after briefly stopping his truck for officers who were attempting an investigatory stop, sped away and was later charged under Subsection (B)); *Gutierrez*, 2005-NMCA-093, ¶ 20, (describing circumstances where an officer asked the defendant to stop, the defendant ignored the officer, went inside a house claiming that he needed to use the bathroom, walked out the back door of the house, then jumped over a backyard fence); *State v. Diaz*, 1995-NMCA-137, ¶ 17, 121 N.M. 28, 908 P.2d 258 (explaining that "evidence that [the d]efendant was backing away from the officers . . . would have supported a finding that [the d]efendant was . . . attempting to evade arrest in violation of Section 30-22-1(B)"); *State v. Andazola*, 1981-NMCA-002, ¶¶ 3-5, 95 N.M. 430, 622 P.2d 1050 (evaluating facts where the defendant walked away from the police, went into his house, and used his dog to keep police at bay). We believe these cases make clear that, in order to violate Section 30-22-1(B), a defendant must engage in conduct that is tantamount to fleeing, which, as the language of Subsection (B) suggests, can be accomplished either openly (e.g., by running or driving away from an officer, or "fleeing"), or surreptitiously (i.e., by "evading" or "attempting to evade").

{38} By contrast, our cases that deal with Subsection (D)—"resisting or abusing"—make it clear that violations of Subsection (D) differ from Subsection (B) violations in that a defendant's violation is predicated on a direct engagement with, rather than evasion of an officer. *See State v. Cotton*, 2011-NMCA-096, ¶ 23, 150 N.M. 583, 263 P.3d 925 (describing the defendant's conduct that resulted in his being charged under Subsection (D) as kicking at officers who were trying to place him in police car and positioning his legs and head to prevent the door from being closed); *Diaz*, 1995-NMCA-137, ¶ 14 (explaining that "[a]nyone who commits aggravated assault [on a police officer] . . . also commits resisting in violation of [Section] 30-22-1(D)"); *State v. Padilla*, 1983-NMCA-096, ¶¶ 2, 9, 10, 101 N.M. 78, 68 P.2d 706 (holding that resisting an officer, such as by kicking the officer in the groin, is a lesser included offense of battery on a police officer).

{39} Our cases illustrate that another way a person can violate Subsection (D) is by avoiding doing something required, including refusing to comply with an officer's orders. *See, e.g.*, *Diaz*, 1995-NMCA-137, ¶¶ 4, 16-23 (providing that "resisting" refers not only to a defendant's overt physical act, but also to the failure to act when refusing to obey lawful police commands, such as dropping a weapon); *see also City of Roswell v. Smith*, 2006-NMCA-040, ¶ 5, 139 N.M. 381, 133 P.3d 271 (affirming the defendant's conviction under Roswell's "obstructing an officer" ordinance, Roswell, N.M., Code of Ordinances ch. 10, art. 1, § 10-48 (1999), which is equivalent to Section 30-22-1(A), (D), based on the defendant's refusal to leave a fast-food restaurant parking lot after being ordered to do so by an officer).[5] While it is true that one (and the State's preferred) definition of "evade" is "to avoid doing (something required)," these cases illustrate that our courts interpret a refusal to do something required as constituting "resisting" not "evading" an officer, which violates Subsection (D), not (B).

{40} In sum, understood temporally and geospatially, violations of Subsection (B) and Subsection (D) are distinguishable based on at what point in an encounter a defendant first begins to exhibit resistant conduct. A defendant who is not yet physically capable of being apprehended and who attempts to avoid apprehension by trying to evacuate himself from the presence of an officer is more likely to be in violation of Subsection (B). By contrast, a defendant who is effectively "cornered," i.e., whose apprehension is imminent, but who, nonetheless, chooses to challenge or forestall his arrest—either by physical battery, refusing to comply with orders, or verbally—violates Subsection (D).

{41} We turn, now, to the evidence in this case regarding Defendant's conviction under Count 2. The State relies exclusively on evidence related to the telephonic interaction between Defendant and Detective Downs to establish a violation of Section 30-22-1(B). Specifically, the State argues that Defendant's "refus[al] to comply" with Detective Downs' orders to surrender constituted evasion of Detective Downs. We disagree.

{42} Defendant's entire interaction with Detective Downs occurred via telephone and lasted somewhere between five and ten minutes, according to Defendant, and one hour, according to Detective Downs. Detective Downs testified that the reason his call with Defendant ended was that the battery in Defendant's phone died. Detective Downs further testified that, during the course of the call, Defendant agreed on perhaps two or three occasions to surrender to police. Although Defendant ultimately did not willingly surrender to police, we believe the fact that Defendant repeatedly agreed to surrender, coupled with his continued presence in the club, is evidence that he lacked the requisite intent to "flee, attempt to evade, or evade" Detective Downs under Subsection (B). While refusing to comply with Detective Downs' orders to surrender may have constituted "resisting" under our case law, *see Diaz*, 1995-NMCA-137, ¶¶ 4, 16-23, in this case we do not believe that this conduct alone was sufficient to convict Defendant as charged. And we reiterate that there was no evidence presented to suggest that Defendant surreptitiously tried to escape from the Arid Club, such as out the back or side door, in order to evade arrest. We conclude that there was insufficient evidence to convict Defendant of fleeing, evading, or attempting to evade Detective Downs.

{43} While the State acknowledges that the jury instructions allowed the jury to convict Defendant of Count 2 based on either his interaction with Detective Downs *or* Officer Savage, the State, in its briefing, points to no evidence related to Defendant's interactions with Officer Savage that would support conviction under Section 30-22-1(B). Our review of the record likewise indicates that the prosecutor, in her closing argument, focused on the fact that Detective Downs and Officer Savage "issued commands to [D]efendant" and that Defendant "didn't comply" to support a conviction under Count 2. Even viewed in the light most favorable to sustaining the jury's verdict, we are unable to identify facts that support a conviction for fleeing, evading, or attempting to evade Officer Savage.

{44} The record reflects that Officer Savage, a member of the Las Cruces Police Department's K-9 unit, entered the Arid

[5]The State's reliance on *Smith* is perplexing and unavailing. The section of the Roswell Code under which the defendant was convicted, Section 10-48, parallels Section 30-22-1(D). The Roswell Code contains a separate section—Section 10-49—that criminalizes "eluding an officer" and contains, verbatim, the language of Section 30-22-1(B).

Club after the SWAT team made contact with Defendant. Along with other officers, Officer Savage commanded Defendant to surrender. He directed Defendant also to put down the nunchucks, and Defendant complied. Defendant was then given conflicting orders, including to "get on the floor," on the one hand, and to "[co]me to us[,]" on the other hand. Defendant did not comply with either command. Officer Savage testified that "[e]ventually, very quickly a plan was put together for use of force. A bean bag shotgun along with the K-9 was going to be used to take the subject into custody." Defendant was first "engaged with several bean bag rounds in the legs" which were ineffective. Officer Savage's K-9 was then given an "apprehension command." After that, Defendant picked up a chair and threw it in the direction of the dog. The K-9 then "went in for an engagement[.]" Defendant was "kicking and striking at the dog as the SWAT team made entry and moved towards [Defendant]." In the process of Defendant being taken into custody, Officer Savage's dog bit Defendant and Defendant was tasered. All of this transpired in approximately five to eight minutes.

{45} Based on these facts, there is insufficient evidence to support a finding that Defendant "fled, attempted to evade, or evaded" Officer Savage. Defendant's actions more closely resemble conduct that we have previously stated constitutes "resisting" an officer in violation of Subsection (D). The act of throwing a chair, kicking, and striking at Officer Savage's K-9—an act of direct physical confrontation and engagement—is more similar to kicking at an officer while resisting being put in a police car like in *Cotton*. *See* 2011-NMCA-096, ¶ 23. Additionally, quite the opposite of fleeing the officers (and the K-9), Defendant stayed exactly where he was and made no attempt to leave. With respect to refusing to comply with Officer Savage's commands that he surrender, again we have held that refusing to comply with an officer's order violates Section 30-22-1(D), resisting an officer. *See, e.g.*, *Diaz*, 1995-NMCA-137, ¶¶ 4, 16-23. We do not believe that Defendant's failure to follow Officer Savage's orders—particularly when Officer Savage conceded that Defendant was being given conflicting commands—constituted evasion or attempted evasion of Officer Savage.

{46} It matters not whether Defendant was "resisting" because he "feared for [his] life" and was defending himself as he claims, or because he was confused by the conflicting commands, or because he simply did not want to surrender. The burden was on the State to prove that Defendant "fled, attempted to evade, or evaded" Officer Savage. The State failed to carry its burden, and for that reason we reverse Defendant's conviction under Count 2 and remand for resentencing.

C. There Was Sufficient Evidence For the Jury to Convict Defendant of Being a Felon in Possession of a Firearm in Violation of Section 30-7-16

{47} Because Defendant stipulated to being a convicted felon, the critical element that the State was required to prove in order for the jury to convict Defendant of violating Section 30-7-16(A) was that Defendant "possessed a firearm" on or about February 25, 2012. *See* UJI 14-701 NMRA.

{48} "Possession" may be actual or constructive. *See* UJI 14-130 NMRA. A person is in actual possession of a firearm when, "on the occasion in question, he knows what [the firearm] is, he knows it is on his person or in his presence[,] and he exercises control over it." UJI 14-130. Alternatively, the State may proceed on a theory of constructive possession, whereby it must prove that, "[e]ven if the [firearm] is not in [Defendant's] physical presence, . . . he knows what it is and where it is and he exercises control over it." *Id.* In the case of constructive possession, we "must be able to articulate a reasonable analysis that the fact-finder might have used to determine knowledge and control." *State v. Garcia*, 2005-NMSC-017, ¶ 13, 138 N.M. 1, 116 P.3d 72 (alteration, internal quotation marks, and citation omitted). Under either an actual possession or constructive possession theory, the two key elements the State must establish are knowledge and control. *See* UJI 14-130. The State must prove that the defendant knows of the "presence and character of the item possessed." *Garcia*, 2005-NMSC-017, ¶ 14 (internal quotation marks and citation omitted). Knowledge may be proved by circumstantial evidence, and the jury is permitted to draw a reasonable inference of knowledge. *Id.* ¶ 15. Control may also be established by drawing reasonable inferences from circumstantial evidence. *Id.* ¶¶ 20-22. A defendant's ability to exercise control over ammunition may give rise to an inference of control over a firearm that can utilize that ammunition. *Id.* ¶ 22.

{49} In this case, the State had sufficient evidence to proceed and secure a conviction under the theory of either actual or constructive possession. A reasonable jury could have found that Defendant's possession of the firearm was established through the testimony of Detective Downs. Detective Downs testified on direct examination that Defendant told him that he was armed with a gun. Detective Downs further testified that Brandon Chandler, the volunteer who was working at the snack bar at the Arid Club on the date in question, told him over the phone that Defendant had a gun. If the jury chose to believe Detective Downs, his testimony was sufficient to prove beyond a reasonable doubt that Defendant had knowledge and control, and thereby possession of a gun on February 25, 2012.

{50} There was additional evidence from which a reasonable jury could infer Defendant's possession of a firearm. Police recovered a handgun inside the club, sitting on a countertop within arm's reach of where Defendant admitted he had been sitting and just feet from where police apprehended Defendant. This was sufficient evidence to circumstantially establish Defendant's ability to exercise control over the gun. Police also recovered forty-five rounds of ammunition from inside the car that Defendant drove to the Arid Club on February 25, 2012. While the car belonged to Defendant's then-girlfriend, Defendant admitted that his girlfriend did not possess a firearm and would not have had any need for the ammunition that was found in the car.

{51} Finally, Defendant seems to argue that there was insufficient evidence to link him, as opposed to someone else, to the gun found at the club because it was found on a counter in an area that was open to the public. As this Court recognized in *State v. Maes*, "[i]n non-exclusive access cases, the problem the [s]tate faces is the alternative inference that some other individual with access to the premises is responsible for the presence of the contraband." 2007-NMCA-089, ¶ 17, 142 N.M. 276, 164 P.3d 975. The problem lies in the fact that "[e]vidence equally consistent with two hypotheses tends to prove neither." *Herron v. State*, 1991-NMSC-012, ¶ 18, 111 N.M. 357, 805 P.2d 624. Yet here, no evidence exists to suggest that the gun belonged to or was possessed by anyone other than Defendant. Instead, Defendant testified that Brandon Chandler, the only other person in the club with him when police

arrived on February 25, left the club before Defendant and did not place the gun police found on the counter. Furthermore, like in *Garcia*, 2005-NMSC-017, ¶ 22, where the court held that control over an ammunition clip gave rise to a fair inference of control over the gun in a non-exclusive access situation, here, police found ammunition in Defendant's car that both matched the ammunition found inside the club and was usable by the type of gun that Detective Downs testified that Defendant stated he was armed with. The jury was free to reject any inference Defendant offered that the gun was possessed by anyone other than himself.

{52} Because "a reviewing court will not second-guess the jury's decision concerning the credibility of witnesses, reweigh the evidence, or substitute its judgment for that of the jury[,]" *State v. Lucero*, 1994-NMCA-129, ¶ 10, 118 N.M. 696, 884 P.2d 1175, we conclude that the State presented sufficient evidence from which the jury could reasonably infer that Defendant either actually or constructively possessed the .22-caliber handgun recovered from inside the club.

III. The Trial Court Did Not Fundamentally Err by Failing to Give a Portion of the Constructive Possession Jury Instruction

{53} Defendant argues that the district court committed fundamental error when it failed to include optional language from UJI 14-130, the definitional instruction for "possession." We disagree.

{54} "The standard of review we apply to jury instructions depends on whether the issue has been preserved." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. "If the error has been preserved we review the instructions for reversible error." *Id.* If a party fails to "object to the jury instructions as given, . . . we only review for fundamental error." *Cunningham*, 2000-NMSC-009, ¶ 8. "Under both standards we seek to determine whether a reasonable juror would have been confused or misdirected by the jury instruction." *Benally*, 2001-NMSC-033, ¶ 12. Because Defendant failed to object to the instructions given at trial, Defendant failed to preserve this issue, and we review for fundamental error only. *See State v. Varela*, 1999-NMSC-045, ¶ 11, 128 N.M. 454, 993 P.2d 1280 ("Ordinarily a defendant may not base a claim of error on instructions he or she requested or to which he or she made no objection. . . . [F]undamental error need not be preserved . . . [and] cannot be waived." (internal quotation marks and citations omitted)).

{55} UJI 14-130 provides that "[a] person is in possession of (*name of object*) when, on the occasion in question, he knows what it is, he knows it is on his person or in his presence[,] and he exercises control over it." When the theory of possession is based on constructive possession, the instruction provides supplemental language that "*may* be used depending on the evidence." UJI 14-130, Use Note 2 (emphasis added). There are three statements that can be used to supplement the main possession instruction. The first deals with a situation where the object the defendant is accused of possessing is not in his physical presence, but where he nevertheless exercises control over it. UJI 14-130. The second deals with a situation where two or more people may be able to simultaneously constructively possess an object. *Id.* The third explains that "[a] person's presence in the vicinity of the object or his knowledge of the existence or the location of the object is not, by itself, possession." *Id.* In this case, the district court instructed the jury as follows with respect to the felon-in-possession charge:

> For you to find . . .[D]efendant guilty of possession of a firearm by a felon as charged in [C]ount 1, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [D]efendant possessed a firearm;
>
> 2. [D]efendant, in the preceding ten years, was convicted and sentenced to one or more years imprisonment by a court of the United States or by a court of any state; and
>
> 3. This happened in New Mexico on or about the 25th day of February, 2012.

See UJI 14-701.

{56} In addition to this elemental instruction, the district court instructed the jury as follows with respect to the definition of "possession":

> A person is in possession of a firearm when, on the occasion in question, he knows what it is, he knows it is on his person or in his presence[,] and he exercises control over it.
>
> Even if the object is not in his physical presence, he is in possession if he knows what it is and where it is and he exercises control over it.

{57} The district court included the latter statement even though the evidence showed that Defendant was, in fact, in the physical presence of the gun. The district court, however, did not include the third supplemental statement regarding proximity to the object: "A person's presence in the vicinity of the object or his knowledge of the existence or the location of the object is not, by itself, possession." UJI 14-130. Defendant failed to object to the instruction, including the omission of the "proximity" statement, despite the court's express invitations to register any objections to proposed instructions and to submit competing instructions. Because Defendant failed to preserve the matter, we review for fundamental error only.

{58} We begin our review by noting that in *State v. Barber*, our Supreme Court held that it was not fundamental error to fail to give any part of the definitional instruction for possession. 2004-NMSC-019, ¶ 1, 135 N.M. 621, 92 P.3d 633. In *Barber*, like in this case, the defendant's trial counsel failed to request a jury instruction defining possession. *Barber* was a case dealing with possession of a controlled substance, in which case UJI 14-3130 NMRA rather than UJI 14-130 applies. *See* UJI 14-3130 comm. cmt. ("This instruction must be given if possession is in issue and its use replaces UJI 14-130 which should not be used in controlled substance cases."). However, for our purposes, this distinction does not matter because the instructions are, for all intents and purposes, identical, and the court's reasoning in *Barber* is what matters here.

{59} The *Barber* court explained that definitional instructions are not always essential, *see* 2004-NMSC-019, ¶ 25, and held that failing to give a definitional instruction was not fundamental error because "the missing definition of possession does not implicate a critical determination akin to a missing elements instruction[.]" *Id.* ¶ 26 (internal quotation marks and citation omitted). Notably, the definitional instruction at issue in *Barber* was mandatory in a case where possession was an issue, *see* UJI 14-3130 comm. cmt. ("[t]his instruction *must be given* if possession is in issue" (emphasis added)), whereas UJI 14-130 provides that the supplemental instructions are optional. *See* UJI 14-130, Use Note 2 ("One or more of the following bracketed sentences *may be used* depending on the evidence." (emphasis added)).

{60} In a case such as this, "we must place all the facts and circumstances under close scrutiny to see whether the missing instruction caused such confusion that the jury could have convicted [the d]efendant based upon a deficient understanding of the legal meaning of possession as an essential element of the crime." *Barber*, 2004-NMSC-019, ¶ 25. Here, if the State had relied solely on Defendant's proximity to the gun found inside the club—i.e., the fact that the chair he was sitting in was directly in front of the gun that police found on the countertop inside the club—it may have been error to fail to give the "proximity" instruction because the jury may have been confused and erroneously equated "proximity" with "possession." However, the State presented other evidence unrelated to Defendant's physical proximity to the gun from which the jury could have reasonably concluded that Defendant possessed the gun. First, Detective Downs testified that Defendant told him over the phone that he was armed with a gun. Second, Detective Downs testified that Brandon Chandler stated to him over the phone that Defendant had a gun. From this evidence, the State could have proceeded on a theory of actual possession, in which case the trial court's failure to give a portion of the constructive possession definition was not error at all.

{61} We also note that the district court's instruction properly informed the jury that, in order to convict Defendant of possession, it had to find both that he knew what the gun was and that he exercised control over it. The omitted instruction of which Defendant now complains does not add anything that was not already addressed by the main definitional instruction. To instruct the jury that "[a] person's presence in the vicinity of the object or his knowledge of the existence or the location of the object is not, by itself, possession[,]" UJI 14-130, simply restates what the main instruction provides: that one can only be found to be in possession of something if he both "knows" what the object is *and* "exercises control over it." *Id.* We are satisfied that, even under a constructive possession theory, it was not fundamental error for the district court to fail to provide the jury with the optional "proximity" language of UJI 14-130.

IV. The Trial Court Did Not Abuse Its Discretion by Allowing the State to Introduce Evidence of Defendant's Pending Lawsuit Against the City of Las Cruces

{62} Defendant argues that the district court erred when it allowed the State to introduce the fact that Defendant has a pending lawsuit against the City of Las Cruces. While we find the State's responsive argument somewhat unpersuasive and the record scant as to the district court's justification for allowing the evidence, we hold that it was not an abuse of discretion and that, even assuming it was, any error in allowing evidence of Defendant's pending lawsuit was harmless.

{63} We review decisions to admit or exclude evidence under an abuse of discretion standard. *See State v. Stampley*, 1999-NMSC-027, ¶ 37, 127 N.M. 426, 982 P.2d 477; *Garcia*, 2005 NMCA-042, ¶ 38. A trial court abuses its discretion "when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize [the ruling] as clearly untenable or not justified by reason." *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citations omitted).

{64} At trial, the prosecutor's first question of Defendant on cross-examination was whether he had "filed some sort of lawsuit against the City of Las Cruces." After Defendant responded affirmatively and answered the prosecutor's next question about where the lawsuit was filed, standby counsel requested a bench conference where he made a relevancy-based objection to the prosecutor's questions about the lawsuit. The prosecutor responded, "[g]oes to bias, Your Honor. It's absolutely relevant if a witness has filed a lawsuit. It has a connection to the case." The district court overruled the objection but cautioned the prosecutor "not to belabor the point." After reestablishing that Defendant had filed a lawsuit against the City of Las Cruces related to the incident at the Arid Club, the prosecutor asked Defendant what kind of damages he was seeking. Defendant initially resisted answering and stated, "I feel . . . that has nothing to do with this case." After the trial judge instructed him to answer, Defendant began describing his claims, which included excessive force and false imprisonment, rather than the damages Defendant sought.[6] The district court stepped in to clarify the question and explained to Defendant that the prosecutor was asking him to state the amount of monetary damages he claimed to be appropriate in his civil suit. Defendant disclosed that he asked for eighty million dollars for his claims related to the February 25, 2012, incident. The prosecutor then moved on to a different line of impeachment questioning related to Defendant's criminal history.

{65} Defendant argues that evidence of his pending civil lawsuit related to the events of February 25, 2012, was not relevant to proving the charges against him and, therefore, was inadmissible. He further argues on appeal, though he did not preserve the argument at trial, that evidence of the lawsuit was "distracting to the jury, resulting in confusion of the issues and unfair prejudice." As already mentioned, the prosecutor's counterargument to Defendant's relevancy challenge at trial was simply that the evidence "[g]oes to bias." Once the evidence was admitted, the prosecutor used it to argue in closing that "[Defendant] has a bias because now he thinks he's going to get a big paycheck. Apparently, he thinks if he's not convicted, that will help his lawsuit." The prosecutor also told the jury, "you can factor that in to the sort of bias [Defendant] might have for the way that he testified here today."

{66} The State clarifies its argument on appeal as being that, because of the conflicting evidence with which the jury was presented, evidence of Defendant's lawsuit was "relevant for the purpose of assisting the jury in determining what actually happened at the Arid Club on February 25, 2012." The State reasons that the evidence would assist the jury with "reconciling . . . competing narratives" and "would have been helpful to the jury's assessment of witness credibility[.]" Echoing the prosecutor's closing argument, the State also argues that "[h]ad [Defendant] successfully persuaded the jury that his version of the events in question was the more accurate one, he could have collected potent ammunition for use in his litigation against the City." While the State's broader arguments are unconvincing, we generally agree with the State that the evidence was admissible for the purpose of attacking Defendant's credibility.

[6]The State attempts to characterize Defendant's specific reference to the nature of his claims as having "opened the door to the subject matter of the litigation." We do not agree with the State's characterization. The record reflects that Defendant, in fact, resisted discussing the lawsuit and only went into details when instructed to do so by the district court.

{67} In order to be admissible, evidence must be relevant. Rule 11-402 NMRA; *see State v. Christopher*, 1980-NMSC-085, ¶ 12, 94 N.M. 648, 615 P.2d 263. "Evidence is relevant if [(a)] it has any tendency to make a fact more or less probable than it would be without the evidence, and [(b)] the fact is of consequence in determining the action." Rule 11-401 NMRA. "Any doubt whether the evidence is relevant should be resolved in favor of admissibility." *State v. Balderama*, 2004-NMSC-008, ¶ 23, 135 N.M. 329, 88 P.3d 845.

{68} "[W]hen a defendant testifies, he is subject, within the limits of certain rules, to cross-examination the same as any other witness." *State v. Gutierrez*, 2003-NMCA-077, ¶ 13, 133 N.M. 797, 70 P.3d 797. The general rule is that the "[s]tate has a right to inquire into and comment upon the credibility of the defendant as a witness." *State v. Hoxsie*, 1984-NMSC-027, ¶ 6, 101 N.M. 7, 677 P.2d 620, *overruled on other grounds by Gallegos v. Citizens Ins. Agency*, 1989-NMSC-055, ¶ 28, 108 N.M. 722, 779 P.2d 99. Credibility is "[t]he quality that makes something (as a witness or some evidence) worthy of belief." *Black's Law Dictionary* 448 (10th ed. 2014).

{69} Bias is widely recognized as being one way to attack the credibility of a witness. *See* 1 Kenneth S. Broun, *McCormick on Evidence* § 33 (7th ed. 2013). "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *United States v. Abel*, 469 U.S. 45, 52 (1984). A criminal defendant who testifies at trial is presumed to be biased and to have an interest in the outcome of the case. *See United States v. Dickens*, 775 F.2d 1056, 1059 (9th Cir. 1985) (explaining that, when a criminal defendant testifies at trial, "the defendant's bias in his own behalf [is] self-evident").[7] Bias may also be inferred from "a witness'[s] like, dislike, or fear of a party, *or by the witness*'[s] *self-interest*." *Abel*, 469 U.S. at 52 (emphasis added). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness'[s] testimony." *Id.*; *see also State v. Chambers*, 1986-NMCA-006, ¶ 15, 103 N.M. 784, 714 P.2d 588 ("Testimony concerning bias and credibility is always relevant.").

{70} Defendant, having chosen to testify, put his credibility in issue, making evidence related to his credibility relevant. The State used the evidence of Defendant's pending lawsuit to undermine his credibility by inferring that he had reason to be untruthful in his testimony based on what the State argued was his interest in getting "a big paycheck." Because Defendant testified to the events at the Arid Club on February 25, 2012, and because Defendant's testimony was relevant to establishing whether it was more or less probable that he committed the crimes with which he was charged, it was within the district court's discretion to allow the State to introduce evidence for the purpose of impeaching Defendant's testimony. We cannot say, as a matter of law, that the district court's decision to admit the evidence was "clearly untenable or not justified by reason." *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citation omitted). We, therefore, hold that the district court did not abuse its discretion in allowing limited testimony regarding Defendant's pending lawsuit as a way of attacking Defendant's credibility.

{71} As a final matter, we note that Defendant also argues, for the first time on appeal, that the evidence of his pending lawsuit should have been excluded under Rule 11-403 NMRA, which provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Because Defendant failed to timely object on this ground at trial, we will reverse on this basis only if we are "convinced that admission of the testimony constituted an injustice that creates grave doubts concerning the validity of the verdict." *State v. Barraza*, 1990-NMCA-026, ¶ 17, 110 N.M. 45, 791 P.2d 799; *see State v. Lucero*, 1993-NMSC-064, ¶¶ 12-13, 116 N.M. 450, 863 P.2d 1071 (explaining that appellate courts review un-preserved challenges to the admission of evidence for plain error—meaning error that "affected substantial rights although the plain errors were not brought to the attention of the judge" (alteration, internal quotation marks, and citation omitted)).

{72} Defendant argues that the evidence of his pending lawsuit was "highly prejudicial" because it tended to paint him as a "litigious person and tried to demonstrate to the jury that the only reason [Defendant] was fighting this case was because of a vendetta held against other governmental agencies and so that he could win a significant amount of money." Given the other evidence in this case that the jury could have relied on to convict Defendant—namely, the testimony of Detective Downs and the physical evidence the State presented—we are not persuaded that the admission of evidence of Defendant's pending lawsuit, even if unfair, confusing, and distracting, "constituted an injustice that creates grave doubts concerning the validity of the verdict." *Barraza*, 1990-NMCA-026, ¶ 17.

{73} We hold that it was neither an abuse of discretion nor plain error for the trial court to admit evidence of Defendant's pending lawsuit.

V. The State Did Not Commit Prosecutorial Misconduct

{74} Defendant argues that it was prosecutorial misconduct, rising to the level of fundamental error for the prosecutor to (1) repeatedly mention Defendant's civil lawsuit, and (2) fail to call as witnesses the police officers who obtained the search warrant for Defendant's car and arrested Defendant. We disagree. Defendant failed to object at trial to conduct he now characterizes as prosecutorial misconduct; therefore, we will review Defendant's prosecutorial misconduct claims for fundamental error only. *See State v. Trujillo*, 2002-NMSC-005, ¶ 52, 131 N.M. 709, 42 P.3d 814.

{75} "Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citation omitted). "To find fundamental error, we must be convinced that the prosecutor's conduct created a reasonable probability that the error was a significant factor in the jury's deliberation in relation to the rest of the evidence before them." *State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351, 223 P.3d 348 (internal quotation marks and citations omitted). We will reverse a jury verdict only "(1) when guilt is so doubtful as to shock the conscience, or (2) when there has

[7]In this case, the prosecutor acknowledged a criminal defendant's assumed bias when she argued in closing that Defendant, "also, of course, doesn't want to be convicted. That's a natural bias."

been an error in the process implicating the fundamental integrity of the judicial process." *Id.* "However, an isolated, minor impropriety ordinarily is not sufficient to warrant reversal, because a fair trial is not necessarily a perfect one." *State v. Garvin*, 2005-NMCA-107, ¶ 13, 138 N.M. 164, 117 P.3d 970 (alteration, internal quotation marks, and citation omitted).

A. The Prosecutor's References to Defendant's Pending Lawsuit Against the City of Las Cruces Did Not Constitute Prosecutorial Misconduct

{76} In assessing whether prosecutorial misconduct has occurred based on statements made by a prosecutor at trial, reviewing courts are to evaluate a prosecutor's challenged statements "objectively in the context of the prosecutor's broader argument and the trial as a whole." *Sosa*, 2009-NMSC-056, ¶ 26. We start from the long-accepted proposition that "[d]uring closing argument, both the prosecution and defense are permitted wide latitude, and the trial court has wide discretion in dealing with and controlling closing argument[.]" *State v. Smith*, 2001-NMSC-004, ¶ 38, 130 N.M. 117, 19 P.3d 254 (internal quotation marks and citations omitted). "[R]emarks by the prosecutor must be based upon the evidence or be in response to the defendant's argument." *Id.* "It is misconduct for a prosecutor to make prejudicial statements not supported by evidence." *State v. Duffy*, 1998-NMSC-014, ¶ 56, 126 N.M. 132, 967 P.2d 807, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110. However, "[s]tatements having their basis in the evidence, together with reasonable inferences to be drawn therefrom, are permissible and do not warrant reversal." *State v. Herrera*, 1972-NMCA-068, ¶ 8, 84 N.M. 46, 499 P.2d 364 (internal quotation marks and citation omitted).

{77} Defendant argues that the prosecutor's repeated references to Defendant's pending civil litigation constituted misconduct because the litigation "had no bearing on the issues in this case[and were] irrelevant and prejudicial." Defendant ignores the fact that the trial court overruled his relevancy-based objection to the introduction of evidence of Defendant's pending lawsuit. The prosecutor's statements during closing and rebuttal were based on facts she had elicited from Defendant on cross-examination after standby counsel's objection was overruled. In closing, the prosecutor argued to the jury that Defendant "filed a lawsuit, thinks he's going to collect [eighty] million dollars." The prosecutor also argued that the jury should infer that Defendant "has a bias because now he thinks he's going to get a big paycheck." During rebuttal, she commented, "[D]efendant is the one with bias. [D]efendant is the one who thinks he's going to collect an [eighty] million dollar[] paycheck from the City of Las Cruces." Nothing in the prosecutor's comments during closing or rebuttal fell outside of already-admitted evidence or assumed facts not in evidence.

{78} Because the evidence referred to by the prosecutor had been admitted—whether erroneously or not—the prosecutor was free to comment on it. *Compare State v. Santillanes*, 1970-NMCA-003, ¶¶ 13-14, 81 N.M. 185, 464 P.2d 915 (explaining that the remarks of prosecutor during closing were not improper because they were based on facts in evidence), *with State v. Cummings*, 1953-NMSC-008, ¶ 8, 57 N.M. 36, 253 P.2d 321 (explaining that "a statement of facts *entirely outside of the evidence*, and highly prejudicial to the accused, cannot be justified as argument" (emphasis added)). We reject Defendant's claim that his conviction was tainted by prosecutorial misconduct.

B. The State Did Not Commit Prosecutorial Misconduct by Not Calling the Officers Involved in Securing the Search Warrant and Arresting Defendant

{79} Defendant argues that the prosecutor committed misconduct by failing to call necessary witnesses, specifically the officer who signed the affidavit for the search warrant for Defendant's car and the officer who arrested Defendant, whom Defendant argues he was entitled to cross examine. As this Court has explained, "[t]he decision to call or not call a witness is a matter of trial tactics and strategy within the control of counsel." *Maimona v. State*, 1971-NMCA-002, ¶ 11, 82 N.M. 281, 480 P.2d 171. For the same reasons that our courts have long held that defense counsel's failure to call witnesses is an insufficient basis for finding ineffective assistance of counsel, *see id.*, we reject Defendant's argument that the prosecutor's decision not to call certain witnesses constituted misconduct.

CONCLUSION

{80} We hold that there was insufficient evidence to support Defendant's conviction for resisting, evading, or obstructing an officer under Count 2 of the indictment. We affirm Defendant's conviction for felon in possession of a firearm, reverse his conviction under Count 2, and remand for resentencing in accordance with this opinion.

{81} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:
TIMOTHY L. GARCIA, Judge
M. MONICA ZAMORA, Judge

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