

1 complaint for declaratory judgment. We issued a notice of proposed summary
2 disposition, proposing to affirm on May 5, 2015. Appellant has filed a timely
3 memorandum in opposition and two motions to amend the docketing statement, which
4 we have duly considered. We remain unpersuaded that our initial proposed disposition
5 was incorrect, and we therefore affirm. We also deny Appellant’s motions to amend
6 the docketing statement on the basis that the issues raised are not viable. *See State v.*
7 *Moore*, 1989-NMCA-073, ¶42, 109 N.M. 119, 782 P.2d 91 (stating that issues sought
8 to be presented must be viable).

9 **BACKGROUND**

10 {2} Appellant argues that the district court erred in determining that his complaint
11 for declaratory judgment was barred by the statute of limitations. [DS 3-4] In his
12 docketing statement, Appellant argued that his action for declaratory judgment is an
13 action based on a written contract, and therefore, the six year statute of limitations of
14 NMSA 1978, Section 37-1-3(A) (1975) applies, rather than the four year statute of
15 limitations contained in NMSA 1978, Section 37-1-4 (1953). *See* Section 37-1-3(A)
16 (providing that an action founded upon a contract in writing must be brought within
17 six years); *see also* Section 37-1-4 (providing that an action “brought for injuries to
18 property or for the conversion of personal property or for relief upon the ground of
19 fraud, and all other actions not herein otherwise provided for and specified” must be

1 brought within four years). In general, “[w]e review de novo whether a particular
2 statute of limitations applies.” *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 8, 132
3 N.M. 459, 50 P.3d 554; *see also In re Estate of Baca*, 1999-NMCA-082, ¶ 12, 127
4 N.M. 535, 984 P.2d 782 (stating that statutory interpretation is a matter of law subject
5 to de novo review).

6 {3} Appellant and Defendant, the New Mexico Medical Board (NMMB), entered
7 into a settlement agreement on June 27, 2008, in which Appellant agreed to surrender
8 his medical license. [RP 3] On May 16, 2013, Appellant filed a complaint in district
9 court for declaratory judgment asking the district court to declare the settlement
10 agreement void and unenforceable due to fraud, duress, lack of consideration, and
11 failure to adequately state the agreement between the parties. [RP 5] Appellant’s
12 complaint alleges that at the time he signed the settlement agreement, he was
13 undergoing severe medical problems and did not understand the meaning of the
14 agreement. [RP 3] Appellant asserted that he believed that under the settlement
15 agreement he would be able to continue consulting with patients, and he based that
16 belief on representations made to him by the chief administrative prosecutor for the
17 NMMB. [RP 3] Appellant also claimed that his then counsel and the chief
18 administrative prosecutor placed undue pressure on him to sign the agreement, which
19 he ultimately signed under duress. [RP 4] Appellant further asserted that on June 30,

1 2008, three days after the settlement agreement was executed, he rescinded the
2 agreement by a communication sent the NMMB. [RP 4]

3 **DISCUSSION**

4 {5} The district court determined that this action was governed by the four year
5 statute of limitations contained in Section 37-1-4, and was therefore untimely. [RP
6 383] We agree. “To come within the six year limitation period ‘founded upon any . . .
7 contract in writing,’ an action must be brought for breach of contract, one which
8 requires a policy to do the things for the nonperformance of which the action is
9 brought.” *Rito Cebolla Investments, Ltd. v. Golden West Land Corp.*, 1980-
10 NMCA-028, ¶ 29 , 94 N.M. 121, 607 P.2d 659. In *Nance v. L. J. Dolloff Associates,*
11 *Inc.*, 2006-NMCA-012, ¶ 11, 138 N.M. 851, 126 P.3d 1215, we explained that an
12 action is founded upon a written contract within the meaning of Section 37-1-3(A)
13 when the written instrument itself contains “a contract to do the thing for the
14 nonperformance of which the action is brought.” *See also Martinez v. Cornejo,*
15 *2009-NMCA-011, ¶ 29, 146 N.M. 223, 208 P.3d 443* (stating that in order to fall
16 within the six-year statute of limitations of Section 37-1-3(A), the nature of the right
17 sued upon must be based on the breach or nonperformance of a term in a written
18 contract).

1 {6} This was not an action founded on a written contract, within the meaning of
2 Section 37-1-3(A). Appellant’s complaint for declaratory judgment does not allege
3 that the NMMB breached a term of the settlement agreement. Rather, it asks the
4 district court to declare that the settlement agreement is void based on fraudulent
5 misrepresentations, duress, and illegality, and lack of consideration. [RP 4-5] Rather
6 than allege that NMMB breached the agreement, Appellant’s claims seek to void the
7 entire agreement on the basis of alleged defects in formation. Accordingly,
8 Appellant’s action for declaratory judgment was governed by Section 37-1-4 . *See*
9 *Rito-Cebolla*, 1980-NMCA-028, ¶ 34 (“It is established law that a cause of action for
10 rescission of contracts based upon false representations are barred four years after the
11 action shall have accrued.”); *see also* § 37-1-4 (stating that actions seeking relief
12 based on fraud must be brought within four years); *see also Branch v. Chamisa Dev.*
13 *Corp., Ltd.*, 2009-NMCA-131, 147 N.M. 397, 223 P.3d 942 (stating that rescission is
14 an equitable remedy that results in the cancellation of a contract entered into through
15 mistake, fraud, or duress).

16 {7} In his memorandum in opposition, Appellant argues that he validly rescinded
17 the settlement agreement by sending a letter to the NMMB three days after the parties
18 executed the agreement. [MIO 2] Appellant also argues that the contract was illegal
19 and void ab initio as it violated the New Mexico Constitution. [MIO 2] Appellant cites

1 to federal authority for the proposition that a contract can be rescinded by letter.
2 However, to the extent that Appellant sought to have the district court declare that the
3 contract had been validly rescinded, such an action needed to be brought within four
4 years. *See Taylor v. Lovelace Clinic*, 1967-NMSC-234, ¶ 6, 78 N.M. 460, 432 P.2d
5 816 (holding that the plaintiff’s action to rescind and declare void a contract on the
6 basis of duress at the time of signing was essentially an action for rescission based on
7 fraud and needed to be brought within four years). Appellant’s action for declaratory
8 judgment was untimely, and the district court properly dismissed his action.

9 {8} We also deny Appellant’s motion to amend the docketing statement to raise the
10 issue of vindictive prosecution. This issue was not raised before the district court
11 below in this case, and it is therefore not preserved. *See Woolwine v. Furr’s, Inc.*,
12 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 (“To preserve an issue for
13 review on appeal, it must appear that appellant fairly invoked a ruling of the trial court
14 on the same grounds argued in the appellate court.”). Accordingly, the issue is not
15 viable, and the motion to amend must be denied.

16 {9} For these reasons, we affirm.

17 {10} **IT IS SO ORDERED.**

18
19

TIMOTHY L. GARCIA, Judge

1 **WE CONCUR:**

2

3 _____
3 **CYNTHIA A. FRY, Judge**

4

5 _____
5 **J. MILES HANISEE, Judge**