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Bar Bulletin

February 3, 2016 • Volume 55, No. 5

Winter Light , by Dick Evans

ARTWORKinternational, INC., Santa Fe

Inside This Issue

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3
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10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

5
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10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

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

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Cover Artist: Dick Evans was born in the Land of Enchantment and grew up in a rural farming community in the panhandle of Texas with no exposure to art until he started college. He graduated from the University of Utah with a BFA in Drawing and Painting and an MFA in Ceramics and Sculpture. Evans has taught art, primarily in ceramics, which is his primary form of expression. He has also produced sculpture in welded steel and cast bronze. Evans' art is found in many art museums, corporate collections and publications. He feels that the more personal the statement is, the more universal it may be. By avoiding the visually expected, his art often aids the viewer to see surroundings in a different and richly rewarding manner. To view more of Evans' work, visit www.dickevansart.com.

Notices

Court News

New Mexico Supreme Court Board of Legal Specialization

Comments Solicited

The following attorneys are applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicant's qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Workers' Compensation Law
Michael Scott Owen
Local County-Municipal Government Law
Randall Van Vleck

State Bar News

Attorney Support Groups

- March 7, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)
- Feb. 8, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (the group meets on the second Monday of the month). To increase access, teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- March 21, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)

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

Animal Law Section

Judges Needed for National Animal Law Appellate Moot Court

UNM School of Law Professor Marsha Baum is coaching two teams participating in the National Animal Law Appellate Moot Court Competition. The Animal Law Section is looking for volunteers to serve as judges for the students' practice sessions, held on Tuesdays (7–9 p.m.), Thursdays (7–9 p.m.) and Sundays (5–7 p.m.) through Feb. 17. To volunteer, contact Gwenellen Janov at gjanov@janovlaw.com or 505-842-8302. Materials and bench briefs will be provided.

Rescue Adoption Contracts Animal Talk

Guy Dicharry will present "Animal Rescue Adoption Contracts and the Uniform Commercial Code" at the next Animal Talk at noon on Feb. 24 at the State Bar Center. Cookies and drinks will be provided. R.S.V.P. to Evann Kleinschmidt, ekleinschmidt@nmbar.org.

Board of Bar Commissioners

Third Bar Commissioner District Vacancy

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Feb. 26 meeting to fill the vacancy, with a term ending Dec. 31, 2016, until the next regular election of Commissioners. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply. Applicants should plan to attend the 2016 Board meetings scheduled for May 6, July 28 (in conjunction with the State Bar of New Mexico Annual Meeting at Buffalo Thunder Resort), Sept. 30 and Dec. 14 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and résumé to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 7199-2860; fax to 828-3765; or email to jconte@nmbar.org by Feb. 12.

Entrepreneurs in Community Lawyering

Now Accepting Applications

The New Mexico State Bar Foundation announces its new legal incubator initiative, Entrepreneurs in Community Lawyering. ECL will help new attorneys to start successful and profitable, solo and small firm practices throughout New Mexico. Each year, ECL will accept three licensed attorneys with 0-3 years of practice who are passionate about starting their own solo or small firm practice. ECL is a 24 month program that will provide extensive training in both the practice of law and how to run a law practice as a successful business. ECL will provide subsidized office space, office equipment, State Bar licensing fees, CLE and mentorship fees. ECL will begin operations in October and the Bar Foundation is currently accepting applications from qualified practitioners. To view the program description, visit www.nmbar.org/nmbardocs/formembers/ECLProgramDescription.pdf. For more information, contact Stormy Ralstin at sralstin@nmbar.org.

Professionalism Tip

With respect to my clients:

I will advise my client that civility and courtesy are not weaknesses.

Public Law Section

Accepting Award Nominations

The Public Law Section is accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol on April 29. Visit www.nmbar.org > About Us > Sections > Public Lawyer Award to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on March 10. Send nominations to Sean Cuniff at scunniff@nmag.gov. The selection committee will consider all nominated candidates and may nominate candidates on its own.

Solo and Small Firm Section

'Verbal Alchemy of a Trial Lawyer' with Randi McGinn

New Mexico trial lawyer Randi McGinn will present "The Verbal Alchemy of a Trial Lawyer: Challenges, Mistakes and Funny Stories from 36 years in the Courtroom" at noon, Feb. 16, at the State Bar Center in Albuquerque. The luncheon is free and open to all members of the bench and bar. Lunch is provided to those who R.S.V.P. to Evann Kleinschmidt at ekleinschmidt@nmbar.org.

The Section has scheduled exciting and current speakers through April 2016:

- March 15: Legislative session review with State Sen. Mike Sanchez
- April 19: "The Emerging Future of Legal Relationships with Cuba" with David Serna and Leon Encinias

Young Lawyers Division

Volunteers Needed for Veterans Legal Clinic on Feb. 9

The Young Lawyers Division and the New Mexico Veterans Affairs Health Care

System are holding clinics for the Veterans Civil Justice Legal Initiative from 9 a.m.–noon, the second Tuesday of each month at the New Mexico Veterans Memorial, 1100 Louisiana Blvd. SE, Albuquerque. Breakfast and orientation for volunteers begin at 8:30 a.m. No special training or certification is required. Volunteers can give advice and counsel in their preferred practice area(s). The next clinic is Tuesday, Feb. 9. Those who are interested in volunteering or have questions should contact Keith Mier at kcm@sutinfirm.com or 505-883-3395.

UNM

Law Library

Hours Through May 14

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.
Saturday–Sunday	Closed

Women's Law Caucus

Justice Mary Walters Award

Each year the Women's Law Caucus at UNM School of Law chooses two outstanding women in the New Mexico legal community to honor in the name of former Justice Mary Walters, who was the first woman appointed to the New Mexico Supreme Court. In 2016 the WLC will honor Judge Cynthia Fry and Bonnie Stepleton. The WLC invites the New Mexico legal community to the Awards Dinner on Feb. 24 at Hotel Andaluz in Albuquerque. Individual tickets for the dinner can be purchased for $90. Tables can be purchased for $600 and seat approximately eight people. Event sponsorship is also available for $500 and includes a table for eight. To purchase tickets, visit www.lawschool.unm.edu/students/organizations/wlc/. For more information, contact WLC President Dana Beyal at beyalda@law.unm.edu.

Other Bars

Albuquerque Bar Association

February Membership Luncheon Sponsored by Merrill Lynch

The Albuquerque Bar Association welcomes members to the Feb. 9 membership meeting at the Embassy Suites Hotel sponsored by Merrill Lynch from noon–1 p.m.(arrive at 11:30 a.m. for networking). Paulette Walz of BlackRock will present "Securing Your Retirement; Transforming Social Security into a Winning Retirement Strategy." After the luncheon, Grace Allison, UNM School of Law, will present the CLE "Income Tax Tips for the Non-Tax Lawyer" (2.0 G) from 1:15–3:15 p.m. To register, visit www.abqbar.org. Members who bring a guest will be entered in a giveaway for suite tickets at the Feb. 13 Lobo basketball game.

First Judicial District Court Bar Association

Ski Day in Santa Fe

Join the First Judicial District Bar Association at Ski Santa Fe on Feb. 27. Families are welcome. Enjoy discounted half- and full-day lift tickets (half-day: $35, full-day: 45, beginner's chairlift: $20). To purchase tickets, contact Erin McSherry at erin.mcsherry@state.nm.us. Payment for all guests is due by Feb. 25. Discounted tickets may not be purchased through Ski Santa Fe.

New Mexico Defense Lawyers Association

Seeking New Members for Board of Directors

The New Mexico Defense Lawyers Association seeks interested civil defense lawyers to serve on its board of directors. Board terms are five years with quarterly meetings. Board members are expected to take an active role in the organization by chairing a committee, chairing or participating in a CLE program, contributing to *Defense News* or engaging in other duties and responsibilities as designated by the board. Those who want to be considered for a board position should send a letter of interest to NMDLA Board President, Sean Garrett at sg@conklinfirm.com by Feb. 12.

New Mexico Chapter of the Federal Bar Association

CLE and Movie

The New Mexico Chapter of the Federal Bar Association will present its annual CLE and movie at 1 p.m., Feb. 11, at the Regal Theaters in Albuquerque. The movie will be *CitizenFour* followed by a panel discussion including Dana Gold from the Government Accountability Project and local practitioners. *CitizenFour* is the story of filmmaker Laura Poitras and journalist Glenn Greenwald's encounters with Edward Snowden as he hands over classified documents providing evidence of mass indiscriminate and illegal invasions of privacy by the National Security Agency. MCLE approval is pending. For more information, contact Kiernan Holliday at kiernanholliday@mac.com.

Other News

Center for Civic Values

Judges Needed for High School Mock Trial Competition

The Gene Franchini New Mexico High School Mock Trial Competition is in need of judges for the regional and state rounds. The regional competition will be held Feb. 19–20 and the state competition will be held March 18–19. Both will be hosted by the Bernalillo County Metropolitan Court.

Every year, hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. To sign up, visit www.civicvalues.org/judge-volunteer-registration by Feb. 12. For more information, contact Kristen at CCV at 505-764-9417 or Kristen@civicvalues.org.

Society for Human Resource Management of New Mexico
2016 Conference in Albuquerque

The Society for Human Resource Management of New Mexico has announced its 2016 conference "Picture the Future... BE the Future" on March 7–9 at the Embasy Suites Hotel and Spa in Albuquerque. The conference includes speakers and topics of interest to HR professionals, legal professionals, and business professionals of all disciplines. Keynote speakers include Louis Efron, former head of global engagement and leadership development at Tesla Motors, Ann Rhoades, president of People Ink, and former vice president of the People Department for Southwest Airlines, Dr. Richard Pimentel, senior partner with Milt Wright & Associates Inc. and Cy Wakeman, author and president and founder of Reality Based. More information and registration is available at www.shrmnm.org. Early bird rates apply through Feb. 7.

2016–2017 Bench & Bar Directory

Update Your Contact Information by March 25

Verify your current information:
www.nmbar.org/FindAnAttorney

Submit changes:

- Online: www.nmbar.org > for Members > Change of Address
- Mail: Address Changes, PO Box 92860, Albuquerque, NM 87199-2860
- Fax: 505-828-3765
- Email: address@nmbar.org

Publication is not guaranteed for information submitted after March 25.

ALBUQUERQUE LAW-LA-PALOOZA

Help us address the needs of low-income New Mexicans!

The Second Judicial District Pro Bono Committee is hosting ***Law-La-Palooza***, a free legal fair, on **Thursday, February 18, 2016** from **3:00 pm-6:00 pm** at the **Barelas Community Center**, 801 Barelas Rd. SW, Albuquerque, NM 87102.
first-come, first-served interpreters will be available*

We are looking for attorneys who practice in the following areas to give consults:

Divorce	Creditor/Debtor	Power of Attorney
Custody	Child Support	Public Benefits
Landlord/Tenant	Kinship/Guardianship	Unemployment
Bankruptcy	Wills/Probate	Immigration
Social Security/SSI	Contracts	Personal Injury

If you would like to volunteer, please register at:
www.cognitoforms.com/VolunteerAttorneyProgram1/Albuquerque21816LawLaPalooza

For questions, please contact Aja Brooks at (505)797-6040 or by email at ajab@nmlegalaid.org

FAMILY LAW CLE

The **Volunteer Attorney Program** is hosting a CLE entitled **"Advocating for Justice: Family Law in the Pro Bono Context"** on **February 11, 2016** from **1:30 pm - 4:45 pm** at the **State Bar of New Mexico**, 5121 Masthead St. NE, Albuquerque, NM 87109

The CLE (**3.0 G pending**) will be presented by **Gretchen Walther, Esq., Torri Jacobus, Esq., Dina Afek, Esq.** & **Kasey Daniel, Esq.**

FREE for attorneys who agree to give advice at the Second Judicial District Court Family Law Clinic for two clinics.

If you would like to attend this CLE, please contact Aja Brooks at (505) 797-6040 or ajab@nmlegalaid.org.

Volunteer Attorney Program
A Program of New Mexico Legal Aid

Volunteer Attorney Program

A Program of New Mexico Legal Aid

First Annual
Attorney Appreciation Luncheon and Awards Ceremony

On Friday, Nov. 13, 2015, the Volunteer Attorney Program showed their appreciation for the many attorneys who accepted pro bono cases, who gave advice and counsel at legal fairs, clinics or LawLaPaloozas, who mentored other volunteer attorneys and all who gave of their time and expertise in so many ways to promote access to justice for low-income New Mexicans. The event at the Crowne Plaza Hotel was accompanied by live Jazz music. Senior Justice Petra Jimenez Maes addressed the crowd of about 70 people who came from all over the state. Dina Afek and Charles Archuleta were co-emcees.

The VAP recognized the following 15 people for their outstanding dedication to pro bono services with certificates of appreciation:

Charles Archuleta	Theresa Delgado	Jared Kalunki	Susan Page	Thomas Smidt II
Cassandra Brulotte	Rachel Felix	Robert Lara	Adam Rankin	Sara Traub
Benjamin Cross	Hilda Jiron	Riley Masse	Gary Don Reagan	Erin Wideman

The VAP staff: Dina Afek, Aja Brooks and Felipe Quintana introduced the awardees and presented the 2015 awards.

Attorney of the Year Award	**Erik Thunberg**
Law Firm of the Year Award	**Allan, Shepherd, Lewis & Syka S.A.**
Pro Bono Committee of the Year Award	**11th Judicial District Pro Bono Committee for San Juan County**
Non-attorney Volunteer of the Year Award	**Debbie Norman**
VAP Attorney of the Year Award	**Julia Barnes**
New VAP Attorney Award	**Brian Gaddy**
VAP Shining Star Award	**Felipe Quintana**

Congratulations and a big thank you to all the award winners.

Erik Thunberg

Members of the Allen, Shepherd, Lewis & Syra Firm Corrine L. Holt, Kimberly A. Syra, and Christopher P. Winters

Members 11th Judicial District Pro Bono Committee from San Juan County Marilyn Coulson, Weldon Neff, and Judge Daylene Marsh

Julia Barnes

Jennifer L. Stone

1965 - 2016

It is with great sadness that the lawyers and staff of the Rodey Law Firm bid goodbye to Jennifer Stone, our much-loved friend and colleague, who passed away on January 18, 2016.

We will miss her wisdom, insight, humor and compassion. Her memory will continue to inspire us.

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Legal Education

February

9 **Better Not Call Saul Reprise**
1.0 EP
Live Program
H. Vearle Payne Inn of Court
505-321-1461

10 **BYOD (Bring Your Own Device to Work) and Social Media—Employment Law Issues in the Workplace**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Advocating for Justice: Family Law in the Pro Bono Context**
3.0 G
Live Seminar, Albuquerque
Volunteer Attorney Program
505-797-6040

11 **Management and Voting Agreements in Business**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **26th Annual Appellate Practice Institute**
5.0 G, 2.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

12 **Hot Topics in Real Property Issues (2015 Real Property Institute)**
1.5 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

12 **A Practical Guide to Trial Practice Part 1 (2015 Trial Know-How! Courtroom Skills from A to Z)**
3.5 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

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

18 **Special Issues in Small Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Current Immigration Issues for the Criminal Defense Attorney (2015 Immigration Law Institute)**
5.0 G, 2.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

19 **Estate Planning and Ethical Considerations for Probate Lawyers (2015 Probate Institute)**
3.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

19 **Intellectual Property and Entrepreneurship (Representing Technology Start-ups in New Mexico 2015)**
3.5 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

19 **A Practical Guide to Trial Practice Part 2 (2015 Trial Know-How! Courtroom Skills from A to Z)**
3.5 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

19 **Civil Rights and Diversity: Ethics Issues**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Tenth Circuit Winter Meeting & Social Security Disability Practice Update**
5.0 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

22 **Drafting Promissory Notes to Enhance Enforceability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Introduction to the Practice of Law in New Mexico**
4.5 G, 2.5 EP
Live Seminar
Center for Legal Education of NMSBF
www.nmbar.org

March

4 **How Ethics Still Apply When Lawyer's Act as Non-Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Estate and Gift Tax Audits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Navigating New Mexico Public Land Issues (2015)**
5.5 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective January 8, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,686	State v. Romero	COA 34,264	01/07/16
No. 35,685	State v. Gipson	COA 34,552	01/07/16
No. 35,680	State v. Reed	COA 33,426	01/06/16
No. 35,682	Peterson v. LeMaster	12-501	01/05/16
No. 35,678	TPC, Inc. v. Hegarty	COA 32,165/32,492	01/05/16
No. 35,677	Sanchez v. Mares	12-501	01/05/16
No. 35,676	State v. Sears	COA 34,522	01/04/16
No. 35,675	National Roofing v. Alstate Steel	COA 34,006	01/04/16
No. 35,672	State v. Berres	COA 34,729	12/31/15
No. 35,669	Martin v. State	12-501	12/30/15
No. 35,668	State v. Marquez	COA 33,527	12/30/15
No. 35,665	Kading v. Lopez	12-501	12/29/15
No. 35,664	Martinez v. Franco	12-501	12/29/15
No. 35,657	Ira Janecka	12-501	12/28/15
No. 35,658	Bustos v. City of Clovis	COA 33,405	12/23/15
No. 35,656	Villalobos v. Villalobos	COA 32,973	12/23/15
No. 35,655	State v. Solis	COA 34,266	12/22/15
No. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,652	Tennyson v. Santa Fe Dealership	COA 33,657	12/18/15
No. 35,650	State v. Abeyta	COA 34,705	12/18/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
No. 35,645	State v. Hart-Omer	COA 33,829	12/17/15
No. 35,644	State v. Burge	COA 34,769	12/16/15
No. 35,642	Rabo Agrifinance Inc. v. Terra XXI	COA 34,757	12/16/15
No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15
No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,654	Dimas v. Wrigley	COA 35,654	12/11/15
No. 35,635	Robles v. State	12-501	12/10/15
No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,617	State v. Alanazi	COA 34,540	11/30/15
No. 35,612	Torrez v. Mulheron	12-501	11/23/15
No. 35,599	Tafoya v. Stewart	12-501	11/19/15
No. 35,593	Quintana v. Hatch	12-501	11/06/15
No. 35,588	Torrez v. State	12-501	11/04/15
No. 35,581	Salgado v. Morris	12-501	11/02/15
No. 35,586	Saldana v. Mercantel	12-501	10/30/15
No. 35,576	Oakleaf v. Frawner	12-501	10/23/15
No. 35,575	Thompson v. Frawner	12-501	10/23/15
No. 35,555	Flores-Soto v. Wrigley	12-501	10/09/15
No. 35,554	Rivers v. Heredia	12-501	10/09/15
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No. 35,523	McCoy v. Horton	12-501	09/23/15
No. 35,522	Denham v. State	12-501	09/21/15
No. 35,515	Saenz v. Ranack Constructors	COA 32,373	09/17/15
No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,480	Ramirez v. Hatch	12-501	08/20/15
No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,422	State v. Johnson	12-501	08/10/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
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No. 35,440	Gonzales v. Franco	12-501	07/22/15
No. 35,422	State v. Johnson	12-501	07/17/15
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No. 35,415	State v. McClain	12-501	07/15/15
No. 35,374	Loughborough v. Garcia	12-501	06/23/15
No. 35,372	Martinez v. State	12-501	06/22/15
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No. 35,369	Serna v. State	12-501	06/15/15
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No. 35,335	Chavez v. Hatch	12-501	06/03/15
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No. 35,159	Jacobs v. Nance	12-501	03/12/15
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No. 35,097	Marrah v. Swisstack	12-501	01/26/15
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No. 33,819	Chavez v. State	12-501	10/29/12
No. 33,867	Roche v. Janecka	12-501	09/28/12
No. 33,539	Contreras v. State	12-501	07/12/12
No. 33,630	Utley v. State	12-501	06/07/12

Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)			Date Writ Issued
No. 33,725	State v. Pasillas	COA 31,513	09/14/12
No. 33,877	State v. Alvarez	COA 31,987	12/06/12
No. 33,930	State v. Rodriguez	COA 30,938	01/18/13
No. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
No. 34,274	State v. Nolen	12-501	11/20/13
No. 34,443	Aragon v. State	12-501	02/14/14
No. 34,522	Hobson v. Hatch	12-501	03/28/14
No. 34,582	State v. Sanchez	COA 32,862	04/11/14
No. 34,694	State v. Salazar	COA 33,232	06/06/14
No. 34,669	Hart v. Otero County Prison	12-501	06/06/14
No. 34,650	Scott v. Morales	COA 32,475	06/06/14
No. 34,784	Silva v. Lovelace Health Systems, Inc.	COA 31,723	08/01/14
No. 34,812	Ruiz v. Stewart	12-501	10/10/14
No. 34,830	State v. Mier	COA 33,493	10/24/14
No. 34,929	Freeman v. Love	COA 32,542	12/19/14
No. 35,063	State v. Carroll	COA 32,909	01/26/15
No. 35,016	State v. Baca	COA 33,626	01/26/15
No. 35,130	Progressive Ins. v. Vigil	COA 32,171	03/23/15
No. 35,101	Dalton v. Santander	COA 33,136	03/23/15
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	04/03/15
No. 35,198	Noice v. BNSF	COA 31,935	05/11/15
No. 35,183	State v. Tapia	COA 32,934	05/11/15
No. 35,145	State v. Benally	COA 31,972	05/11/15
No. 35,121	State v. Chakerian	COA 32,872	05/11/15
No. 35,116	State v. Martinez	COA 32,516	05/11/15
No. 34,949	State v. Chacon	COA 33,748	05/11/15
No. 35,298	State v. Holt	COA 33,090	06/19/15
No. 35,297	Montano v. Frezza	COA 32,403	06/19/15
No. 35,296	State v. Tsosie	COA 34,351	06/19/15
No. 35,286	Flores v. Herrera	COA 32,693/33,413	06/19/15
No. 35,255	State v. Tufts	COA 33,419	06/19/15
No. 35,249	Kipnis v. Jusbasche	COA 33,821	06/19/15
No. 35,214	Montano v. Frezza	COA 32,403	06/19/15
No. 35,213	Hilgendorf v. Chen	COA 33056	06/19/15
No. 35,279	Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,289	NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,290	Olson v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,349	Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586	07/17/15
No. 35,302	Cahn v. Berryman	COA 33,087	07/17/15
No. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,386	State v. Cordova	COA 32,820	08/07/15
No. 35,278	Smith v. Frawner	12-501	08/26/15
No. 35,398	Armenta v. A.S. Homer, Inc.	COA 33,813	08/26/15
No. 35,427	State v. Mercer-Smith	COA 31,941/28,294	08/26/15
No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
No. 35,451	State v. Garcia	COA 33,249	08/26/15
No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	08/31/15
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	08/31/15
No. 35,499	Romero v. Ladlow Transit Services	COA 33,032	09/25/15
No. 35,456	Haynes v. Presbyterian Healthcare Services	COA 34,489	09/25/15
No. 35,437	State v. Tafoya	COA 34,218	09/25/15
No. 35,395	State v. Bailey	COA 32,521	09/25/15

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
No. 33,969	Safeway, Inc. v. Rooter 2000 Plumbing	COA 30,196	08/28/13
No. 33,884	Acosta v. Shell Western Exploration and Production, Inc.	COA 29,502	10/28/13
No. 34,093	Cordova v. Cline	COA 30,546	01/15/14
No. 34,287	Hamaatsa v. Pueblo of San Felipe	COA 31,297	03/26/14
No. 34,613	Ramirez v. State	COA 31,820	12/17/14
No. 34,798	State v. Maestas	COA 31,666	03/25/15
No. 34,630	State v. Ochoa	COA 31,243	04/13/15
No. 34,789	Tran v. Bennett	COA 32,677	04/13/15
No. 34,997	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,993	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,726	Deutsche Bank v. Johnston	COA 31,503	08/24/15
No. 34,826	State v. Trammel	COA 31,097	08/26/15
No. 34,866	State v. Yazzie	COA 32,476	08/26/15
No. 35,035	State v. Stephenson	COA 31,273	10/15/15
No. 35,478	Morris v. Brandenburg	COA 33,630	10/26/15
No. 34,728	Martinez v. Bravo	12-501	12/14/15
No. 35,248	AFSCME Council 18 v. Bernalillo County Comm.	COA 33,706	01/11/16

Opinion on Writ of Certiorari:

			Date Opinion Filed
No. 34,146	Madrid v. Brinker Restaurant	COA 31,244	12/10/15
No. 35,049	State v. Surratt	COA 32,881	12/10/15

Writ of Certiorari Quashed:

			Date Order Filed
No. 34,946	State v. Kuykendall	COA 32,612	12/04/15
No. 34,945	State v. Kuykendall	COA 32,612	12/04/15

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,432	Castillo v. Macias	12-501	01/07/16
No. 35,399	Lopez v. State	12-501	01/07/16
No. 35,651	Bustos v. City of Clovis	COA 33,405	01/05/16
No. 35,643	State v. Orozco	COA 34,665	01/05/16
No. 35,639	State v. Kenneth	COA 33,281	01/05/16
No. 35,636	AFSCME Council 18 v. State	COA 34,144	01/05/16
No. 35,632	State v. Terrazas	COA 33,241	01/05/16
No. 35,627	State v. James	COA 34,413	01/05/16
No. 35,626	State v. Garduno	COA 34,355	01/05/16
No. 35,624	State v. Depperman	COA 33,871	01/05/16
No. 35,623	State v. James	COA 34,549	01/05/16
No. 35,622	State v. Costelon	COA 34,265	01/05/16
No. 35,621	State v. Bejarano	COA 34,439	01/05/16
No. 35,620	State v. Sandoval	COA 33,108	01/05/16
No. 35,561	State v. Scott C.	COA 33,891/34,220/34,221	01/05/16
No. 35,602	State v. Astorga	COA 32,374	12/30/15
No. 35,615	State v. Mary S.	COA 33,905	12/22/15
No. 35,613	State v. Archuleta	COA 34,699	12/22/15
No. 35,606	State v. Romero	COA 33,376	12/22/15
No. 35,605	State v. Sertuche	COA 34,579	12/22/15
No. 35,598	Fenner v. N.M. Taxation and Revenue Dept.	COA 34,365	12/22/15
No. 35,549	Centex v. Worthgroup Architects	COA 32,331	12/22/15
No. 35,375	Martinez v. State	12-501	12/22/15
No. 35,271	Cunningham v. State	12-501	12/22/15
No. 35,604	State v. Wilson	COA 34,649	12/17/15
No. 35,603	State v. County of Valencia	COA 33,903	12/17/15
No. 35,596	State v. Lucero	COA 34,360	12/07/15
No. 35,595	State v. Axtolis	COA 33,664	12/07/15
No. 35,594	State v. Hernandez	COA 33,156	12/07/15
No. 35,591	State v. Anderson	COA 32,663	12/07/15
No. 35,587	State v. Vannatter	COA 34,813	12/07/15
No. 35,585	State v. Parra	COA 34,577	12/07/15
No. 35,584	State v. Hobbs	COA 32,838	12/07/15
No. 35,582	State v. Abeyta	COA 33,485	12/07/15
No. 35,580	State v. Cuevas	COA 32,757	12/07/15
No. 35,579	State v. Harper	COA 34,697	12/07/15
No. 35,578	State v. McDaniel	COA 31,501	12/02/15
No. 35,573	Greentree Solid Waste v. County of Lincoln	COA 33,628	12/02/15
No. 35,509	Bank of New York v. Romero	COA 33,988	12/02/15

Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective January 22, 2016

Published Opinions

No. 33561	2nd Jud Dist Bernalillo CR-12-1143, STATE v L ERWIN (affirm)	1/19/2016
No. 31678	6th Jud Dist Grant CR-11-8, STATE v A PEREZ (reverse and remand)	1/20/2016

Unublished Opinions

No. 34472	7th Jud Dist Torrance CR-12-36, CR-12-35, STATE v T CRABB (affirm)	1/19/2016
No. 34614	2nd Jud Dist Bernalillo CR-14-3667, STATE v E JOE (dismiss)	1/20/2016
No. 33472	9th Jud Dist Roosevelt CR-12-47, STATE v L SHIPLEY (reverse and remand)	1/20/2016
No. 34889	2nd Jud Dist Bernalillo CR-13-5118, STATE v P TEMPLE (reverse)	1/21/2016
No. 34409	11th Jud Dist San Juan LR-13-174, STATE v J BEGAY (affirm)	1/21/2016
No. 34892	2nd Jud Dist Bernalillo CR-11-2335, STATE v A LARA (reverse)	1/21/2016

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective January 20, 2016

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

None to report at this time.

Recently Approved Rule Changes Since Release of 2015 NMRA:

For 2014 year-end rule amendments that became effective December 31, 2014, and which now appear in the 2015 NMRA, please see the November 5, 2014, issue of the Bar Bulletin *or visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us/nmrules/NMRuleSets.aspx.*

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

From the New Mexico Supreme Court

Opinion Number: 2015-NMSC-029

No. 34,085 (filed September 10, 2015)

KENNETH BADILLA,
Plaintiff-Petitioner,
v.
WAL-MART STORES EAST INC., d/b/a WAL-MART #850, et al.,
Defendant-Respondent

ORIGINAL PROCEEDING ON CERTIORARI
C. SHANNON BACON, District Judge

NARCISO GARCIA, JR.
Albuquerque, New Mexico
for Petitioner

JEFFREY M. CROASDELL
PATRICK M. SHAY
THOMAS A. OUTLER
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Albuquerque, New Mexico
for Respondent

Opinion

Barbara J. Vigil, Chief Justice

{1} We are called upon to decide whether a complaint for breach of warranty seeking damages for personal injury under the Uniform Commercial Code (UCC) is governed by the four-year statute of limitations for suits based on the sale of goods, or whether the three-year statute of limitations for tort applies.

{2} Kenneth Badilla (Plaintiff) bought a pair of work boots at Wal-Mart. He claims the soles of the boots came unglued, causing him to trip and injure his back. More than three years later, on September 20, 2007, he sued Wal-Mart and its store manager (Defendants) for breach of express and implied warranties. In his complaint Plaintiff seeks damages for personal injuries he claims were caused by the boots' alleged failure to conform to their warranties. Defendants moved for summary judgment, which the district court granted on two grounds: first, that Plaintiff's complaint was time-barred by the application of the three-year statute of limitation for causes of action for torts in NMSA 1978, Section 37-1-8 (1976) rather than the four-year statute of limitation period in the UCC under NMSA 1978, Section 55-2-725(1) (1961); and second, that there were no genuine issues of material fact to rebut Plaintiff's inability to establish the elements for breach of express and implied warranty.

{3} Plaintiff appealed the district court's grant of summary judgment in Defendants' favor to the Court of Appeals. *Badilla v. Wal-Mart Stores E., Inc.*, 2013-NMCA-058, 302 P.3d 747. The Court of Appeals affirmed the district court's grant of summary judgment on the statute of limitations issue, and because its determination on that issue was dispositive, it abstained from addressing the second basis upon which the district court granted summary judgment. *Id.* ¶ 16.

{4} Plaintiff sought review of the Court of Appeals' decision by petition for writ of certiorari, asking this Court to determine whether his claims for personal injury damages resulting from breach of warranties were subject to the four-year limitation period set out in Section 55-2-725 or the three-year limitation period for tort actions found in Section 37-1-8.[1] *Badilla v. Wal-Mart Stores E., Inc.*, *cert. granted*, 2013-NMSA-005. We granted Plaintiff's petition and reverse the Court of Appeals. We hold that the UCC's four-year statute of limitation governs breach of warranty claims, including those seeking damages for personal injuries resulting from the breach.

I. BACKGROUND

{5} Plaintiff, a tree trimmer, purchased a pair of Brahma brand men's work boots from Wal-Mart on October 19, 2003. The boots' packaging described the boots as "iron tough," "rugged leather . . . men's work boots." The label also stated that the boots "me[t] or exceed[ed] ASTM F2413-05 standards," which "outlin[e] what footwear employers must ensure employees use under the Occupational Safety and Health Administration, which requires protection against falling or rolling objects, objects piercing the sole, and when an employee's feet are exposed to electrical wires." *Badilla*, 2013-NMCA-058, ¶ 2 & 2 n.1 (citing 29 C.F.R. § 1910.136 (2009)). Plaintiff wore the boots eight to twelve hours per day, six days a week, for about nine months. He claims that as the sole of "the boots wear down[,] the yellow rubber piece tends to unglue itself and roll up as you are walking, making it very dangerous when working." Plaintiff states that this unglued piece of the sole of the boots caused him to trip, fall over, and injure his back.

{6} On July 28, 2004, Plaintiff was wearing the boots while at work cutting down dead tree limbs and removing the logs. When he began to move a log weighing about 150 pounds, the unglued sole of his boot got caught on debris, causing him to fall backwards and drop the log on top of himself. He immediately felt a sharp pain in his back. The next morning, he was unable to get out of bed due to his back pain, and was driven to the emergency room. He had x-rays and an MRI, which showed that he had two ruptured or bulging discs.

[1] While we acknowledge that Section 37-1-8 refers to actions for personal injuries without explicit reference to tort claims, this statute governs general tort claims. Therefore, this opinion refers to it as the "tort statute of limitation" for ease of reference. *See Sam v. Sam*, 2006-NMSC-022, ¶ 3, 139 N.M. 474, 134 P.3d 761 (noting that Section 37-1-8 provides the "statute of limitation[] for general tort actions").

Following five or six months of physical therapy, Plaintiff eventually underwent back surgery.

{7} Plaintiff filed his complaint against Defendants alleging breach of warranties on September 20, 2007, about three years and two months after the accident. In his complaint, Plaintiff seeks damages for personal injuries caused by the allegedly defective boots based upon (1) breach of express warranty, (2) breach of implied warranty of merchantability, and (3) breach of implied warranty of fitness for a particular purpose. These claims are brought pursuant to the UCC as set forth in NMSA 1978, Sections 55-2-313 to -315 (1961), respectively. Defendants answered the complaint and raised affirmative defenses, including the assertion that Plaintiff's damages were barred by the statute of limitations.

{8} Defendants filed a second motion for summary judgment, arguing that Plaintiff's complaint was time-barred by the three-year tort statute of limitations under Section 37-1-8. Defendants also argued that, while Plaintiff had "establishe[d] the existence of an express warranty based on the product description printed on the packaging," he had failed to assert that Defendants engaged in "any specific acts [that would] constitute a breach of that warranty," and failed to show how the boots failed to conform with any implied warranties. Defendants argued that there were no genuine issues of material fact at issue on either basis, and that they were entitled to summary judgment. The district court agreed with Defendants on both grounds, and granted summary judgment in their favor under Rule 1-056 NMRA.

{9} Plaintiff appealed the district court's grant of summary judgment to the Court of Appeals. *Badilla*, 2013-NMCA-058, ¶ 4. The Court of Appeals addressed only the first issue and affirmed the district court's grant of summary judgment, holding that "when a personal injury is the basis for a breach of warranty suit, the essence of the injury should govern which statute of limitation applies." *Id.* ¶ 12. Thus, the Court of Appeals concluded that because Plaintiff's claims were "undisputedly for personal injury, rather than loss based on the commercial value of the boots, [they] must remain subject to the three-year . . . statute of limitation" for torts. *Id.* The Court of Appeals found that its determination of the statute of limitations issue was dispositive, and for this reason it did not address the second basis upon which it granted certiorari to the district court—whether there was indeed no genuine issue of material fact as to Plaintiff's inability to establish the elements necessary to prove breach of warranty. *Id.* ¶ 16.

{10} Plaintiff petitioned this Court for a writ of certiorari, which we granted in order to review whether the "essence of the injury should govern which statute of limitation applies" in a breach of warranty suit seeking damages for personal injury caused by the breach. *Id.* ¶ 12. We hold that it does not.

II. DISCUSSION

{11} The central issue is whether the four-year statute of limitation period applies to claims under the UCC seeking damages for personal injury sustained from a breach of warranty, or whether the three-year statute of limitation period for claims based in tort applies. In deciding this issue, we first examine the development of the UCC, and then proceed to review the language of the statute, to discern the Legislature's intent behind its adoption of the UCC statute of limitation. In doing so, we conclude that the UCC statute of limitation applies to actions for breach of warranty where a party seeks to recover damages for personal injuries. Further, we acknowledge that other jurisdictions join one of two main approaches in addressing this issue, and conclude that the majority approach is most consistent with the law in New Mexico. Finally, we conclude that Plaintiff asserts breach of warranty claims seeking personal injury damages. Therefore the UCC statute of limitation governs his claims. Accordingly, we reverse and remand to the Court of Appeals for consideration of whether there was a genuine issue of material fact precluding summary judgment on the merits of Plaintiff's claims, which the Court of Appeals did not reach in its initial opinion on this case.

A. Standard of Review

{12} Our determination of the applicable statute of limitations requires us to interpret the statutory scheme of our UCC. "Interpretation of a statute is an issue of law . . . [which w]e review . . . de novo." *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860 (internal quotation marks and citation omitted). "When this Court construes statutes, our charge is to determine and give effect to the Legislature's intent." *Moongate Water Co. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405 (internal quotation marks and citation omitted). "To discern the Legislature's intent, the Court look[s] first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *State v. Almanzar*, 2014-NMSC-001, ¶ 14, 316 P.3d 183 (alteration in original) (internal quotation marks and citation omitted). "Where the language of a statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Id.* (internal quotation marks and citation omitted). "When interpreting a statute, we are also informed by the history, background, and overall structure of the statute, as well as its function within a comprehensive legislative scheme." *Id.* ¶ 15 (internal quotation marks and citation omitted). We apply these principles in interpreting the UCC statutory scheme in order to decipher whether the Legislature indeed intended to allow for the recovery of damages for personal injuries resulting from a breach of warranty. We begin by reviewing the history and purpose of the UCC.

B. History and Purpose of the UCC

{13} The UCC was developed by the joint efforts of the National Conference of Commissioners on Uniform State Laws and the American Law Institute beginning in the 1940s. 1 William D. Hawkland & Frederick H. Miller, *Uniform Commercial Code Series* § 1-101:1 [Rev.] (2012). The first official text of the Code was published in 1952 and first adopted by Pennsylvania in 1953. *Id*. The Code was revised in 1957 based in part on lessons gleaned from Pennsylvania's experience, and other states gradually began adopting the Code. *Id.* "The UCC, and the subsequent revisions of it, [were] presented to the various state legislatures for adoption, but only bec[a]me the law of a respective state when adopted by that state's legislature." Henry D. Gabriel, *The Revisions of the Uniform Commercial Code—Process and Politics*, 19 J.L. & Com. 125, 130 (1999). "[B]ecause the individual states have the power to adopt whatever version or modifications the state pleases, there is a substantial amount of non-uniformity among the states." *Id*.

{14} New Mexico adopted the UCC in 1961. NMSA 1978, §§ 55-1-101 to 55-12-111 (1961, as amended through 2013). As the UCC has been revised and updated over the years, New Mexico has adopted these revisions. *See, e.g.*, 2005 N.M. Laws, ch. 144 ("amending, repealing and enacting certain sections of the NMSA 1978

to accomplish the additions to, deletions from and clarifications of the [UCC]"); 2005 N.M. Laws, ch. 144 § 1 (amending NMSA 1978, § 55-1-101 (2005)).

{15} The purposes of the UCC are: "(1) to simplify, clarify and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and (3) to make uniform the law among the various jurisdictions." NMSA 1978, § 55-1-103(a) (2005). The Legislature indicated that the UCC "must be liberally construed and applied to promote [these] underlying purposes and policies." *Id.* Further, "[t]he remedies provided by the [UCC] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed." NMSA 1978, § 55-1-305(a) (2005).

{16} The statute of limitation which governs causes of actions under the UCC is established by Section 55-2-725. The Legislature explained that the purpose of Section 55-2-725 is "[t]o introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred." *Id*. cmt. However, the scope of the causes of action governed by this section of the UCC has not been universally agreed upon. *See* 63B Am. Jur. 2d *Products Liability* § 1448 (2015) ("[W]hether a plaintiff is required to bring an action for personal injury . . . that is based upon breach of an implied warranty within the limitations period specified in the [UCC] or within the limitations period specified in a statute relating to torts, is a problem that has received considerable judicial attention and has resulted in a split of authority among the various jurisdictions that have addressed the problem."). This is the central issue we are called upon to decide in this case: which, if any, approach is consistent with New Mexico law.

{17} The Court of Appeals aptly observed that, "[a]lthough other jurisdictions have addressed the issue of whether personal injury or UCC time limits apply to such cases with disparate results, New Mexico lacks a definitive rule." *Badilla*, 2013-NMCA-058, ¶ 9. We agree, and with this opinion fill that chasm in New Mexico law. Having framed this issue in the context of the history and purpose of the UCC, we proceed to interpret New Mexico's UCC statute to determine to what claims the Legislature intended that it apply.

C. There Are Two Main Approaches to Determining Whether a Particular Claim Asserts a Cause of Action Governed by the UCC's Statute of Limitations

{18} "Courts in other jurisdictions have reached varying conclusions as to when an action is governed by the limitations period of the UCC." *Wieser v. Firestone Tire & Rubber Co.*, 596 F. Supp. 1473, 1475 (D. Colo. 1984). These varying conclusions have created two main approaches to the issue: the majority approach and the minority approach.[2] *Id.*

{19} To start with, "[t]he majority [approach holds] that the UCC limitations period applies to all actions for breach of warranties, regardless of whether the plaintiff seeks personal injury damages or economic and contractual damages." *Id.* This approach essentially looks to the nature of the right asserted; if the right is based in contract, it is subject to the UCC. The minority approach "holds that the type of damages sought in an action determines whether the statute of limitations in [UCC] § 2-725 applies," thus, "[a]ctions for personal injury damages or tortious injury to personal property are governed by general, non-[UCC] limitations periods, while actions for economic or breach of contract damages are governed by § 2-725." *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 16 (Utah 1990). The minority approach focuses upon the remedy sought: if the remedy sought is economic damages, the claim is subject to the UCC; if the remedy sought is personal injury damages, the claim is not subject to the UCC. We turn to the specific language used in our statute to decipher whether the Legislature intended to adopt one approach or the other.

D. The Plain Language of New Mexico's UCC Statute Denotes the Legislature's Intent That the UCC Statute of Limitation Governs Breach of Warranty Claims Which Seek Damages for Personal Injuries

{20} This case requires us to interpret New Mexico's UCC statute. "Our primary goal when interpreting a statute is to determine and give effect to the Legislature's intent." *Cook v. Anding*, 2008-NMSC-035, ¶ 7, 144 N.M. 400, 188 P.3d 1151. "We do so by first looking to the statute's plain language and giving effect to the plain meaning of the words therein." *Id.* We now turn to the relevant UCC statutory provisions.

{21} Article 2 of the UCC applies to sales of goods and is codified at Sections 55-2-101 to -725; *see* § 55-2-102 ("[T]his article applies to transactions in goods."). "A 'sale' consists in the passing of title from the seller to the buyer for a price." Section 55-2-106(1). " 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . ." Section 55-2-105(1). "The law of warranty for sales of goods is codified at NMSA 1978, Sections 55-2-312 to -318. . . ." *Camino Real Mobile Home Park P'ship v. Wolfe*, 1995-NMSC-013, ¶ 15, 119 N.M. 436, 891 P.2d 1190, *overruled on other grounds by Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 2013-NMSC-017, ¶¶ 14, 16, 301 P.3d 387.

{22} Article 2 also sets out the various warranties that apply to sales of goods. These include express warranties and implied warranties of merchantability and

[2] An additional approach to determining which statute of limitation applies in cases such as this holds that the UCC period governs all actions for breach of warranty, regardless of the remedy sought, so long as there is privity between the parties. *See Wieser,* 569 F. Supp at 1475; *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 16 (Utah 1990). The New Mexico Legislature has effectively eliminated the need for analysis of privity in the context of express or implied warranties under the UCC. *See* § 55-2-318 ("A seller's warranty whether express or implied extends to any natural person who is in the family or household of his [or her] buyer or who is a guest in his [or her] home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."); *id*. cmt. 2 ("The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to 'privity.' "). The Legislature has indicated its intent not to rely on privity to determine the persons entitled to bring an action asserting those warranties. Therefore we find it unnecessary to consider this approach.

fitness for a particular purpose, among others. Sections 55-2-313 to -315 establish the methods by which express and implied warranties are created. *See* § 55-2-313(1) ("Express warranties by the seller are created as follows . . . ."); § 55-2-314(1) ("Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." (citation omitted)); § 55-2-315 ("Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.").

{23} If the goods provided are not as warranted, the goods are in breach of warranty. "A breach of warranty presents an objective claim that the goods do not conform to a promise, affirmation, or description, or that they are not merchantable." *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 13, 132 N.M. 459, 50 P.3d 554. "A breach of warranty occurs when tender of delivery is made . . . ." Section 55-2-725(2). "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." *Id.*

{24} The UCC also establishes the remedies available under a cause of action for breach of warranty. "For breach of warranty the buyer may recover direct, incidental, and consequential damages." *Manouchehri v. Heim*, 1997-NMCA-052, ¶ 10, 123 N.M. 439, 941 P.2d 978; *see also* § 55-2-714 ("[B]uyer [who] has accepted goods and given notification . . . may recover as damages . . . the loss resulting in the ordinary course of events from the seller's breach . . . . The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted . . ." and "[i]n a proper case any incidental and consequential damages under [Section 55-2-715] may also be recovered." (citation omitted)). Section 55-2-715(2) provides:

> Consequential damages resulting from the seller's breach include:
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.

Section 55-2-725 sets forth the statute of limitation for such causes of action. It provides, in pertinent part:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.

{25} The Legislature has thus clearly established that: (1) a seller's breach of express or implied warranties creates in the buyer a cause of action; (2) consequential damages, *including those for personal injuries*, are available pursuant to such cause of action; and (3) the statute of limitation applicable to that cause of action is four years. The four-year deadline for filing suit under the UCC for breach of warranty of goods sold in New Mexico is clearly and unambiguously set forth in the statute. *See State v. Bernal*, 2006-NMSC-050, ¶ 14, 140 N.M. 644, 146 P.3d 289 (stating that when statutory language is unambiguous, "we follow the language, and . . . [our] inquiry is complete"). Accordingly, we apply the statute as it is written. *See Aeda v. Aeda*, 2013-NMCA-095, ¶ 11, 310 P.3d 646 ("[I]t is . . . the responsibility of the judiciary to apply the statute as written." (omission in original) (internal quotation marks and citation omitted)). We hold that by expressly including the cause of action, as well as the remedy, in Section 55-2-725, which creates the limitation period for claims brought pursuant to the UCC, the Legislature intended to establish a four-year statute of limitation period for all breach of warranty claims, including those seeking damages for personal injury caused by the breach. We conclude that the New Mexico Legislature had in mind that the four-year statute of limitations period in Section 55-2-725 would apply to the very cause of action Section 55-2-725 recognizes.

{26} In deciding this issue, other courts have likewise concluded that the cause of action for breach of warranty established by Section 55-2-725 should be subject to the limitation period provided in that same section. *See Needle v. Lasco Indus., Inc.*, 89 Cal. Rptr. 593, 594 (Cal. Ct. App. 1970) ("Since one of the purposes of the Commercial Code is to make uniform the law among the various jurisdictions . . . cases [from other states] are compelling authority which we accept." (internal quotation marks and citation omitted)). We find that the reasoning provided in the following cases is helpful in informing our analysis of this issue under New Mexico law. *See, e.g.*, *Johnson v. Hockessin Tractor, Inc.*, 420 A.2d 154, 158 (Del. 1980) (holding that "it [is] completely logical that a statutory remedy have its period of limitation governed by the limitation provision of the [s]tatute that created the remedy"); *Di Prospero v. R. Brown & Sons, Inc.*, 494 N.Y.S.2d 181, 182 (N.Y. App. Div. 1985) (holding that "UCC 2-715(2) specifically states that [c]onsequential damages resulting from the seller's breach include . . . injury to person or property proximately resulting from any breach of warranty. Thus, it is clear that consequential damages under the UCC include personal injury to a buyer proximately resulting from a seller's breach of warranty." (alteration in original) (internal quotation marks omitted)); *Garcia v. Tex. Instruments, Inc.*, 610 S.W.2d 456, 462 (Tex. 1980), quoting *Berry v. G. D. Searle & Co.*, 309 N.E.2d 550, 553 (Ill. 1974) (adopting Illinois' holding that UCC Sections 2-314, -715, -719, and -725 "clearly demonstrate the legislative intent to create a statutory cause of action for breach of implied warranty to afford consumer protection to those who sustain personal injuries resulting from product deficiencies. This remedy is distinct and in addition to that existing in strict tort liability."). We find such reasoning to be persuasive and see no reason to depart from it in New Mexico.

E. Our Interpretation of New Mexico's UCC Statute is Consistent with the Majority of Other States, Which Furthers the Goal of Uniformity Under the UCC

{27} While the plain language of the UCC compels this Court to conclude that the

Legislature intended that the four-year limitation period set forth in the UCC governs a breach of warranty claim, including those claims which seek damages for personal injuries in furtherance of the UCC's important goal of uniformity, we also consider the two main approaches taken by other states in deciding this issue. Upon doing so, we adopt the approach taken by a majority of other states, which informs our analysis and is consistent with New Mexico law.

{28} The Sixth Circuit addressed this issue under Michigan's UCC statute in *Reid v. Volkswagen of America, Inc.*, 512 F.2d 1294 (6th Cir. 1975). Having reached the same conclusion as we do regarding the Legislative intent behind Michigan's UCC statute, the Sixth Circuit explained why the majority approach is consistent with the statute's purposes. *Id.* at 1296. We find this case highly informative, given that both the facts and the law are quite similar to those in the case before us.

{29} In *Reid*, the plaintiff sued the manufacturer and distributor of the car she was driving when she was involved in a wreck, arguing that the car was defective because "on impact, the left front seat of the Volkswagen broke loose from the floor of the car, causing plaintiff to be thrown about the car," and "claiming that her injuries resulted from defendant's breach of express and implied warranties of fitness of the automobile." *Id.* at 1295. The plaintiff filed suit "more than three years and less than four years after the . . . accident." *Id.* The Michigan statute establishing a three-year statute of limitations on actions "for injuries to persons and property" had last been "reenacted in 1961, to be effective in 1963 . . . ." *Id.* at 1295-96. The Sixth Circuit acknowledged that jurisdictions are split among two main approaches to this issue, as we recognized above, and considered the history of Michigan's UCC as well as the language of the Michigan statute for guidance. *Id.* at 1295-97. Michigan adopted the UCC in 1962, to take effect in 1964. *See id.* at 1296. Therefore, the three-year personal injury statute was adopted, but not yet in effect, when the UCC was adopted. *Id.* The Sixth Circuit noted that the UCC "contained no general repealer section and made no reference to the three-year personal injury limitation in the earlier general limitation statute." *Id.* Then, based on the language of the statute, the Sixth Circuit held that the UCC applies the plaintiff's claims and permitted recovery of personal injury damages, thereby adopting the majority approach. *Id.* at 1297. The *Reid* court gave six reasons to support its holding. *Id.* at 1297-98.

{30} First, the plaintiff's "complaint [wa] s filed under and in specific reference to Michigan's [UCC]." *Id.* at 1297. Second, "[t]he plain language of Michigan's [UCC] limitation section encompasses plaintiff's case." *Id.* Third, "[th]e Michigan [UCC]'s limitation section was adopted to be effective January 1, 1964, subsequent to the general limitation section which was adopted effective January 1, 1963, and hence, should be regarded as having amended it (by implication) as it pertains to warranty actions." *Id.* Fourth, "[t]he Michigan [UCC] limitation is specific as opposed to the general limitation statute, and hence, should be given effect. *Id.* Fifth, "[g]enerally the courts (absent a showing of prejudice on the part of defendant) tend to favor the longer of two limitation statutes." *Id.* Finally, "[a]lthough nationwide the courts are divided on whether a state tort limitation statute or the [UCC] limitation statute prevails, we believe the [UCC] statute is the only uniform statute possible and that adopti[ng] its limitation [period] will favor uniformity amongst the states in an important area of commercial law," which the Michigan Legislature specifically stated as one of the purposes of adopting the UCC. *Id.*

{31} The analysis taken by the *Reid* court presents a logical and persuasive approach to determining the central issue in the instant case. It also furthers the fundamental policy of uniformity embraced by the Legislature through its enactment of the UCC in New Mexico. Accordingly, we apply its six-part rationale in addressing the issue before us. We address *Reid*'s second, fifth, and sixth reasons for its holding here, and the remaining reasons in discrete sections of this opinion.

{32} *Reid* reasoned that the plain language of Michigan's UCC indicated that the UCC governed the plaintiff's claim, and we have reached the same holding in this case. *Id.* at 1297. *Reid* also reasoned that "[g]enerally the courts (absent a showing of prejudice on the part of defendant) tend to favor the longer of two limitation statutes." *Id.* at 1297. New Mexico law also favors statutes of limitation which permit, rather than bar, causes of action. *See First Nat'l Bank in Albuquerque v. Chase*, 1994-NMSC-127, ¶ 17, 118 N.M. 783, 887 P.2d 1250 (Franchini, J., dissenting) (noting that New Mexico has long held that "law favors the right of action over a limitation"). *Reid* further reasoned that its holding aligned with the majority of courts that have addressed this issue, which furthered the UCC's goal to "make uniform the law among the various jurisdictions." 512 F.2d at 1297-98 (internal quotation marks and citation omitted). Our holding achieves the same goal, and is consistent with the Legislature's mandate that the UCC "be liberally construed and applied to promote its underlying purposes and policies," and its remedies liberally administered. Section 55-1-103(a); *see also* § 55-1-305(a) ("The remedies provided by the [UCC] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ."). We find the majority approach taken by other states, particularly as illustrated in *Reid*, to be persuasive in that it not only embraces the plain language in the statute, which reveals the Legislative intent to apply the UCC limitation period to breach of warranty claims seeking damages for personal injuries, but also furthers the important public policies embodied in the UCC.

F. We Reject the Minority Approach

{33} In deciding this issue, the Court of Appeals aligned New Mexico with the minority approach. *Badilla*, 2013-NMCA-058, ¶¶ 9-12. The minority approach looks to the remedy sought, not the right asserted, to determine the applicable statute of limitations; this is contrary to New Mexico law.

{34} The Court of Appeals concluded that Plaintiff's "injuries were personal, rather than related to any failure of the purchase of the boots," implying that a claim must seek recovery of economic damages in order to fall under the UCC. *Id.* ¶ 8. The Court of Appeals held that "when a personal injury is the basis for a breach of warranty suit, the essence of the injury should govern which statute of limitation applies." *Id.* ¶ 12. The Court of Appeals therefore concluded that because the essence of Plaintiff's injury was personal, the tort statute of limitations applied because it governs "injury to the person," and foreclosed application of the UCC because it "applies to cases involving the sale of goods." *Id.* ¶¶ 7, 12 (internal quotation marks and citation omitted).

{35} Defendants implore this Court to do as the Court of Appeals did—align New Mexico with the minority approach and regard the remedy of damages for personal injuries as paramount to the determination of the nature of the right sued upon,

and thus determinative of which statute of limitations period should apply. *See id.* ¶ 10. This approach "holds that the type of damages sought in an action determines whether the statute of limitations in [UCC] § 2-725 applies," thus, "[a]ctions for personal injury damages or tortious injury to personal property are governed by general, non-[UCC] limitations periods, while actions for economic or breach of contract damages are governed by § 2-725." *Davidson*, 794 P.2d at 16. Courts adopting this approach reason that "[w]here the injury is personal, the statute relating to personal injury actions applies." *Kinney v. Goodyear Tire & Rubber Co.*, 367 A.2d 677, 680 (Vt. 1976).

{36} We decline Defendants' invitation to adopt the minority approach and shape the nature of the claim to conform to the relief requested. We conclude that the minority approach is inconsistent with our Legislature's intent in adopting the UCC. We find the rationale taken by the Kansas Court of Appeals in rejecting the minority approach to be informative and persuasive. *See Golden v. Den-Mat Corp.*, 276 P.3d 773, 787 (Kan. Ct. App. 2012). It provides an excellent illustration of the aberrational outcomes that may result from allowing a plaintiff's requested damages to dictate the cause of action asserted. *Id.*

{37} In *Golden*, a patient who hoped to have extremely white teeth purchased porcelain veneers from a dentist, who marketed the veneers, sold them to the patient, and put the veneers in place. *Id.* at 780-81. The patient alleged that after 15 months of wear, "the veneers became discolored and stained despite representations" by the dentist and the manufacturer (the defendants) "that [the veneers] would retain their appearance." *Id.* at 781, 782. The veneers were covered by a written five-year limited warranty. *Id.* at 782. The patient sued the defendants, "alleging breach of express warranties regarding the veneers and breach of implied warranties of merchantability and fitness for a particular purpose," among other claims. *Id.* at 783. The defendants argued that the patient was "asserting a tort-based products liability claim" because she sought damages for pain and suffering, along with other remedies. *See id.* at 785. The Kansas Court of Appeals said "the notion that a plaintiff's requested monetary damages define the cause of action rather than the stated cause of action defining the appropriate monetary remedies borders on the nonsensical." *Id.* at 786. It then illustrated the absurdity of this proposition: if the remedy requested defined the cause of action asserted, then if the patient had sought treble damages as a remedy, her warranty claims could be treated as "alleged violations of federal antitrust laws, 15 U.S.C. § 15 (2006), or the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (2006), since they permit such a recovery," even though the complaint "did not state claims under either of those federal statutory schemes." *Golden*, 276 P.3d at 786.

{38} The Kansas Court concluded that "the district court would have had no more business dismissing the suit on [the basis of the remedy requested] than it did in declaring the claims to be torts filed past the limitations deadline because [the plaintiff] asked for pain and suffering damages." *Id.* It held that "the monetary damages [should be conformed] to the claims, not the other way around," explaining that "[t]he proper approach is to [determine the nature of the claim and] disallow [any] damages inconsistent with [that] claim." *Id.* We adhere to the proposition that the nature of the claim determines the available remedies. Thus, in determining which statute of limitations governs a claim, we first identify the nature of the claim asserted, which then establishes the available remedy, not the other way around. Such an approach is consistent with the legislative mandate that we construe statutes so as to avoid absurd results. NMSA 1978, § 12-2A-18 (1997). Therefore, we conclude that the minority approach is inapposite to both the policies upon which the UCC is based, as well as the manner in which claims are addressed—which must focus upon the nature of the right asserted, rather than the remedy sought.

G. Pre-UCC Cases Do Not Govern Which Statute of Limitations Applies to Causes of Action Which Accrued After the UCC Took Effect

{39} Defendants contend that the minority approach is consistent with New Mexico law, because "[i]t has long been preceden[t] that when the essence of a plaintiff's claim is for personal injury, the three-year personal injury statute of limitations applies, even though the cause of action is framed as an action in contract." Defendants therefore argue that if this Court adopts the majority approach, we will be "legislat[ing] judicially by providing that the UCC limitations period applie[s] to personal injury claims in simple product liability cases," because the Legislature had the opportunity to do so but chose not to. Defendants argue that *Chavez v. Kitsch*, 1962-NMSC-122, 70 N.M. 439, 374 P.2d 497, governs the analysis of which statute of limitation applies in this case and mandates our adoption of the minority approach.

{40} *Chavez* is distinguishable from the case at bar because it dealt with a cause of action that accrued before the UCC took effect. The UCC first took effect in New Mexico at midnight on December 31, 1961, and "applie[d] to transactions entered into and events occurring after that date." 1961 N.M. Laws, ch. 96, § 10-101. In *Chavez*, the alleged breach of warranty occurred on February 5, 1956, when the plaintiffs bought a house that was unfit for habitation. 1962-NMSC-122, ¶ 1. Thus the provisions of the UCC did not apply to an action which accrued in February 1956. While we agree with the Court of Appeals that "New Mexico has *historically* distinguished claims for personal injuries from contractual claims," we conclude that our Legislature nullified the arbitrary distinction of claims based solely on the remedy sought when it adopted the UCC. *Badilla*, 2013-NMCA-058, ¶ 11 (emphasis added). By adopting the UCC, the Legislature intended to circumscribe the scope of claims that the tort statute of limitation in Section 37-1-8 governs, in order to usher claims for breach of warranty based in contract, which seek damages for personal injuries, into the realm of the UCC.

H. Plaintiff's Claims Are Governed by the UCC

{41} We next determine the nature of Plaintiff's claims, and whether Plaintiff asserts those claims under the UCC. In doing so, "[w]e look to the nature of the right sued upon, and not the form of action or relief demanded, to determine the applicability of the statute of limitations to a cause of action." *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 29, 146 N.M. 223, 208 P.3d 443 (alterations in original omitted) (internal quotation marks and citation omitted). The UCC governs contracts for sales, including the present sale of goods. Section 55-2-106(1). A " '[c]ontract for sale' includes . . . a present sale of goods," which "means a sale which is accomplished by the making of the contract." *Id.* "A 'sale' consists in the passing of title from the seller to the buyer for a price." *Id.* (citation omitted). A contract for sale encompasses "the total legal obligation that results from the parties' agreement as determined by the [UCC] as supplemented by any other

applicable laws." Section 55-1-201(b)(12). Under the UCC, "[g]oods . . . conform to the contract when they are in accordance with the obligations under the contract." Section 55-2-106(2). If one of the parties to the contract fails to meet their obligation to ensure that the goods conform, this "constitutes a breach of the contract, giving rise to a remedy, typically damages." UJI 13-822 NMRA Committee Commentary. These legal obligations include any warranties made about the goods. *See id*. (stating that the legal obligations of a contract "may be either expressed in the contract or implied, such as any obligation of good faith or implied warranties").

{42} Plaintiff's purchase of the boots from Wal-Mart was a contract for the present sale of goods. Such contracts are governed by the UCC. *See Sinka v. N. Commercial Co*., 491 P.2d 116, 118 (Alaska 1971) (holding that because "the transaction was a typical sale of goods . . . the sale necessarily was subject to the [UCC]" (footnote omitted)); § 55-2-102 ("Unless the context otherwise requires, this article applies to transactions in goods . . . ."). In his first amended complaint for damages, Plaintiff contends that Defendants made express and implied warranties about the product Plaintiff purchased. Any such warranties gave Plaintiff the right to receive goods which complied with those warranties. If the product Plaintiff purchased was not as warranted, then Defendants breached the contract, and Plaintiff has the right to recover any damages resulting from the seller's breach of that warranty if the goods do not so comply.

{43} We hold that the nature of the right Plaintiff's claims assert is the right to receive consequential damages as compensation for Defendant's alleged failure to provide Plaintiff with boots that conformed with the warranties Defendants allegedly made. This is a contract-based right. Accordingly, we consider the nature of Plaintiff's claims to lie in contract rather than in tort, and therefore Plaintiff's cause of action is governed by Section 55-2-725 of the UCC. Under this cause of action, incidental and consequential damages, including those for personal injuries, may be recovered pursuant to Section 55-2-714(3). Plaintiff alleged that the boots' failure to conform to their warranties caused him to "suffer damages, including severe, painful and permanent mental and physical injury, loss of earnings and medical expenses," and sought relief "in a reasonable amount to be decided by the trier of fact." Plaintiff therefore seeks damages which are eligible for recovery under Section 55-2-714. This is congruent with our holding that the nature of the claim asserted dictates the remedies available.

{44} Plaintiff's cause of action asserts this claim under the UCC by invoking its statutory language. Again, we find the Sixth Circuit's analysis of whether a claim for breach of warranty was properly brought under the UCC helpful. *See Reid*, 512 F.2d at 1296. While Plaintiff here did not specifically cite the UCC in his complaint, as the plaintiff did in *Reid*, he repeats almost verbatim the language of the UCC statutes which apply to each of his claims, respectively. For example, under his claim for breach of express warranty, Plaintiff asserts: "Defendants made representations, affirmations of fact, promises and descriptions which related to the boots and became part of the basis of the bargain." Compare this to Section 55-2-313(1)(a), stating: "any affirmation of fact, . . . promise[, or description] 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." Although Plaintiff did not actually cite these statutes, we find his near-verbatim recitation of their language sufficient to conclude, as the court did in *Reid*, that Plaintiff's claims were "filed under" the UCC. *See* 512 F.2d at 1297.

{45} Defendants argue that, under the majority approach which looks to the nature of the right asserted, Plaintiff's claims are governed by the tort limitation period. Defendants artfully assert that, looking to the nature of the right Plaintiff asserts, "the gravamen of Plaintiff's complaint is a claim for personal injury and nothing more." Therefore, the three-year statute of limitation for tort under Section 37-1-8 should apply. Defendants imply that Plaintiff's claims are governed by the tort limitation period because they are truly "simple product liability" claims. As a threshold matter, this argument assumes that Plaintiff's claim could only be a products liability claim, a proposition with which we disagree. Products liability claims and warranty claims are not mutually exclusive. The fact that products liability in tort is a theory available to plaintiffs does not mean it is the *only* theory plaintiffs may pursue when the case is based on an allegedly defective product. *See Perfetti v. McGhan Med.*, 1983-NMCA-032, ¶¶ 45-47, 99 N.M. 645, 662 P.2d 646 (acknowledging that New Mexico law explicitly provides that both products liability and breach of warranty causes of action are available to plaintiffs). Even if Plaintiff was asserting a claim for products liability, that would not necessarily foreclose his option to assert a warranty claim as well. *See Di Prospero*, 494 N.Y.S.2d at 183 ("[I]t does not follow that merely because a cause of action exists under strict product liability in tort, a separate cause of action under the warranty provisions of the UCC is precluded."); *see also* Introduction to UJI ch. 14 NMRA, Products Liability (noting that the UCC and the doctrine of strict liability in tort "create parallel but independent bodies of product liability law," and "[p]laintiffs may proceed under both theories"; "[n]o election is required").

{46} Further, Defendants' contention that Plaintiff's claims are tort-based ignores the very nature of tort-based products liability claims, which rely on a theory of negligence. *See Fernandez v. Char-Li-Jon, Inc.*, 1994-NMCA-130, ¶ 4, 119 N.M. 25, 888 P.2d 471 (recognizing "[a]n action seeking recovery for personal injury as a result of a defendant's alleged negligence"), *abrogated on other grounds by Romero v. Bachicha*, 2001-NMCA-048, ¶ 16, 130 N.M. 610, 28 P.3d 1151. Defendants overlook the fact that Plaintiff makes no claim for damages based on Defendants' negligence. Defendants point to only one fact which they contend reveals that Plaintiff's claims are truly tort claims: the fact that Plaintiff seeks damages for personal injuries. As we have previously discussed, we will not permit the remedy requested to dictate the nature of the claim. Thus, the outcome Defendants suggest represents the inverse of the rule that we look to the right asserted, not the remedy requested, to determine the nature of a claim: it would require us to look to the remedy requested in order to determine the right sued upon.

{47} While we agree with Defendants' contention that we must determine the true nature of a claim in order to prevent parties from avoiding the shorter tort limitation period by couching their claims in terms of breach of warranty when they are actually tort-based, we do not find this to be true in the case at bar. *See B & B Paint Corp. v. Shrock Mfg., Inc.*, 568 N.E.2d 1017, 1019 (Ind. Ct. App. 1991) (acknowledging that "[i]f a cause of action is actually one for negligence or strict liability, but has been couched in terms of breach of warranty under the UCC solely to avoid the shorter statute of limitations [for products

liability actions], the statute of limitations for [p]roduct [l]iability [actions] will apply"). We hold that the nature of the right Plaintiff asserts is based in contract, and therefore the UCC's four-year statute of limitation, which governs actions for breach of warranty seeking personal injury damages, applies.

I. The Tort and UCC Statutes Do Not Conflict; Therefore Analysis of Which Statute Is More Specific Is Unwarranted

{48} The parties suggest that a principle of statutory interpretation, sometimes called the "general/specific rule," also supports each of their respective positions. This rule dictates "that when one statute deals with a subject in general terms and another deals with a part of the same subject more specifically, the more specific statute will be considered an exception to the general statute, and will apply." *Prod. Credit Ass'n of S. N.M. v. Williamson*, 1988-NMSC-041, ¶ 5, 107 N.M. 212, 755 P.2d 56. In light of this opinion's foregoing holdings, we find it unnecessary to address this issue.

{49} As we held above, the tort statute and the UCC statute address distinct causes of action, foreclosing any requirement to apply the general/specific rule of statutory interpretation. It is well established in New Mexico that our tort and UCC bodies of law are parallel, but independent: the UCC governs claims based in contract; the tort limitation governs claims based in negligence. *See Fernandez*, 1994-NMCA-130, ¶ 4 (Section 37-1-8 governs an "action seeking recovery for personal injury as a result of a defendant's alleged negligence"). Because these two bodies of law govern different types of claims, they do not conflict; therefore, we need not decide which one is more specific. *See State ex rel. Madrid v. UU Bar Ranch Ltd. P'ship*, 2005-NMCA-079, ¶ 20, 137 N.M. 719, 114 P.3d 399 ("[T]he general/specific rule of statutory construction applies only when the statutory provisions are conflicting.") (internal quotation marks and citation omitted). Thus, the two statutes are harmonized so that each is given effect. *See Citizens for Incorporation, Inc. v. Bd. of Cty. Comm'rs of Cnty. of Bernalillo*, 1993-NMCA-069, ¶ 20, 115 N.M. 710, 858 P.2d 86 ("If the statutes can be harmonized so that each can be given effect, this Court should do so.").

{50} Lastly, we turn to the parties' final argument. Defendants argue that Plaintiff's claims are barred on the second ground upon which the district court granted summary judgment in their favor, namely, that "there is no genuine issue of material fact as to Plaintiff's inability to establish required elements of his causes of action for breach of express and implied warranty." Because this issue was not included in the grounds upon which this Court granted Plaintiff's petition for writ of certiorari, we decline to address it. *See* Rule 12-502(C)(2)(d) NMRA (stating parenthetically that "the Court will consider only the questions set forth in the petition"); *State v. Morales*, 2010-NMSC-026, ¶ 19, 148 N.M. 305, 236 P.3d 24 ("Under the appellate rules, it is improper for this Court to consider any questions except those set forth in the petition for certiorari." (internal quotation marks and citations omitted)). The case is remanded to the Court of Appeals to consider the second basis upon which the district court granted summary judgment to Defendants. *See Badilla*, 2013-NMCA-058, ¶ 16.

III. CONCLUSION

{51} We hold that the UCC four-year statute of limitations for breach of warranty claims governs Plaintiff's claims, rather than the three-year statute for tort claims. We therefore reverse and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

{52} IT IS SO ORDERED.

BARBARA J. VIGIL, Chief Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice

From the New Mexico Supreme Court

Opinion Number: 2015-NMSC-030

No. 34,411 (filed September 10, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DONOVAN KING,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
JOHN A. DEAN, JR. District Judge

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Opinion

Richard C. Bosson, Justice

{1} Relying on *Santobello v. New York*, 404 U.S. 257 (1971), this Court has previously held that a plea-bargained sentence must be fulfilled by the prosecution, and if not, will be enforced by the courts. *See State v. Miller*, 2013-NMSC-048, ¶¶ 29, 31, 314 P.3d 655. In this first-degree murder appeal, we apply that principle of law to a prosecutorial promise to dismiss a tampering-with-evidence charge if the accused would locate and produce the murder weapon. Here, Defendant Donovan King produced the weapon, but the prosecutor did not drop the charge as promised and Defendant was convicted of tampering with evidence. Accordingly, we reverse the tampering conviction. Affirming all remaining convictions, including first-degree murder, we remand for resentencing.

BACKGROUND

{2} Defendant and Justin Mark arrived at Kevin Lossiah's apartment the morning of May 29, 2011. Initially, Lossiah's neighbors saw Defendant and Mark outside Lossiah's apartment. Neighbor Wesley Gray talked to Defendant briefly before returning to his apartment. Moments later Gray and his wife Nicole Beyale heard banging coming from Lossiah's apartment and someone yelling "Please stop! Shut up!" Beyale immediately called the police, who were dispatched to the apartment and found Lossiah severely beaten but still breathing. Officers called for paramedics and Lossiah was rushed to the hospital.

{3} Farmington police officers, having the descriptions of both Defendant and Mark, began canvassing the area. Shortly after the incident, Detective Paul Martinez and Officer Frank Dart came into contact with Mark and Defendant. Detective Martinez testified that Mark was shirtless and had fresh scratches on his back, and that the clothing on both men was wet and muddy. Detective Martinez also testified that both individuals looked like they had been involved in a struggle. DNA testing later revealed Lossiah's blood on their clothing. While being questioned by Officer Dart, Defendant stated that Lossiah "came at him with a sword." Both Mark and Defendant were arrested and taken to the Farmington Police Department. Lossiah died later that night.

{4} Ultimately, Defendant was charged with and convicted of first-degree murder, conspiracy to commit first-degree murder, armed robbery, conspiracy to commit armed robbery, and tampering with evidence. The district court sentenced Defendant to life imprisonment plus 18 years. Recently this Court upheld Mark's conviction for first-degree murder for his participation in Lossiah's murder. *See State v. Mark*, No. 34,025, dec., ¶¶ 1, 48 (N.M. Sup. Ct. Apr. 13, 2015) (non-precedential). Defendant appeals directly to this Court. *See* Rule12-102(A)(1) NMRA.

DISCUSSION

{5} On direct appeal to this Court, Defendant raises five issues. The principal issue is whether the prosecutor made a promise to Defendant to dismiss one of the charges if Defendant would locate and turn over the murder weapon. If such a promise was made, we must decide the appropriate remedy, if any. To establish necessary context, we begin with Defendant's custodial interrogations.

{6} Officers questioned Defendant on May 29, 2011, the day of the arrest, and again on May 30, 2011. This Court previously upheld the district court's determination that Defendant's interrogation on May 29, 2011, violated Defendant's constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), making Defendant's incriminating statements from that interview inadmissible at trial. *State v. King*, 2013-NMSC-014, ¶¶ 1-2, 13, 300 P.3d 732. When Detective Martinez questioned Defendant the next day, he properly advised Defendant of his *Miranda* rights and Defendant signed a waiver, consenting to questioning without an attorney.

{7} After being advised of his *Miranda* rights, Defendant asked the detective for his paperwork. Defendant indicated that he did not want to talk about the events of the previous day because he wanted to speak to his family first.[1] Detective Martinez asked Defendant if there was anything he did want to talk about, to which Defendant replied "[t]hat's why I asked [you] to bring the papers." Defendant then indicated that he would like to see some charges dropped. The following exchange took place:

[1] Defendant sought to suppress the statements and any physical evidence that resulted from the second interview. The district court found that the second interview did not include a valid waiver of Defendant's right against self-incrimination because of Defendant's stated reluctance to speak with the detective before talking with his family. The court, however, also found that the statements were voluntarily given. Consistent with the *U.S. v. Patane*, 542 U.S. 630 (2004) standard, the district court held that the physical fruits of those statements—in this case the murder weapon—could be admitted at trial.

> **Detective Martinez:** Well, what would you like to see dropped and why?
> **Donovan King**: The tampering with evidence.
> **Detective Martinez:** And how would you like that one to get dropped?
> **Donovan King**: If I show you personally what I did with what I had?
> **Detective Martinez:** Look, I can't make that promise, but if you . . . tell me now where you [put it] I can talk to the [district attorney] but I cannot make you a promise. But I can tell you that if you cooperate and tell me where everything you guys did and where it went well, yeah, that's going to help in the tampering because then it would no longer have, . . . I'm sure the [district attorney] would be willing to work with us.

{8} During the discussion, Defendant admitted that he and Mark had taken a wooden branch into Lossiah's apartment and that Defendant later hid it. This branch is what Defendant was referring to when he offered to show the detective "what I did with what I had" if the tampering charge was dropped. The tampering charge was based on Defendant having hidden the branch.

{9} Because Detective Martinez did not have the authority to drop the charge, he called his supervisor. After the supervisor returned Detective Martinez's telephone call, the detective had this exchange with Defendant:

> **Detective Martinez**: Here is what I was told word for word. We just talked with the district attorney that is actually charging you. The district attorney is willing to talk dismissal of the charge of tampering if we go today and actually find the weapon where you hid it. Is that what you want to do?
> **Donovan King**: Yeah.
> **Detective Martinez:** Okay, let me make arrangements and I got somebody meeting us and we will go right now.

Defendant then went with the officers to the location of the wooden branch Defendant had hidden. At trial the prosecution used the branch as evidence of a murder weapon.

{10} The exchange between Defendant and Detective Martinez is significant because the assistant district attorney, speaking through Detective Martinez, appears to have promised to dismiss the tampering charge in exchange for Defendant locating the murder weapon. Yet, Defendant was in fact charged with and convicted of that same tampering charge pertaining to that same branch. Based on this exchange, we requested supplemental briefing to address the voluntariness of Defendant's statements and subsequent production of the branch in reliance on a promise of leniency—dismissal of the tampering charge.

{11} Normally, we would analyze custodial statements made to a police officer in reliance on a promise of leniency in terms of whether the individual's "'will has been overborne and his capacity for self-determination critically impaired.'" *State v. Munoz*, 1998-NMSC-048, ¶ 20, 126 N.M. 535, 972 P.2d 847 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)). The analysis differs, however, when examining a plea agreement entered into with a prosecutor. *See Miller*, 2013-NMSC-048, ¶ 9. ("Upon review, appellate courts construe the terms of the plea agreement according to what Defendant reasonably understood when he entered the plea." (internal alteration omitted) (internal quotation marks and citation omitted)). The distinction exists in part because "[t]he police have no authority to make prosecutorial decisions." *State v. Reed*, 879 P.2d 1000, 1002 (Wash. Ct. App. 1994). The district attorney obviously does have such authority.

{12} Notably, this appeal presents a kind of hybrid of custodial statements made to a police officer and a plea agreement negotiated with a prosecutor. Defendant only talked with Detective Martinez. However, the level of participation by the prosecutor is significant and cannot be overlooked. In the initial discussion with Defendant, Detective Martinez was very careful not to promise dismissal because he had no authority to make such an offer ("Look, I can't make that promise, but . . . ."). But the prosecutor did have the authority, which appears to be exactly why the detective then conferred with the one person who could "make that promise": "the district attorney that is actually charging you."

{13} After talking directly with the prosecutor, Detective Martinez, acting as a kind of proxy, relayed the prosecutor's offer—not the detective's offer—that the prosecutor would dismiss the tampering charge if Defendant showed the police where the tampered-with evidence—the hidden murder weapon—was located. Importantly, there is no claim here that the detective misunderstood or misrepresented the prosecutor's offer. At the suppression hearing, the same prosecutor who made the offer played the audio interview between Detective Martinez and Defendant without any contradiction, objection, or claim of inaccuracy.

{14} The fundamental problem is not the officer's willingness to participate in the discussion Defendant initiated, but the prosecutor's failure to follow through on his offer. Had the prosecutor dismissed the tampering charge, Defendant would be in no position to complain about having given the statement or produced the murder weapon; he would have received the benefit of his bargain. Thus, it is the level of participation by the prosecutor that places this case into the realm of a plea agreement. As such, "[w]e examine the language in the plea agreement to evaluate the reasonableness of *Defendant's understanding*." *Miller*, 2013-NMSC-048, ¶ 16 (emphasis added).

{15} A literal, finely-parsed reading of the exchange might suggest that the prosecutor promised only to "talk dismissal" of the tampering charge, but not necessarily to dismiss the charge. The State makes such a claim on appeal. A fair reading of this exchange, however, leads ineluctably to a different conclusion. If Defendant showed the branch to Detective Martinez, then the tampering charge really would be dismissed; they would not just "talk" about it. Clearly, that is what Defendant believed and reasonably so. Why else would he locate the branch for Detective Martinez if not in reliance on such an agreement? Defendant performed on his promise; the prosecutor did not. Accordingly, we must consider the appropriate remedy for the prosecutor's unfulfilled promise.

Specific performance is the appropriate remedy for an unfulfilled promise made by the prosecutor in the context of this case

{16} *Santobello*, 404 U.S. 257, provides a helpful framework for this issue. In *Santobello*, the prosecutor permitted the accused to plead guilty to a lesser-included offense and agreed not to recommend any sentence to the court. *Id.* at 258. After a series of delays, a new prosecutor who took over the case failed to adhere to the original plea agreement and recommended the maximum sentence, which the defendant received. *Id.* at 259. The U.S. Supreme Court reversed, saying that "when a plea rests in any significant degree on a promise

or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. Declining to decide categorically how that promise should be enforced, the Court remanded, stating "[t]he ultimate relief to which petitioner is entitled we leave to the discretion of the state court" because the state court is in a better position to choose the remedy. *Id.* at 263. The Court did suggest specific performance of the original plea agreement as one alternative. *Id.*

{17} Citing *Santobello*, this Court granted specific performance in *Miller*, 2013-NMSC-048, ¶¶ 30-31, as a proper remedy for a broken plea agreement. In *Miller*, the defendant and the prosecutor had agreed that the defendant would receive a maximum sentence of forty years. *Id.* ¶ 3. The district court then proceeded to sentence the defendant to forty-two years and suspended nine years of the sentence. *Id.* ¶ 4. This Court held "that the forty-two-year sentence violate[d] the plea agreement." *Id.* ¶ 8. We remanded the case to the district court "to sentence [the defendant] according to his reasonable understanding of the plea agreement, requiring that his sentence contain a total period of incarceration between ten and forty years." *Id.*

{18} In the present case, Defendant voluntarily presented a potential plea agreement to the State, saying essentially: "If you dismiss the tampering charge, I will find the branch." While the deal may not have been in Defendant's best interest, it is the deal he freely proposed; it was not coerced or extracted unfairly. The prosecutor's response, through Detective Martinez and his conduct thereafter, led Defendant reasonably to understand that they had an agreement. There was no apparent reason for the prosecutor not to keep his end of the bargain. We strongly favor the language from *Santobello* quoted earlier that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262. *See State v. Unga*, 196 P.3d 645, 651 (Wash. 2008) (en banc) (charge dismissed when confession was based on a promise not to prosecute for that crime; other charges were upheld).

{19} In the interest of fundamental fairness, we conclude that Defendant is entitled to specific performance of the agreement he made with the prosecutor. As a result, we vacate Defendant's tampering with evidence conviction and remand for resentencing. We continue with the remaining issues Defendant raises on appeal.

Defendant was on notice that he could be convicted as an accessory even though he was only charged as a principal

{20} Defendant failed to preserve his challenge to the jury instruction on accessory liability, which we now review for fundamental error. *See* Rule 12-216(B)(2) NMRA (providing that an appellate court may review, "in its discretion, [unpreserved] questions involving . . . fundamental error"). Fundamental error "'must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.'" *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633 (quoting *State v. Garcia*, 1942-NMSC-030, ¶ 25, 46 N.M. 302, 128 P.2d 459). "The exacting standard of review for reversal for fundamental error requires the question of guilt be so doubtful that it would shock the conscience of the court to permit the verdict to stand." *State v. Samora*, 2013-NMSC-038, ¶ 17, 307 P.3d 328 (internal alterations omitted) (internal quotation marks and citation omitted). Defendant claims for the first time that "[i]nstructing the jury on accessory liability when the State failed to charge [Defendant] at any point with accessory liability deprived [Defendant] of his fundamental rights to notice of the charges against him and the opportunity to prepare a defense." We are not persuaded.

{21} Defendant is correct that the State did not initially charge Defendant with accessory liability. However, New Mexico long ago abolished the distinction between accessory and principal liability. *See State v. Wall*, 1980-NMSC-034, ¶ 10, 94 N.M. 169, 608 P.2d 145 ("The Legislature and our courts have abolished the distinction between a principal and an accessory."), *overruled on other grounds by State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071. *See also State v. Nance*, 1966-NMSC-207, ¶ 18, 77 N.M. 39, 419 P.2d 242 ("The purpose of the [L]egislature to authorize charging and convicting an accessory as a principal is made evident when we consider that no different penalty is provided by law for one who aids and abets."), *abrogated on other grounds by State v. Wilson*, 2011-NMSC-001, ¶¶ 14-15, 149 N.M. 273, 248 P.3d 315; *Tapia v. Tansy*, 926 F.2d 1554, 1561 (10th Cir. 1991) ("New Mexico, like many other states, long ago abolished the distinction between conviction as a principal and an accessory, so that the charge as principal includes a corresponding accessory charge."). The charge against Defendant as a principal included "a corresponding accessory charge," assuming the evidence at trial supported the charge. Accordingly, Defendant "was on notice that he could be charged as a principal and convicted as an accessory or vice-a-versa." *See Wall*, 1980-NMSC-034, ¶ 10. After Defendant was charged as a principal, the district court correctly instructed the jury on accessory liability.

Defendant's statements were hearsay not falling within any recognized exception

{22} Defendant, in reliance on his Fifth Amendment privilege against compelled self-incrimination, declined to testify at trial. Defense counsel, trying to lay an evidentiary foundation for Defendant's claim of self-defense, sought to question Officer Dart about certain statements Defendant had made to him. The State made a hearsay objection. Defense counsel called Officer Dart outside the presence of the jury to make a proffer of evidence. During the proffer, Officer Dart acknowledged being told by Defendant that "Lossiah came at him with a sword." The court granted the State's hearsay objection.

{23} Defendant maintains on appeal that his statement to Officer Dart was admissible either as a nonhearsay statement or, in the alternative, as a statement that satisfied one or more exceptions to the hearsay rule. "We review the admission of hearsay evidence for an abuse of discretion." *State v. Sisneros*, 2013-NMSC-049, ¶ 18, 314 P.3d 665. We begin by asking whether Defendant's statement to Officer Dart was hearsay.

{24} "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." *Id.*; *see also* Rule 11–801(C) NMRA. Defendant argues that his statement to Officer Dart was not hearsay because it was not offered to prove the truth of the matter asserted—that Lossiah actually threatened Defendant with a sword—but only to show how Defendant felt as a result, his fearful state of mind. Defendant argues that excluding this statement effectively denied him a defense, that he believed he was threatened with a sword and reacted accordingly.

{25} This Court has stated: "The purpose of recognizing self-defense as a complete justification to homicide is the *reasonable belief* in the necessity for the use of

deadly force to repel an attack in order to save oneself or another from death or great bodily harm." *State v. Coffin*, 1999-NMSC-038, ¶ 12, 128 N.M. 192, 991 P.2d 477 (emphasis added). We agree with the State's analysis that "[Defendant's] statement only shows a reasonable belief of imminent danger if the statement is true. If the statement is false, then it shows no such thing." Defendant cannot use this statement to demonstrate a *reasonable belief* in the necessity of his use of force for self-defense unless he stated truthfully to Officer Dart that the victim came at him with a sword. Accordingly, the statement in fact was being offered for the truth of the matter stated, and the district court correctly denied its admission.

{26} Defendant also argues for various recognized exceptions to the hearsay rule. He first proposes that his statement was admissible under Rule 11-803(3) NMRA as a then-existing mental, emotional or physical condition. This exception to the hearsay rule applies to "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." *Id.* "The exception is limited to statements showing the mental state, *not its cause*." *State v. Leyba*, 2012-NMSC-037, ¶ 13, 289 P.3d 1215 (emphasis added).

{27} Defendant's statement that "Lossiah came at him with a sword" does not show Defendant's mental state, only its cause. This Court has held that "the rule does not permit evidence explaining why the declarant held a particular state of mind." *State v. Baca*, 1995-NMSC-045, ¶ 19, 120 N.M. 383, 902 P.2d 65. Even if Defendant had told the officer that he was afraid because of Lossiah's conduct, that would not have been his state of mind at the time he made the out-of-court statement, only his previous state of mind at the time of the alleged incident. Therefore, the district court did not abuse its discretion by rejecting Defendant's statement under Rule 11-803(3).

{28} Defendant next argues for the first time on appeal that this was an exception to hearsay as a statement against interest under Rule 11-804(B)(3) NMRA. We review for plain error. *See Lucero*, 1993-NMSC-064, ¶ 13 ("To establish plain error, the error complained of must have affected substantial rights although the plain errors were not brought to the attention of the judge." (internal alterations omitted) (internal quotation marks and citation omitted)). Defendant first must show he is unavailable to testify to meet any exception under Rule 11-804. Rule 11-804(A)(1) states that a declarant is unavailable if he "is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies." Here, Defendant chose to exercise his Fifth Amendment privilege against compulsory self-incrimination. By doing so, he made himself unavailable to the State, but he remained free to change his mind and testify. *See United States v. Peterson*, 100 F.3d 7, 13 (2d Cir. 1996) ("When the defendant invokes his Fifth Amendment privilege, he has made himself unavailable to any other party, but he is not unavailable to himself."). *See also United States v. Kimball*, 15 F.3d 54, 56 (5th Cir. 1994) (holding that a declarant cannot cause his own unavailability by invoking his Fifth Amendment privilege against self-incrimination); *United States v. Hughes*, 535 F.3d 880, 882 (8th Cir. 2008).

{29} Defendant was not unavailable as contemplated by Rule 11-804(A)(1). Even if Defendant were unavailable, however, his claim still fails under Rule 11-804(B)(3). A statement against interest is defined as a "statement . . . so far contrary to the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *State v. Torres*, 1998-NMSC-052, ¶ 14, 126 N.M. 477, 971 P.2d 1267 (internal quotation marks and citation omitted), *overruled by State v. Alvarez-Lopez*, 2004-NMSC-030, ¶¶ 17, 23, 136 N.M. 309, 98 P.3d 699 (overruling *Torres* "to the extent [that *Torres*] held custodial confessions implicating the accused fall with a firmly rooted hearsay exception and do not violate the federal Confrontation Clause"). The advisory committee's note to Fed. R. Evid. 804(b)(3) states that "a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest." Fed. R. Evid. 804(b)(3) advisory committee's note to 1972 amendment.

{30} Defendant argues that since his statement ("Lossiah came at [me] with a sword") exposed him to criminal liability, it was "an inculpatory statement with an aspect of self-defense." We disagree. Defendant gave the statement to Officer Dart when he was covered in Lossiah's blood and had Lossiah's possessions on his person. While this statement did not implicate another person, it could well have been "motivated by a desire to curry favor" with Officer Dart and explain his actions. The statement was not "so far contrary" to Defendant's penal interest. It actually was in Defendant's interest to make the statement. The district court correctly rejected Defendant's argument under Rule 11-804(B)(3).

{31} Defendant also argues for the first time on appeal that the statement should fall under Rule 11-807 NMRA. Again we review for plain error. This hearsay exception is available if

> (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

Rule 11-807(A). This Court has observed that "[t]his exception is to be used sparingly, however, especially in criminal cases." *Leyba*, 2012-NMSC-037, ¶ 20. "The test under the catch-all rules is whether the out-of-court statement—not the witness's testimony—has circumstantial guarantees of trustworthiness." *State v. Trujillo*, 2002-NMSC-005, ¶ 17, 131 N.M. 709, 42 P.3d 814.

{32} Defendant made no effort at trial to demonstrate that his statement shows "indicia of trustworthiness equivalent to those other specific exceptions." *Leyba*, 2012-NMSC-037, ¶ 20 (internal quotation marks and citation omitted). Defendant made the statement two hours after the incident took place while he had Lossiah's blood on his clothes. He was offering the officer self-serving testimony to mitigate or explain his actions. Moreover, Defendant failed to comply with Rule 11-807(B) that "[t]he statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars . . . so that the party has a fair opportunity to meet it." Therefore, we hold that it was not plain error for the district court to deny admission of Defendant's statements under Rule 11-807.

Ineffective assistance of counsel

{33} Defendant argues that he received ineffective assistance of counsel. This

Court has repeatedly stated that ineffective assistance of counsel claims are best served through habeas corpus proceedings so that an evidentiary hearing can take place on the record. *See State v. Baca*, 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776 ("A record on appeal that provides a basis for remanding to the trial court for an evidentiary hearing on ineffective assistance of counsel is rare. Ordinarily, such claims are heard on petition for writ of habeas corpus."). *See also State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845 ("[The] proper avenue of relief [from ineffective assistance of counsel] is a post-conviction proceeding that can develop a proper record."). Generally, only an evidentiary hearing can provide a court with sufficient information to make an informed determination about the effectiveness of counsel. Accordingly, we reject Defendant's ineffective assistance of counsel claim on appeal without prejudice to his ability to bring such a claim by way of habeas corpus.

{34} Because we have vacated Defendant's conviction of tampering while concluding that three other issues he raises are without merit, the fifth issue in which Defendant claims cumulative error is moot.

CONCLUSION

{35} We vacate Defendant's tampering with evidence conviction and remand for resentencing. We affirm Defendant's remaining convictions.

{36} IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:
BARBARA J. VIGIL, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice

From the New Mexico Supreme Court

Opinion Number: 2015-NMSC-031

No. 34,526 (filed September 10, 2015)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
ERNEST PAANANEN,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
JACQUELINE D. FLORES, District Judge

HECTOR H. BALDERAS
Attorney General
NICOLE BEDER
Assistant Attorney General
JACQUELINE ROSE MEDINA
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

JORGE A. ALVARADO
Chief Public Defender
B. DOUGLAS WOOD, III
Assistant Appellate Defender
Santa Fe, New Mexico
for Respondent

Opinion

Richard C. Bosson, Justice

{1} Over two decades ago, in *Campos v. State*, 1994-NMSC-012, ¶ 1, 117 N.M. 155, 870 P.2d 117, this Court held that under our New Mexico Constitution a felony arrest must be preceded by an arrest warrant, even when supported by probable cause, unless exigent circumstances made securing a warrant impractical. Our opinion in *Campos* addressed a situation in which the authorities had ample time to obtain an arrest warrant and provided no good reason for failing to do so. In the present case, by contrast, police officers made their arrest at the scene of the crime, shoplifting, without any prior opportunity to secure a warrant. In the course of our analysis, we explain our reasons for differing from the decision reached by the Court of Appeals, and reverse the opinion upholding the suppression of evidence below. We remand for further proceedings.

BACKROUND

{2} Surveillance cameras at Sportsman's Warehouse in Albuquerque caught Defendant Ernest Paananen placing two flashlights under his jacket and then leaving the store without paying. Moments later, the store's loss prevention team apprehended Defendant and returned him to the store. The loss prevention team placed Defendant in a back room, frisked him, and called the police. During the frisk, a loss prevention employee placed Defendant's possessions on the table, along with the stolen flashlights. The employee did not go through Defendant's backpack.

{3} Albuquerque Police Department Officers Cole Knight and Andrew Hsu arrived at the store, and Officer Knight immediately handcuffed Defendant. Officer Hsu searched Defendant's backpack and found hypodermic needles. When questioned about the needles, Defendant admitted that he had tried to use drugs the day before but said he did not currently possess any drugs.

{4} While waiting for a copy of the surveillance video, Officer Knight searched through Defendant's possessions on the table and found a cigarette pack. Officer Knight looked in the cigarette pack and found a substance he believed to be heroin, a hunch later confirmed by a field kit test. Along with shoplifting, the State charged Defendant with possession of a controlled substance and possession of drug paraphernalia.

{5} Subsequently, Defendant sought to suppress all evidence seized at the store, arguing that the officers had conducted an unreasonable, warrantless search in violation of both the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. In response, the State emphasized that the officers had specific statutory authority in shoplifting cases to arrest Defendant without a warrant. *See* NMSA 1978, Section 30-16-23 (1965) ("Any law enforcement officer may arrest *without warrant* any person [the officer] has probable cause for believing has committed the crime of shoplifting. . . ." (emphasis added)). The State then argued that because the arrest was valid, the officers conducted a lawful search of Defendant in the course of that arrest.

{6} At the suppression hearing, the State argued that the search 1) was incident to a valid arrest for shoplifting, and 2) was the result of inevitable discovery pursuant to that arrest. Unpersuaded, the district court suppressed all evidence seized, concluding that "the State ha[d] failed to establish that the search was conducted pursuant to any exception to the warrant requirement . . . ." The State appealed the suppression order to the Court of Appeals. *See* NMSA 1978, § 39-3-3(B)(2) (1972) ("In any criminal proceeding in district court an appeal may be taken by the state to the . . . court of appeals . . . within ten days from a[n] . . . order . . . suppressing or excluding evidence. . . .").

Court of Appeals opinion

{7} The Court of Appeals affirmed the suppression, holding "that the [warrantless] arrest of Defendant was not lawful under Article II, Section 10 of the New Mexico Constitution." *State v. Paananen*, 2014-NMCA-041, ¶ 2, 321 P.3d 945, *cert. granted*, 2014-NMCERT-003 (No. 34,526, Mar. 28, 2014). The Court acknowledged that a warrantless search may be conducted incident to a lawful arrest. *Id.* ¶ 17. The validity of the search, therefore, depended on the lawfulness of the arrest, and in this case Defendant was apprehended without an arrest warrant. To determine the validity of the warrantless arrest, the Court of Appeals focused heavily on *Campos*, 1994-NMSC-012, one of this Court's first opinions interpreting Article II, Section 10 of the New Mexico Constitution distinctly from its federal counterpart, the Fourth Amendment to the United States Constitution.

{8} In *Campos*, this Court held that an arrest without a warrant was valid only if both supported by probable cause and made under sufficient exigent circumstances. 1994-NMSC-012, ¶ 1. After determining that "Defendant presented no imminent threat to escape or destroy

evidence," and that "the State made no showing of exigent circumstances," the Court of Appeals held that the arresting officers first needed a warrant to arrest Defendant. *Paananen*, 2014-NMCA-041, ¶ 35-36. Only then could they justify searching Defendant incident to a lawful arrest, despite the undisputed presence of probable cause. *See id.* Accordingly, because the officers arrested Defendant without an arrest warrant, the Court of Appeals held that the arrest and subsequent search were unconstitutional and suppression of the evidence was appropriate. *Id.*

{9} In resolving the case at bar, we consider both federal and state constitutional precedent, especially our opinion in *Campos*, because the lawfulness of Defendant's warrantless arrest at Sportsman's Warehouse—and the search incident thereto—hangs in the balance.

DISCUSSION

{10} "Appellate review of a motion to suppress presents a mixed question of law and fact. We review factual determinations for substantial evidence and legal determinations de novo." *State v. Ketelson*, 2011-NMSC-023, ¶ 9, 150 N.M. 137, 257 P.3d 957.

The State properly preserved the issue of a search incident to an arrest

{11} Initially, we uphold the Court of Appeals' decision that the State properly preserved its theory of a search incident to an arrest. While the State initially argued only that the search of Defendant was the result of an inevitable discovery, the State clarified during the suppression hearing that it was also relying on an alternative theory of search incident to arrest. We agree with the Court of Appeals that the State sufficiently asserted the issue and adduced the evidence necessary to support the legal principle. Defendant, moreover, had an opportunity to respond below. Thus, we are satisfied that the issue was preserved for review on appeal. *See Paananen*, 2014-NMCA-041, ¶ 15.

Reasonableness of a warrantless arrest under the Fourth Amendment

{12} To determine the constitutionality of Defendant's arrest, under our interstitial approach to constitutional analysis, before looking to our New Mexico Constitution we first decide whether the arrest was lawful under the U.S. Constitution. *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1. Only if the federal constitution would not provide protection from the law enforcement activity under consideration, do we then turn to the civil liberties protected under Article II, Section 10 of the New Mexico Constitution. *Gomez*, 1997-NMSC-006, ¶ 19.

{13} The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated . . . ." U.S. Const. amend. IV (emphasis added). "To determine the constitutionality of a seizure we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks, citation, and brackets omitted).

{14} Almost 40 years ago, in *United States v. Watson*, 423 U.S. 411 (1976), the U.S. Supreme Court squarely applied these principles to determine the constitutionality of a warrantless arrest supported by probable cause and explicit statutory authority, similar to the statutory authority to arrest in cases of shoplifting in New Mexico. *See* Section 30-16-23 ("Any law enforcement officer may arrest *without warrant* any person [the officer] has probable cause for believing has committed the crime of shoplifting. . . ." (emphasis added)). In *Watson*, a statute authorized postal service officers to "make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony." *Id.* at 415. Watson was suspected of possessing stolen credit cards. *Id.* at 412. An informant notified the postal inspector, and the inspector subsequently set up a sting operation to catch Watson in possession of the stolen credit cards. *Id.* at 412-13. The informant notified the postal inspector six days before the sting operation. *Id.* at 426 (Powell, J., concurring). Once Watson arrived at the intended meeting, officers arrested him. *Id.* at 413. After receiving permission to search Watson's vehicle, officers discovered two stolen credit cards. *Id.*

{15} The main issue on appeal was whether the warrantless arrest violated the Fourth Amendment. *Watson*, 423 U.S. at 412-14. The U.S. Court of Appeals for the Ninth Circuit held that the arrest was not constitutional, despite the presence of probable cause, because no exigent circumstances justified the absence of an arrest warrant. *Id.* at 414. Notably, the postal inspector had probable cause for Watson's arrest six days before the sting operation. *Id.* at 413-14. "The Government made no effort to show that circumstances precluded the obtaining of a warrant, relying instead for the validity of the arrest solely upon the showing of probable cause to believe that respondent had committed a felony." *Id.* at 426 (Powell, J., concurring). Thus, according to the Ninth Circuit the postal inspector should have obtained an arrest warrant as he "concededly had time to do so." *Id.* at 414.

{16} The U.S. Supreme Court disagreed, determining that probable cause alone was a sufficient basis for a warrantless felony arrest. In reaching that determination, the Court considered the import of the statute that authorized the arrests and noted that "there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is reasonable." *Id.* at 416 (internal quotation marks and citation omitted). Additionally, the Court surveyed several prior cases in which it had upheld the validity of warrantless arrests based solely on a determination that such arrests were supported by probable cause. *See, e.g., id.* at 417 (concluding in its discussion of *Henry v. United States*, 361 U.S. 98 (1959), that "[t]he necessary inquiry, therefore, was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest."). The Court concluded that the statute and case law supported the constitutionality of a warrantless felony arrest as long as it was supported by probable cause. *Watson*, 423 U.S. at 416-24.

{17} In addition to statutory authority for a warrantless arrest, the U.S. Supreme Court looked to the common law standard "that a peace officer [is] permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground [probable cause] for making the arrest." *Id.* at 418. *See also* 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.1(b), at 15 (5th ed. 2012) (citing *Draper v. United States*, 358 U.S. 307 (1959), for the proposition that the "'reasonable grounds' test . . . and the 'probable cause' requirement of the Fourth Amendment 'are substantial equivalents.'"). Moreover, " '[t]he rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been generally held by the courts of the several [s]tates to be in force in cases of felony

punishable by the civil tribunals.' " *Id.* at 419, quoting *Kurtz v. Moffitt*, 115 U.S. 487 (1885). Continuing, the Court observed that although it would be "wise" for law enforcement officers to obtain an arrest warrant when it is "practicable to do so," *Watson*, 423 U.S. at 423, the Court declined to read that prudential consideration into the Fourth Amendment.

> [W]e decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.

Watson, 423 U.S. at 423-24.

{18} *Watson* remains good law today. Accordingly, there is no doubt that the warrantless arrest of Defendant did not violate his rights under the United States Constitution. That, in turn, would make the subsequent search incident to that arrest lawful as well, at least under the Fourth Amendment. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969) (recognizing that "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested"). Under our interstitial analysis we now proceed to examine this case under Article II, Section 10 of the New Mexico Constitution, and *Campos* in particular, to determine whether our New Mexico Constitution would require a warrant where the federal constitution does not. *See Gomez*, 1997-NMSC-006, ¶ 19.

Reasonableness of a warrantless arrest under Article II, Section 10 of the New Mexico Constitution

{19} In *Campos*, this Court held "that for a warrantless arrest to be reasonable the arresting officer must show that the officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant." *Campos*, 1995-NMSC-012, ¶ 14. Tellingly, our opinion in *Campos* was directed squarely at *Watson* and expressly disavowed the *Watson* holding that a warrant was not required, even when officers had sufficient time and opportunity to obtain one.

{20} Similar to *Watson*, a state statute in *Campos* authorized officers to make a warrantless arrest of any individual based solely on probable cause that a suspect was violating the Controlled Substances Act. *Campos*, 1994-NMSC-012, ¶ 4. The officer received information from a confidential informant that Campos would be conducting a drug transaction the next morning. *Id.* ¶ 2. "The informant told Officer Lara that Campos would be driving either a silver and black pickup truck or a small blue car down one of two routes to a location on East Deming Street in Roswell at about 8:00 a.m." *Id.* This information was corroborated by evidence that "Officer Lara had been investigating Campos for approximately one year, knew that Campos used vehicles like those described by the informant, and believed that Campos engaged in illegal drug activity." *Id.* The informant had proven to be reliable and accurate on previous occasions.

{21} In response, the officers set up a surveillance team. *Id.* ¶ 2. Officer Lara explained that he did not first secure an arrest warrant from a magistrate because he wanted to corroborate the information from the informant. The information provided to the officers proved to be accurate. When the defendant arrived at the transaction scene, he was arrested without a warrant. *Id.* ¶ 3. After a search of the defendant and his car, officers discovered heroin. *Id.*

{22} On certiorari review, this Court acknowledged the *Watson* rule that "a warrantless public arrest of a felon based on *probable cause* will be upheld regardless of whether the officer could have secured an arrest warrant." *Campos*, 1994-NMSC-012, ¶ 9 (emphasis added). This Court then recognized that since New Mexico strongly favors warrants, Article II, Section 10 of the New Mexico Constitution provides greater protection than the Fourth Amendment. *Campos*, 1994-NMSC-012, ¶ 10. Accordingly, this Court "[did] not assume that warrantless public arrests of felons are constitutionally reasonable." *Id.*

{23} In its analysis of the constitutionality of the warrantless arrest, the *Campos* Court pointed out, the crucial "inquiry in reviewing warrantless arrests [is] whether it was reasonable for the officer not to procure an arrest warrant." *Id.* ¶ 15. The Court appears to have been strongly influenced by the factor of time. Given the early presence of probable cause and adequate opportunity to obtain a warrant prior to the arrest, the officers had no good reason not to get the warrant. Thus, because "Officer Lara had probable cause to obtain a warrant on December 7 for the arrest of Campos on December 8," there were no "sufficient exigent circumstances to make the warrantless arrest of Campos reasonable." *Id.* ¶¶ 16-17.

{24} In contrast, in the case at bar, time was not on the officers' side. After they arrived at the arrest scene, the officers clearly developed probable cause to arrest Defendant based on their review of the video tape and the evidence of shoplifting displayed on the table before them. Unlike either *Campos* or *Watson*, however, the officers did not have this information or time to act on it prior to arriving on scene, and thus could not have gotten an arrest warrant before responding to the call.

{25} Given that it was not reasonably practical for the officers to obtain an arrest warrant before responding to the scene, they faced three alternatives after arriving on scene and gathering information amounting to probable cause. First, the officers could arrest Defendant on scene, as they did. Second, the officers could have continued to detain Defendant at the store while going to court to obtain the warrant, an effort likely to have taken significant time, during which Defendant would have remained under a de facto warrantless arrest at the store. *See, e.g.*, *State v. Werner*, 1994-NMSC-025, ¶ 16, 117 N.M. 315, 871 P.2d 971 (holding, after consideration of the "combination of the length of time of detention, the place of detention, and the restriction on Werner's freedom of movement," that a forty-five minute detention in a police car amounted to a de facto arrest). Finally, the officers could have released Defendant while they went to secure the warrant in the hope they could relocate and arrest him later, an expenditure of resources seemingly disproportionate to the crime of shoplifting and a risk our Legislature has declared unacceptable. *See* § 30-16-23 (authorizing warrantless arrests of shoplifting with probable cause). In our view, the officers chose the only reasonable approach, and the facts of this case provide a prime example of an "exigency . . . that precluded the officer[s] from securing a warrant." *See Campos*, 1994-NMSC-012, ¶ 14.

{26} The phrase "exigent circumstances" has been described in our jurisprudence as including "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." *Cam-*

pos, 1994-NMSC-012, ¶ 11 (quoting *State v. Copeland*, 1986-NMCA-083, ¶ 14, 105 N.M. 27, 727 P.2d 1342). The Court of Appeals appears to have relied upon this language in finding a lack of exigency when it reviewed this case below. *See Paananen*, 2014-NMCA-041, ¶¶ 32-36. The quoted language, however, is not an exclusive list. As *Campos* provides—and we now hold—there are other situations in which an exigency not necessarily amounting to an imminent threat of danger, escape, or lost evidence will be sufficient to render reasonable a warrantless public arrest supported by probable cause under the totality of the circumstances. *See Campos*, 1994-NMSC-012, ¶ 14 (declaring that "exigency will be presumed" where an officer observes the commission of a felony, without reference to imminent danger, escape, or destruction of evidence). An on-the-scene arrest supported by probable cause will usually supply the requisite exigency.

{27} We reiterate our holding in *Campos* that the overarching "inquiry in reviewing warrantless arrests [is] whether it was reasonable for the officer not to procure an arrest warrant," and that a warrantless arrest supported by probable cause is reasonable if "some exigency existed that precluded the officer from securing a warrant." *Id.* ¶ 14-15. Accordingly, when the police have ample time to obtain a warrant before making an arrest, as was the case in *Campos*, our New Mexico Constitution compels them to do so. *See id.* ¶ 15 ("We will not hesitate . . . to find a warrantless arrest unreasonable if no exigencies existed to excuse the officer's failure to obtain a warrant."). However, where as here sufficient exigent circumstances make it not reasonably practicable to get a warrant, one is not required.

{28} That this was a misdemeanor arrest does not materially alter the analysis. We have previously held that exigent circumstances can justify a warrantless arrest for misdemeanor driving while intoxicated. *See City of Santa Fe v. Martinez*, 2010-NMSC-033, ¶¶ 14, 17, 148 N.M. 708, 242 P.3d 275 (evanescent nature of alcohol in the body presents sufficient exigent circumstances to justify warrantless arrest). More recently, we upheld a warrantless arrest for misdemeanor domestic battery as long as the officer apprehended the suspect reasonably close to the scene of the crime. *See State v. Almanzar*, 2014-NMSC-001, ¶ 2, 316 P.3d 183; NMSA 1978, § 31-1-7(A) (1979, amended 1995) ("[A] peace officer may arrest a person and take that person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause."). The same principle of probable cause plus exigent circumstances justifies an arrest for misdemeanor shoplifting made at the scene of the crime.

The search was reasonable because it was incident to a valid arrest

{29} In New Mexico, a warrantless search is presumed unreasonable unless the search fits within a judicially recognized exception to the warrant requirement. *State v. Rowell*, 2008-NMSC-041, ¶ 10, 144 N.M. 371, 188 P.3d 95. "One of the most firmly established exceptions to the warrant requirement is the right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested." *Id.* ¶ 13 (internal quotation marks and citations omitted). "Given the exigencies always inherent in taking an arrestee into custody, a search incident to arrest is a reasonable preventative measure to eliminate any possibility of the arrestee's accessing weapons or evidence, without any requirement of a showing that an actual threat exists in a particular case." *Id.* ¶ 25, n.1.

{30} Officer Knight testified at the suppression hearing that it is standard procedure to search a suspect incident to an arrest to "make sure they don't take contraband to jail . . . ." Officer Knight explained that searches are performed thoroughly because "[i]t's been my experience that they can have little razor blades and such in their property. We're pretty thorough to make sure there's no weapons first off." Finally, counsel for the State asked Officer Knight if opening up small containers was part of the procedure to protect against small razor blades, to which Officer Knight answered, "[a]bsolutely."

{31} Once Officer Knight placed Defendant in handcuffs, Defendant was deemed under arrest. Pursuant to protocol, Officer Knight opened the cigarette package that was sitting on the table and discovered heroin. This search, while performed without a warrant, was conducted incident to a valid arrest. Hence, the search fits within a judicially recognized exception to the warrant requirement and was reasonable.

CONCLUSION

{32} Defendant's arrest, though without a warrant, was reasonable under the New Mexico Constitution. The subsequent warrantless search of Defendant fits a judicially recognized exception to the warrant requirement and was therefore also constitutionally reasonable. Accordingly, we reverse the Court of Appeals and remand for further proceedings.

{33} IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:
BARBARA J. VIGIL, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice

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The Santa Fe office of The Rothstein Law Firm seeks an associate attorney with 3 plus years of litigation experience. Candidates should have a strong academic background and excellent research and writing skills. Please email a resume and writing sample to info@rothsteinlaw.com.

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The Mescalero Apache Tribe is seeking proposals to provide Public Defender Services to the Mescalero Tribal Court for criminal cases. SUMMARY: The Mescalero Apache Tribal Court is a court of general jurisdiction addressing crimes under the Mescalero Apache Law and Order Code. All crimes do not exceed one year sentencing. Attorneys licensed and in good standing with the State of New Mexico Bar is required; Proposed fees may be based on an hourly rate or a flat rate; Proposed fees may NOT exceed $50,000.00 per budget year; Final terms of submitted proposals are negotiable. SUBMIT PROPOSALS TO THE MESCALERO TRIBAL ADMINISTRATOR: DUANE DUFFY, MESCALERO APACHE TRIBE, MESCALERO, NM 88340; 575-464-4494 EXT. 211

13th Judicial District Attorney Assistant Trial Attorney, Associate Trial Attorney Sandoval and Valencia Counties
Assistant Trial Attorney - The 13th Judicial District Attorney's Office is accepting applications for entry to mid-level attorney to fill the positions of Assistant Trial Attorney for Sandoval (Bernalillo) or Valencia (Belen) County Offices. These positions require misdemeanor and felony caseload experience. Associate Trial Attorney - The 13th Judicial District Attorney's Office is accepting applications for entry level positions for Sandoval (Bernalillo) or Valencia (Belen) County Offices. These positions require misdemeanor, juvenile and possible felony cases. Upon request, be prepared to provide a summary of cases tried. Salary for each position is commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, PO Box 1750, Bernalillo, NM 87004, or via E-Mail to: RAragon@da.state.nm.us. Deadline for submission of resumes: Open until positions are filled.

Paralegal
Paralegal for Plaintiff's Injury Firm. Minimum 3 years' experience in Plaintiff's injury law. Litigation experience necessary. Fast-paced environment with a high case load. We work as a team, and are the best team in Albuquerque. Outstanding pay, perks, and benefits. Come join us. To see the position description and apply, please type into your browser: ParnallLawJobs.com

Experienced Santa Fe Paralegal $45k
Santa Fe Law Firm has an immediate opening for a 10 yr+ EXPERIENCED SANTA FE PARALEGAL — bright, conscientious, hardworking, self-starter, mature, meticulous, professional to join our team. Excellent attention to detail, written and oral communication skills and multitasking. Our firm is computer intensive, informal, non-smoking and a fun place to work. Very Competitive Compensation package $45,000+ pa (plus fully paid health insurance and a Monthly Performance Bonus), paid parking, paid holidays + sick and personal leave. All responses will be kept strictly confidential. Please send us your resume and a cover letter in PDF format by eMail to sfelegalsecretary@gmail.com

State Bar of New Mexico Seeks Two FT Positions
Center for Legal Education Program Assistant and Member Services Coordinator. Degree preferred. Both require excellent customer service, communications, time management and computer skills. Compensation $13-$16 plus benefits DOE. Email cover letter and resume to hr@nmbar.org, EOE.

Positions Wanted

Are You Looking for a FT Legal Assistant/Secretary?
7-8 years experience, Want to work in Personal Injury or Insurance Defense area ONLY. Gen./Civil Litigation. Professional. Transcription, Proofreading/Formatting, Organized, Attn. to Detail, E-filing in Odyssey-CM/ECF, Cust. Svc. Exp., Basic Pleadings, Discovery Prep., Calendaring, File Maintenance, MSWord, MS Outlook, Excel. Please contact LegalAssistant0425@yahoo.com for Resume, Salary Expectations and References.

Services

Briefs, Research, Appeals—
Leave the writing to me. Experienced, effective, reasonable. cindi.pearlman@gmail.com (505) 281 6797

Contract Paralegal
Paralegal with 25+ years of experience available for work in all aspects of civil litigation on a freelance basis. Excellent references. civilparanm@gmail.com.

Office Space

Need Office Space?
Plaza500 located in the Albuquerque Plaza Office building at 201 3rd Street NW offers all-inclusive office packages with terms as long or as short as you need the space. Office package includes covered parking, VoIP phone with phone line, high-speed internet, free WiFi, meeting rooms, professional reception service, mail handling, and copy and fax machine. Contact Sandee at 505-999-1726 or sgalietti@allegiancesw.com.

620 Roma N.W.
620 ROMA N.W., located within two blocks of the three downtown courts. Rent includes utilities (except phones), fax, internet, janitorial service, copy machine, etc. All of this is included in the rent of $550 per month. Up to three offices are available to choose from and you'll also have access to five conference rooms, a large waiting area, access to full library, receptionist to greet clients and take calls. Call 243-3751 for appointment to inspect.

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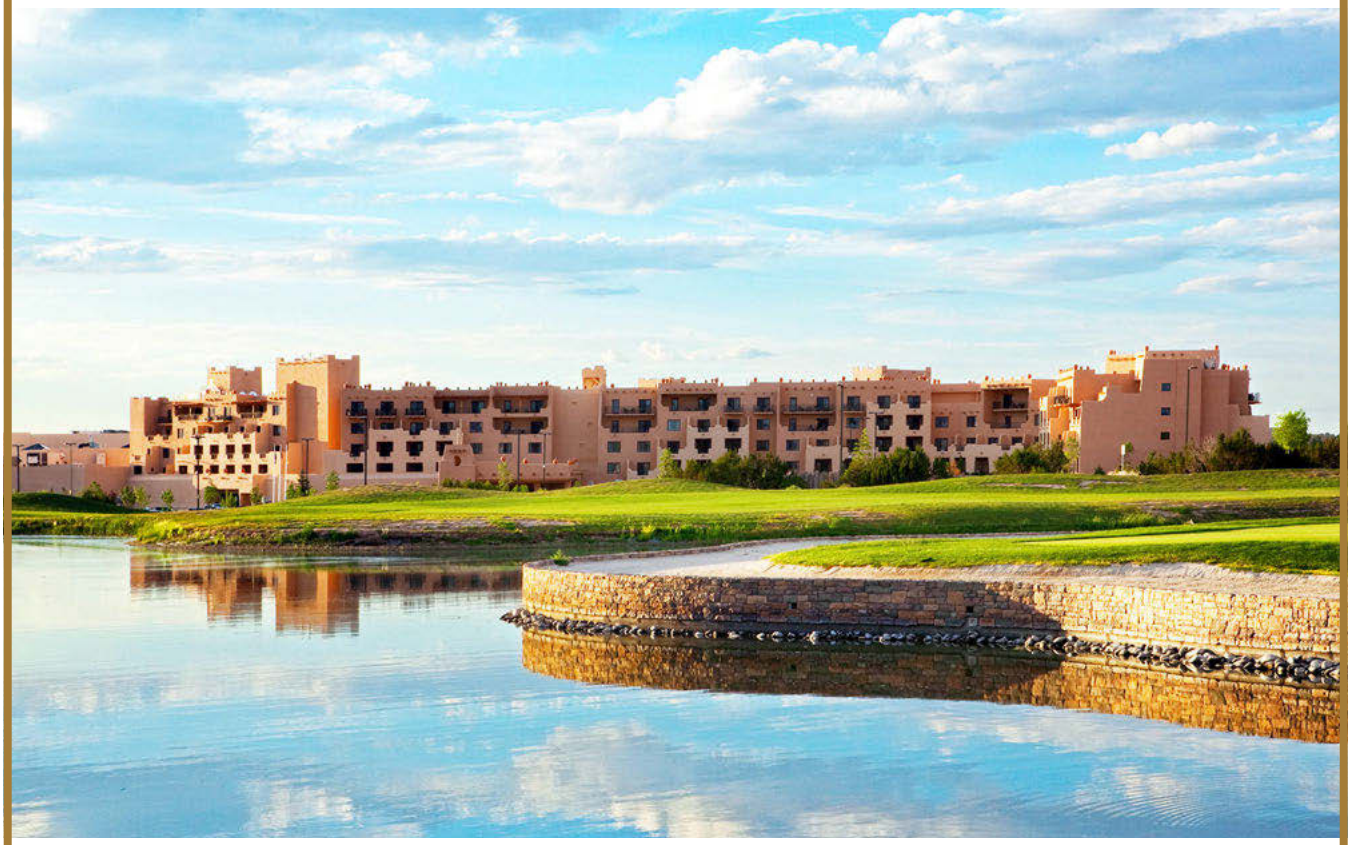

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