Official Publication of the State Bar of New Mexico

Bar Bulletin

January 18, 2017 • Volume 56, No. 3

The Watcher, by Jenifer Garcia (see page 3) Weems Art Gallery

Inside This Issue

Friday, Jan. 27

See page 2 for details.

131st Birthday Celebration

You're Invited!

The State Bar is proud of the tremendous dedication and service that our membership has given to the legal profession and the public. We hope you will join us for this important celebration.

State Bar President Scotty A. Holloman
will honor attorneys celebrating 25 and 50 years of service.

Distinguished guests from the New Mexico Supreme Court, New Mexico Court of Appeals and the UNM School of Law have been invited to attend.

Friday, Jan. 27
Ceremony at 4 p.m. • Reception to follow
State Bar Center, 5121 Masthead NE, Albuquerque

STATE BAR of NEW MEXICO

For more information or to R.S.V.P., contact Breanna Henley, bhenley@nmbar.org.

STATE BAR of NEW MEXICO

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25
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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

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

1
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

3
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15
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

Cover Artist: Jenifer Garcia is a self-taught artist specializing in original artwork including watercolor on paper, acrylic on canvas, handcrafted jewelry, prints, and hand-painted ornaments. View more of her work at www.etsy.com/shop/SnapDragonStudiosNM. In addition to Weems Art Gallery in Old Town Albuquerque, Garcia has shown at Jezebel Gallery in Madrid and Old Schoolhouse Gallery in San Antonio, N.M.

Notices

Court News

New Mexico Supreme Court Board of Legal Specialization

Comments Solicited

The following attorney is 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.

Immigration Law: Brett Janos

Second Judicial District Court

Exhibit Destruction

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits, the Second Judicial District Court will destroy exhibits filed with the Court, the Civil cases for the years of 1988 to the end of 2006 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Feb. 4. Those with cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.–5 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

U.S. District Court, District of New Mexico

Federal Bar Dues for the District of New Mexico

Attorney federal bar dues ($25) will be collected for calendar year 2017. Delinquent payments for prior years must still be made in order to maintain good standing. For information on making payments and checking on bar status, visit www.nmd.uscourts.gov/admissions.

State Bar News

Attorney Support Groups

- Feb. 6, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Feb. 13, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Feb. 20, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month but will not meet in January due to Martin Luther King Jr. Day.)

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

2017 Licensing Notification

Due by Feb. 1

2017 State Bar licensing fees and certifications were due Dec. 31, 2016, and must be completed by Feb. 1, 2017, to avoid non-compliance and related late fees. Complete annual licensing requirements at www.nmbar.org/licensing. Payment by credit card is available (payment by credit card will incur a service charge). For more information, call 505-797-6083 or email license@nmbar.org. For help logging in or other website troubleshooting, call 505-797-6084 or email aarmijo@nmbar.org. Those who have already completed their licensing requirements should disregard this notice.

Alternative Methods of Dispute Resolution Committee

Feedback Survey

The ADR Committee is interested in receiving feedback regarding speaker presentations, topics and participation from State Bar members who are not already involved with the Committee. To complete the survey, visit www.surveymonkey.com/r/66CR2LL.

Committee on Women and the Legal Profession

Nominations: 2016 Outstanding Advocacy for Women Award

Nominations for the 2016 Justice Pamela B. Minzner Outstanding Advocacy for Women Award are now open. Each year the Committee gives this award to a New Mexico attorney, male or female, who has distinguished themselves during the prior year by providing legal assistance to women who are underrepresented or underserved or by advocating for causes that will ultimately benefit and/or further the rights of women. To make a nomination, submit one to three letters describing the work and accomplishments of the nominee to Zoe Lees at zoe.lees@modrall.com by Jan. 31. The award ceremony will be held on June 8. For more details about the award and previous recipients, visit www.nmbar.org/committeeonwomen.

Practice Sections

Proposed Veterans Law Section

Are you interested in a Veteran's Law section to serve the needs of attorneys who focus their practice on veterans-related matters, including VA Disability Benefits? The proposed section will pledge to promote professionalism, excellence, understanding and cooperation among those attorneys engaged in this area of practice. The section would be committed to addressing the professional interests of veterans law counsel by informing members about issues of particular interest to them, identify and share best practices through various forms of information sharing, and offering social and professional networking opportunities. If you are interested in a section, email Breanna Henley at bhenley@nmbar.org.

UNM

Law Library

Hours Through May 13

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.

KANW New Mexico Public Radio

The Law of Rock and Roll with Michael Olivas

The Law of Rock and Roll radio show is hosted by University of Houston Law professor and New Mexico native Michael A. Olivas. The show explores the legal aspects of stars' careers, cases involving record

Professionalism Tip

In all matters: "My Word is My Bond."

companies and the business of rock and roll. KANW presents an evening of entertainment with Dr. Olivas at 6:30 p.m., Jan. 20, at Robertson & Sons Violin Shop Recital Hall, 3201 Carlisle Blvd., Albuquerque. Tickets are $30 and proceeds support KANW programming. One hour of CLE credit is available at no extra cost. Tickets can be purchased at www.kanw.com. The event is co-sponsored by the UNM School of Law, New Mexico Hispano Music Association Inc. and the New Mexico Hispanic Bar Association.

Other Bars

Federal Bar Association, New Mexico Chapter

Chemerinsky Event in March

The New Mexico Chapter of the Federal Bar Association is pleased to have University of California Irvine School of Law Dean Erwin Chemerinsky return to Albuquerque. On March 31, Dean Chemerinsky will present his popular talk about the Supreme Court and its recent cases, "An Amazing Time in the Supreme Court." The talk will be presented at the Hotel Andaluz in downtown Albuquerque at lunchtime. CLE credit is pending. Save the date! For more information, email nmfedbar@gmail.com.

First Judicial District Bar Association

January Luncheon Features Santa Fe Mayor Javier Gonzales

Santa Fe Mayor Javier Gonzales will discuss Santa Fe's status as a sanctuary city at the First Judicial District Court's noon luncheon event on Jan. 30 at the Santa Fe Hilton (100 Sandoval Street). Mayor Gonzales will be joined by City Attorney Kelley Brennan. The total cost for the luncheon is $15. R.S.V.P. to David Pumarejo at djp@santafelawgroup.com, by the close of business on Jan. 26 to attend this event.

From the Lawyers Professional Liability and Insurance Committee

Good Signs to Look for When Choosing a Professional Liability Insurance Company

4. Free "Tail" Policy After Three Years with the Company for Retiring Attorneys

Insurance companies providing policies for professional liability coverage for lawyers typically offer such policies on a claims made policy. Under a claims made policy, the act or omission giving rise to a potential claim must have occurred subsequent to the retroactive date of the policy, and the claim must also be made and reported during the policy period, after the inception date and prior to the expiration date. Typically, extended reporting coverage is available as an endorsement for an additional premium for an extended period of time for claims to be reported after the expiration date of the policy.

Some situations that warrant a review of this type of additional coverage—and at the very least a call to the insurance company or agent to inquire about options—include:

- When a professional liability policy is cancelled or non-renewed
- A lawyer closes a solo practice
- A lawyer changes law firms
- A lawyer dies or becomes disabled
- When a lawyer retires from the practice of law

This extended reporting coverage, also known as "tail" coverage, can be purchased for an additional premium which is significant, usually some multiple of the annual premium for professional liability coverage. Most insurance companies allow for some limited time for extending reporting of claims beyond the expiration of the policy, typically for 30 or 60 days following the expiration. However, the extended "tail" coverage is often for periods of several years. For retiring attorneys, some insurance companies offer free "tail" coverage as long the attorney is entering into full retirement and has been insured with the company for a number of years, usually from three to five years. This is something that a retiring attorney should discuss with the insurance company or agent and review the potential for free or reduced cost "tail" coverage so that if a claim is made, the attorney is not without coverage or at risk for losing retirement savings.

This is the fourth in a series of good signs to look for when choosing a professional liability insurance company, compiled by the Lawyers Professional Liability and Insurance Committee. Look for a new tip in the third issue of each month. Read the full list of tips and introduction in the Oct. 19, 2016, (Vol. 55, No. 42) issue of the Bar Bulletin. *The next tip will be published in the Feb. 15 issue.*

Legal Education

January

19 **Trust and Estate Planning Issues in Divorce**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Effective Use of Trial Technology (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Best and Worst Practices Including Ethical Dilemmas in Mediation (2016)**
3.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **If You Post, You May Pay… Ethically (2016 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Lawyer Ethics and Texting**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Capital Contributions, Capital Calls & Finance Provisions in Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **UCC Issues in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Drafting Special Needs Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Deposition Practice in Federal Cases (2016)**
2.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Environmental Regulations of the Oil and Gas Industry (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Effective Mentoring – Building Relationships to Bridge the Gap (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **Just Between Us: Drafting Effective Confidentiality & Non-disclosure Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Februar

7 **2017 Ethics Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **2017 Ethics Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Essentials of Employment Law**
5.6 G
Live Seminar, Las Cruces
Sterling Education Services Inc.
www.sterlingeducation.com

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

10 **Controversial Issues Facing the Legal Profession—Annual Paralegal Division CLE (2016)**
5.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Gender and Justice (2016 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Estate Planning for Digital Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Use of Trust Protectors in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Ethics in Billing and Collecting Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics in Negotiations**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opportunities for High School Students

Win up to $1,000!

State Bar Essay Contest

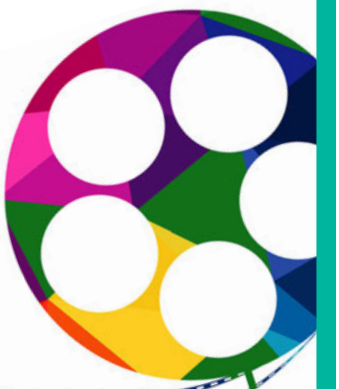
Due Process Dilemma:
To Camp or Not to Camp?

Students will discuss the constitutional guarantee of due process of law, found in the Fifth and Fourteen Amendments. The essay contest question will spark a debate regarding the legality of mandatory camps for high school drop outs that intend to educate youth and keep them out of trouble. Open to New Mexico high school juniors and seniors. Essays should be 1,000-1,500 words and are due on Feb. 27. Visit **www.nmbar.org/EssayContest** for the rules, the official prompt and legal writing tips.

Breaking Good Video Contest

Breaking Good
Video Contest
2016-2017

Who needs legal services in our country and why are they important?



According the U.S. Census Bureau, 46.7 million Americans live in poverty. Civil legal services help the underprivileged members of our society obtain improved access to justice. New Mexico high school students (grades 9–12) will create a 60 second video advocating for the need for legal services. Videos are due by March 31. Visit **www.nmbar.org/BreakingGood** for the official rules packet and more information.

STATE BAR of NEW MEXICO

For more opportunities for students and educators visit **www.nmbar.org > For Public.**

Print and give to the high school student in your life.

Cristina A. Adams has received the highest Martindale-Hubbell peer rating. Adams is an attorney in the Albuquerque office of the Rodey Law Firm and practices in the litigation department with an emphasis on medical malpractice defense.

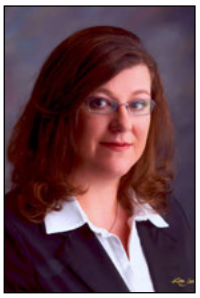
Walker Boyd has joined the Albuquerque law firm of Peifer, Hanson & Mullins, PA, as an associate. His practice focuses on civil litigation. Boyd attended Vassar College (B.A., 2009) and the University of New Mexico (J.D., *cum laude*, 2014).

David P. Buchholtz, an attorney with the Rodey Law Firm, was named Outstanding Attorney of the Year by the Albuquerque Bar Association. Buchholtz was recognized for his significant contributions to the practice of law, as well as his professionalism, integrity, superior legal service and service to the public.

Bobbie J. Collins, an associate attorney in Lewis Roca Rothgerber Christie LLP's Albuquerque office, has earned a Master of Laws in Taxation through the University of Denver Sturm College of Law's Graduate Tax Program. Collins is currently chair of the State Bar of New Mexico Taxation Section.

Tomas J. Garcia has achieved a rating of AV from Martindale-Hubbell, the highest rating available based on a peer review. Garcia's practice at Modrall Sperling includes a variety of commercial, healthcare, torts/personal injury, and transportation litigation. He attended Georgetown University Law Center. He is currently chair of the State Bar of New Mexico Young Lawyers Division.

Bridget Mullins has joined Pregenzer, Baysinger, Wideman & Sale, PC. Mullins is bilingual and will represent clients in the areas of guardianships, probate, wills, trusts and elder law. Mullins attended the University of New Mexico (J.D., masters degree) and Montana State University (bachelors degree).



Mariposa Padilla Sivage recently was elected to the board of directors of Sutin, Thayer & Browne law firm of Albuquerque and Santa Fe. Padilla Sivage joined the firm in 2010 and became a shareholder in 2013. She practices primarily in commercial and civil litigation with an emphasis in government entities and public employees.

Each year the **State Bar Family Law Section** offers two $600 academic scholarships. This year's scholarship recipients are first-year student **Israel Chávez** and second-year student **Alexis Shannez Dudelczyk**.

Keleher & McLeod, PA

Best Lawyers – Lawyers of the Year for 2017: **Arthur O. Beach** (product liability litigation – defendants), **Thomas C. Bird** (natural resources law), **Gary J. Van Luchene** (mass tort litigation/class actions – defendants), **Kurt Wihl** (litigation – construction).

Best Lawyers 2017: **S. Charles Archuleta** (labor and employment law - management), **Richard K. Barlow** (corporate law, leveraged buyouts and private equity law, mergers & acquisitions law, non-profit/charities law, securities/capital markets law, tax law, trusts and estates), **Arthur O. Beach** (personal injury litigation – plaintiffs and defendants, product liability litigation - defendants), **Thomas C. Bird** (antitrust law - litigation, appellate practice, Native American law, natural resources law), **Richard B. Cole** (energy law), **Thomas F. Keleher** (commercial litigation, construction law – litigation and non-litigation), **William B. Keleher** (corporate law, real estate law), **Robert J. Perovich** (construction law – litigation and non-litigation), **David W. Peterson** (commercial litigation, Native American law), **James L. Rasmussen** (corporate law), **W. Spencer Reid** (banking and finance law – litigation, commercial litigation, trusts and estates - litigation), **Gary J. Van Luchene** (commercial litigation, mass tort litigation/class actions – defendants, product liability litigation - defendants), **Kurt Wihl** (administrative/regulatory law, commercial litigation, construction law – litigation, insurance law – litigation, personal injury litigation – defendants, trusts and estates - litigation), **Clyde F. Worthen** (administrative/regulatory law, energy law).

Modrall, Sperling, Roehl, Harris & Sisk, PA

U.S. News & World Report and Best Lawyers 2017 "Best Law Firms": Albuquerque and Santa Fe

Benchmark Litigation 2017 "Highly Recommended Firm"

Local Litigation Stars: **Jennifer Anderson**, **Martha Brown**, **Timothy Fields**, **Timothy Holm**, **George McFall** and **Lynn Slade**

Future Stars: **Emil Kiehne**, **Megan Muirhead**, **Maria O'Brien**, **Tiffany Roach Martin** and **Alex Walker**

In Memoriam

Richard N. ("Dick") Carpenter, a 54 year resident of Santa Fe, died on Aug. 6, 2016. He was 79 years old. Carpenter was born on Feb. 14, 1937, in Cortland, N.Y. He graduated from Syracuse University and Yale Law School. From 1959–1960, he traveled and spoke extensively throughout the Indian subcontinent as Rotary Foundation Fellow for International Understanding at the University of Punjab in Lahore, Pakistan, and was described by the Pakistani press as having "earned the unofficial title of 'goodwill ambassador'" and by the Pakistani President as "a great ambassador in spreading goodwill and understanding." Carpenter practiced law in Santa Fe for 40 years, specializing in natural resource and utilities law and participating in many New Mexico and U.S. judicial and administrative proceedings. He was a successful lobbyist who drafted, reviewed, monitored and advocated for proposals before the New Mexico Legislature, the Governor and the U.S. Congress. The many clients he represented included Plains Electric Generation and Transmission Co-op and other Rocky Mountain and southwestern rural electric co-ops, natural resource companies, commercial broadcasters, the Teachers Federation, the Navajo Nation, St. John's College, Stanford University, and various New Mexico school districts. Carpenter was a passionate supporter and leader of charities and civic and governmental organizations. He served on the board of trustees of St. Vincent Hospital from 1980–2001, including service as chair for many years. He served as regent of New Mexico Institute of Mining and Technology from 2003–2015, including multiple terms as chair. From 2002–2012 he served on the board of directors of the Archdiocese of Santa Fe Catholic Foundation. He served many other community organizations, including the St. Vincent Hospital Foundation, Santa Fe Community Council, Santa Fe YMCA, Santa Fe Preparatory School, First Presbyterian Church, New Mexico Educational Assistance Foundation, Con Alma Health Foundation and the Santa Fe Energy Task Force. A devout Catholic, Carpenter was a leader of the Saint Francis Cathedral Basilica capital campaign and was lector at the Cathedral from 2007-2012. His hobbies included computing, reading, tennis and travel to more than 65 countries. Carpenter is survived by his loving wife of 25 years Leslie Carpenter; his son and daughter-in-law Andrew and Rebecca of Westminster, Md.; step-son and daughter-in-law Todd and Patricia Nordby; and step-daughter and son-in-law Kari and James Armijo, all of Santa Fe; five beloved grandchildren, Naomi Carpenter, Adam Nordby, Kayli Nordby, Henry Armijo, and Samuel Armijo; sister Lynne Massey of Nokomis, Fla.; brother and sister-in-law Peter and Marge Carpenter of State College, Penn.; sister-in-law and brother-in-law Lyn and Chuck Lighcap of Memphis, Tenn.; and nephew and nieces.

Paul Malcolm Splett, age 54, died on Feb. 10, 2016. Splett was born on May 23, 1961, to Gilbert and Carolyn Splett. He graduated from Lafollette High School, Madison, Wis., in 1979. Splett spent much of his life struggling with kidney failure, a battle he was determined to win. With the help of a kidney donated from his father in 1986, and a second kidney from his brother, Tim, in 2005, Paul went on to live a rich and meaningful life. Following high school, he moved to Los Angeles to pursue a career in music. There he met Ronette Meyer. He and Ronette were married in 1988 and had two children, Athena and Gilbert. Paul graduated Phi Beta Kappa from UW with majors in philosophy and comparative religion. He graduated from the University of New Mexico's School of Law with a Juris Doctor degree in 2000. Paul's law practice focused initially on mediation in Albuquerque, Salt Lake City and Los Angeles, before taking a position as assistant attorney Ggneral in New Mexico.

Bruce Harl Strotz, age 70, a devoted husband and father died on Dec. 20, 2016. Strotz is survived by his wife of 47 years, Cheryl Strotz; children, Sondra Carpenter and husband, Kevin, Karla Pinckes and husband, Michael; grandchildren, Drake and Kaylin Carpenter and Caden and Addison Pinckes; his sister-in-law, Susan Lucas-Kamat her husband Nikhil Lucas-Kamat; and brother-in-law, Robert Lucas. He had recently connected with siblings, Patricia, Linda and Christopher (Guv) Gilby from England. He was a "small country lawyer" born in Los Angeles, raised in Beverly Hills and Kauai, HI. Bruce attended St. John's Military Academy in Wisconsin, the Air Force Academy in Colorado Springs, and graduated from Loyola University in Los Angeles. He earned his law degree from the University of Southern California Law School in 1971. As an U.S. Air Force captain he was commissioned to the JAG office at Kirtland Air Force Base in Albuquerque in 1972. After he retired, he established permanent residency in Albuquerque and opened up a successful law practice. His true passion was his love for his family. He was known as an accomplished tennis player, a master of music trivia and a constant jokester.

Richard Michael Zamora died on Nov. 29, 2016. He was born Nov. 3, 1964, in Holland, Mich. He attended the University of Texas (B.B.A., 1986) and the University of Texas School of Law (1991). He was licensed in Texas, Nevada, California and New Mexico. He lived in El Paso and Venice, Calif. He owned his law practice The Zamora Law Firm in El Paso. He loved to watch the sunset each night and was compassionate about the wellbeing of animals. He is survived by: Mother Marguerite Bowen (Gary) of Holland, Mich.; father Richard B. Zamora of Houston; sisters Rebecca Wierda (Scott) and Amy Halverson (Michael); niece Gabrielle Wierda; nephews Spencer Wierda, Hogan Wierda, John Halverson. He was preceded in death by his grandparents Nelson and Lois Bosman and Benjamin Zamora.

Editor's Note: The contents of Hearsay and In Memoriam are submitted by members or derived from news clippings. Send announcements to notices@nmbar.org.

Opinions

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

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

Effective January 6, 2017

Unpublished Opinions

No. 35868 12th Jud Dist Lincoln DM-14-49, S ATWELL v T ATWELL (dismiss) 1/03/2017

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

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

Clerk's Certificate of Admission

On December 23, 2016:
Tamera L. D. Begay
Navajo Nation Washington Office
750 First Street, NE, Suite 1010
Washington, DC 20002
202-847-4809
202-682-7391 (fax)
tbegay@nnwo.org

Clerk's Certificate of Withdrawal

Effective December 30, 2016:
John H. Bemis
2119 Conejo Drive
Santa Fe, NM 87505

Effective December 31, 2016:
Phoebe Carter
11870 W. Clover Meadows Dr.
Boise, ID 83713

Effective December 30, 2016:
Jennifer Ann Clements
3524 Barklay Drive, N.E.
Lacey, WA 98516

Effective December 30, 2016:
C. Emery Cuddy Jr.
130 Verano Loop
Santa Fe, NM 87508

Effective January 1, 2017:
Mary Margaret McInerny
619 Paige Loop
Los Alamos, NM 87544

Effective December 30, 2016:
Evaristo Otero
3264 Beaudry Terrace
Glendale, CA 91208

Effective December 30, 2016:
James M. Rosel
9531 Callaway Circle, N.E.
Albuquerque, NM 87111

Effective December 31, 2016:
Steve Stichman
5801 Northwest 36th Street
Warr Acres, OK 73122

Effective December 30, 2016:
Elizabeth May Wee
PO Box 50682
Palo Alto, CA 94303

Clerk's Certificate of Name Change

As of December 20, 2016
Jessica Mendez f/k/a Jessica Perez Gomez
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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective January 18, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2016 NMRA:

Effective Date (except where noted differently: 12/31/2016)

Rules of Civil Procedure for the District Courts

1-005.2	Electronic service and filing of pleadings and other papers	01/01/2017
1-007.2	Time limit for filing motion to compel arbitration	
1-009	Pleading special matters	07/01/2017
1-017	Parties plaintiff and defendant; capacity	07/01/2017
1-023	Class actions	
1-054	Judgments; costs	
1-055	Default	07/01/2017
1-060	Relief from judgment or order	07/01/2017
1-079	Public inspection and sealing of court records	05/18/2016
1-083	Local rules	
1-093	Criminal contempt	
1-096	Challenge of nominating petition	
1-104	Courtroom closure	
1-120	Domestic relations actions; scope; mandatory use of court-approved forms by self-represented litigants	
1-128	Uniform collaborative law rules; short title; definitions; applicability	
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
1-128.1	Collaborative law participation agreement; requirements	
1-128.2	Initiation of collaborative law process; voluntary participation; conclusion; termination; notice of discharge or withdrawal of collaborative lawyer; continuation with successor collaborative lawyer	
1-128.3	Proceedings pending before tribunal; status report; dismissal	
1-128.4	Emergency order	
1-128.5	Adoption of agreement by tribunal	
1-128.6	Disqualification of collaborative lawyer and lawyers in associated law firm	
1-128.7	Disclosure of information	
1-128.8	Standards of professional responsibility and mandatory reporting not affected	
1 128.9	Appropriateness of collaborative law process	
1-128.10	Coercive or violent relationship	
1-128.11	Confidentiality of collaborative law communication	
1-128.12	Privilege against disclosure for collaborative law communication; admissibility; discovery	
1-128.13	Authority of tribunal in case of noncompliance	

Rules of Civil Procedure for the Magistrate Courts

2-110	Criminal contempt
2-114	Courtroom closure
2-305	Dismissal of actions
2-702	Default
2-705	Appeal

Rules of Civil Procedure for the Metropolitan Courts

3-110	Criminal contempt
3-114	Courtroom closure
3-204	Service and filing of pleadings and other papers by facsimile
3-205	Electronic service and filing of pleadings and other papers
3-702	Default

Civil Forms

4-204	Civil summons	
4-226	Civil complaint provisions; consumer debt claims	07/01/2017
4-306	Order dismissing action for failure to prosecute	
4-309	Thirty (30) day notice of intent to dismiss for failure to prosecute	
4-310	Order of dismissal for failure to prosecute	
4-702	Motion for default judgment	
4-702A	Affirmation in support of default judgment	
4-703	Default judgment; judgment on the pleadings	
4-909	Judgment for restitution	
4-909A	Judgment for restitution	
4-940	Notice of federal restriction on right to possess or receive a	05/18/2016
4-982	Withdrawn	
4-986	Withdrawn	
4-989	Withdrawn	
4-990	Withdrawn	

Rules of Criminal Procedure for the District Courts

5-102	Rules and forms	
5-104	Time	
5-112	Criminal contempt	
5-123	Public inspection and sealing of court records	05/18/2016
5-124	Courtroom closure	

5-304	Pleas	
5-511	Subpoena	
5-511.1	Service of subpoenas and notices of statement	
5-614	Motion for new trial	
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/2016
5-801	Reduction of sentence	

Rules of Criminal Procedure for the Magistrate Courts

6-102	Conduct of court proceedings	
6-109	Presence of the defendant	
6-111	Criminal contempt	
6-116	Courtroom closure	
6-201	Commencement of action	
6-209	Service and filing of pleadings and other papers	
6-506	Time of commencement of trial	05/24/2016
6-601	Conduct of trials	

Rules of Criminal Procedure for the Metropolitan Courts

7-109	Presence of the defendant	
7-111	Criminal contempt	
7-115	Courtroom closure	
7-201	Commencement of action	
7-209	Service and filing of pleadings and other papers	
7-304	Motions	
7-506	Time of commencement of trial	05/24/2016
7-606	Subpoena	

Rules of Procedure for the Municipal Courts

8-102	Conduct of court proceedings	
8-108	Presence of the defendant	
8-110	Criminal contempt	
8-114	Courtroom closure	
8-201	Commencement of action	
8-208	Service and filing of pleadings and other papers	
8-506	Time of commencement of trial	05/24/2016
8-601	Conduct of trials	

Criminal Forms

9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
9-611	Withdrawn	
9-612	Order on direct criminal contempt	
9-613	Withdrawn	

Children's Court Rules and Forms

10-103	Service of process	
10-163	Special masters	
10-166	Public inspection and sealing of court records	05/18/2016
10-168	Rules and forms	
10-171	Withdrawn	05/18/2016
10-315	Custody hearing	11/28/2016
10-318	Placement of Indian children	11/28/2016
10-322	Defenses and objections; when and how presented; by pleading or motion	
10-325	Notice of child's advisement of right to attend hearing	
10-340	Testimony of a child in an abuse or neglect proceeding	
10-408A	Withdrawn	
10-413	Withdrawn	
10-414	Withdrawn	
10-417	Withdrawn	
10-502	Summons	
10-521	ICWA notice	11/28/2016
10-560	Subpoena	
10-570	Notice of child's advisement of right to attend hearing	
10-571	Motion to permit testimony by alternative method	
10-604	Withdrawn	05/18/2016
10-701	Statement of probable cause	
10-702	Probable cause determination	
10-703	Petition	
10-704	Summons to child Delinquency Proceeding	
10-705	Summons to parent or custodian or guardian – Delinquency Proceeding	
10-706	Order of appointment of attorney for child and notice and order to parent(s), guardian(s), or custodian(s)	
10-707	Eligibility determination for indigent defense services	
10-711	Waiver of arraignment and denial of delinquent act	
10-712	Plea and disposition agreement	
10-713	Advice of rights by judge	
10-714	Consent decree	
10-715	Motion for extension of consent decree	
10-716	Judgment and Disposition	
10-717	Petition to revoke probation	
10-718	Sealing order	
10-721	Subpoena	
10-722	Affidavit for arrest warrant	
10-723	Arrest warrant	
10-724	Affidavit for search warrant	
10-725	Search warrant	
10-726	Bench warrant	
10-727	Waiver of right to have a children's court judge preside over hearing	
10-731	Waiver of arraignment in youthful offender proceedings	
10-732	Waiver of preliminary examination and grand jury proceeding	
10-741	Order for evaluation of competency to stand trial	
10-742	Ex parte order for forensic evaluation	
10-743	Order for diagnostic evaluation	
10-744	Order for pre dispositional diagnostic evaluation	
10-745	Order for evaluation of amenability to treatment for youthful offender (requested by defense counsel)	
Rule Set 10 Table	Table of Corresponding Forms	

*On June 27, 2016, the Court issued Order No. 16-8300-003 provisionally approving amendments to Rule 10-166 NMRA and provisionally approving new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. On November 28, 2016, the Court issued Order No. 16-8300-037, withdrawing the provisionally-approved amendments to Rule 10-166 NMRA and the provisionally-approved new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. Accordingly, Rule 10-166 NMRA has been restored to the version approved by

Order No. 11-8300-010, and Rule 10-171 and Form 10-604 have been withdrawn.

Rules of Evidence

11-803	Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness

Rules of Appellate Procedure

12-101	Scope and title of rules
12-201	Appeal as of right; when taken
12-202	Appeal as of right; how taken
12-203	Interlocutory appeals
12-203.1	Appeals to the Court of Appeals from orders granting or denying class action certification
12-204	Appeals from orders regarding release entered prior to a judgment of conviction
12-206	Stay pending appeal in children's court matters
12-206.1	Expedited appeals from children's court custody hearings
12-208	Docketing the appeal
12-209	The record proper (the court file)
12-302	Appearance, withdrawal, or substitution of attorneys; changes of address or telephone number
12-305	Form of papers prepared by parties.
12-309	Motions
12-310	Duties of clerks
12-317	Joint or consolidated appeals
12-318	Briefs
12-319	Oral argument
12-320	Amicus curiae
12-321	Scope of review; preservation
12-322	Courtroom closure
12-402	Issuance and stay of mandate
12-403	Costs and attorney fees
12-404	Rehearings
12-501	Certiorari from the Supreme Court to the district court regarding denial of habeas corpus
12-503	Writs of error
12-504	Other extraordinary writs from the Supreme Court
12-505	Certiorari from the Court of Appeals regarding district court review of administrative decisions
12-601	Direct appeals from administrative decisions where the right to appeal is provided by statute
12-602	Appeals from a judgment of criminal contempt of the Court of Appeals
12-604	Proceedings for removal of public officials within the jurisdiction of the Supreme Court
12-606	Certification and transfer from the Court of Appeals to the Supreme Court
12-607	Certification from other courts to the Supreme Court
12-608	Certification from the district court to the Court of Appeals

Uniform Jury Instructions – Civil

13-1830	Measure of damages; wrongful death (including loss of consortium)

Uniform Jury Instructions – Criminal

14-301	Assault; attempted battery; essential elements
14-303	Assault; attempted battery; threat or menacing conduct; essential elements
14-304	Aggravated assault; attempted battery with a deadly weapon; essential elements
14-306	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14-308	Aggravated assault; attempted battery with intent to commit a felony; essential elements
14-310	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14-311	Aggravated assault; attempted battery with intent to commit a violent felony; essential elements
14-313	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14-351	Assault upon a [school employee] [health care worker]; attempted battery; essential elements
14-353	Assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct; essential elements
14-354	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery with a deadly weapon; essential elements
14-356	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14-358	Aggravated assault on a [school employee] [health care worker]; attempted battery with intent to commit a felony; essential elements
14-360	Aggravated assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14-361	Assault on a [school employee] [health care worker]; attempted battery with intent to commit a violent felony; essential elements
14-363	Assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14-371	Assault; attempted battery; "household member"; essential elements
14-373	Assault; attempted battery; threat or menacing conduct; "household member"; essential elements
14-374	Aggravated assault; attempted battery with a deadly weapon; "household member"; essential elements
14-376	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; "household member"; essential elements
14-378	Aggravated assault; attempted battery with intent to commit a felony; "household member"; essential elements
14-380	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; "household member"; essential elements
14-381	Assault; attempted battery with intent to commit a

	violent felony; "household member"; essential elements
14-383	Assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements
14-990	Chart
14-991	Failure to register as a sex offender; 1999 and 2000 versions of SORNA; essential elements
14-992	Failure to register as a sex offender; 2005, 2007, and 2013 versions of SORNA; essential elements
14-993	Providing false information when registering as a sex offender; essential elements
14-994	Failure to notify county sheriff of intent to move from New Mexico to another state, essential elements
14-2200	Assault on a peace officer; attempted battery; essential elements
14-2200A	Assault on a peace officer; threat or menacing conduct; essential elements
14-2200B	Assault on a peace officer; attempted battery; threat or menacing conduct; essential elements
14-2201	Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements
14-2203	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with a deadly weapon; essential elements
14-2204	Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements
14-2206	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements
14-2207	Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements
14-2209	Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14-3106	Possession of a dangerous drug
14-4503	Driving with a blood or breath alcohol concentration of eight one hundredths (.08) or more; essential elements
14-4506	Aggravated driving with alcohol concentration of (.16) or more; essential elements
14-5120	Ignorance or mistake of fact

Rules Governing Admission to the Bar

15-104	Application
15-205	Grading and Scoring
15-302	Admission to practice

Rules of Professional Conduct

16-108	Conflict of interest; current clients; specific rules

Rules Governing Discipline

17-202	Registration of attorneys
17-204	Trust accounting
17-208	Incompetency or incapacity
17-214	Reinstatement

Rules Governing the Client Protection Fund

17A-005	Composition and officers of the commission

Rules Governing the Unauthorized Practice of Law

17B 005	Civil injunction proceedings
17B 006	Determination by the Supreme Court

Rules Governing the Recording of Judicial Proceedings

22-101	Scope; definitions; title
22-204.1	Temporary Certification for Court Reporters

Supreme Court General Rules

23-107	Broadcasting, televising, photographing, and recording of court proceedings; guidelines

Rules Governing the New Mexico Bar

24-101	Board of Bar Commissioners
24-102	Annual license fee
24-110	"Bridge the Gap: Transitioning into the Profession" program
24-111	Emeritus attorney

Recompiled and Amended Local Rules for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth Judicial District Courts

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

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-032

No. S-1-SC-35198 (filed August 18, 2016)

LENARD NOICE, II, as Personal Representative for LENARD E. NOICE,
Plaintiff-Respondent,
v.
BNSF RAILWAY COMPANY,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
SARAH SINGLETON, District Judge

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JUSTIN DUKE RODRIGUEZ
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DANIEL SAPHIRE
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Opinion

Judith K. Nakamura, Justice

{1} Lenard E. Noice (Noice) worked as a conductor for Petitioner BNSF Railway Company (BNSF). He fell from a BNSF train that was moving at speed and perished. The Respondent, Lenard Noice II, acting as personal representative for Noice (the Estate), filed a wrongful death action against BNSF under the Federal Employee's Liability Act (FELA), 45 U.S.C. §§ 51-60 (2012), asserting, among other claims, that BNSF negligently permitted the train from which Noice fell to operate at an excessive speed. The undisputed facts established that the train from which Noice fell never exceeded the speed limit for the class of track upon which it was operating. BNSF moved for summary judgment arguing that the Estate's FELA excessive-speed claim was precluded by the Federal Railroad Safety Act (FRSA), 49 U.S.C. §§ 20101-20168 (2012), and the track-speed regulations promulgated under FRSA and codified at 49 C.F.R. § 213.9(a) (1992). The district court accepted this argument and dismissed the Estate's FELA claim. The Court of Appeals reversed, concluding that FRSA does not preclude a FELA excessive-speed claim. *Noice v. BNSF Ry. Co.*, 2015-NMCA-054, ¶ 24, 348 P.3d 1043, *cert. granted*, 2015-NMCERT-005 (No. 35,198, May 11, 2015). Because FRSA contains no provision expressly precluding the Estate's FELA excessive-speed claim and because permitting the Estate's FELA claim to proceed furthers the purposes of both statutes, we affirm the Court of Appeals.

I. BACKGROUND

{2} In January of 2009, Noice was conducting a BNSF train traveling from Clovis to Belen. The train was pulled by four locomotives. At some point around 6:00 p.m., Noice ceded operation of the train to his assistant, John Royal. Noice exited the lead locomotive and proceeded rearwards. Before leaving the lead locomotive, however, Noice instructed Royal to "start pulling on the train." Royal understood this as an instruction to accelerate.

{3} At the time Noice left the lead locomotive, the train was traveling at approximately 11 mph, or, as Royal put it, "very slowly." After Noice departed, Royal set the throttle to the maximum position. The train approached 55 mph—the speed limit assigned to the class of track upon which the train was traveling—but never exceeded this speed.

{4} How, exactly, Noice fell from the train is unclear. Royal observed Noice proceeding rearwards toward the second locomotive and saw him enter its cabin. The train neared a crossing that required Royal to blow the train's horn. Royal looked back again to ensure that Noice was not returning to the lead locomotive and, thus, near the horn, but Royal could not see Noice. Royal attempted to signal Noice by use of an attendant bell. Noice did not respond and Royal brought the train to a stop. Royal searched the three trailing locomotives, could not locate Noice, and reported to dispatch that Noice was missing. Noice's body was discovered a short time later near the tracks in the direction from which Noice and Royal had traveled.

{5} The Estate's complaint for wrongful death asserts five counts. We are concerned here only with count one, the Estate's FELA negligence claim. The district court construed count one as claiming three types of possible negligence: "(1) defective equipment, (2) failure by Noice's co-employee Royal to engage in a job briefing, and (3) Royal's increase of speed to 55 [mph] while Noice was walking on the exterior of the locomotive on a catwalk." The court concluded that there were insufficient facts to support theories one and two. As to the third theory, the court understood the Estate to be claiming that the increase in speed created rough riding conditions on locomotive two and subjected Noice to 55 mph winds while outside the train. A video in evidence, the court noted, shows Noice walking on the second locomotive and experiencing the rough ride.

{6} Although the court found no "direct evidence that the speed of the train caused Noice to fall from" it, the court nevertheless determined that, because juries are permitted wider latitude to draw inferences under FELA, the Estate's excessive-speed claim created a triable issue of fact. "[I]t is logical," the court found, "that a bucking locomotive combined with a heading wind of 55 [mph] caused by an increase in speed could cause a person to fall . . . ."

{7} Yet, the court concluded that the Estate's excessive-speed claim could not proceed. The court determined that an excessive-speed claim under FELA is "pre-empted so long as the train is within the regulated speed limit," and the parties agreed that the train from which Noice fell never exceeded the permissible track speed. Accordingly, the court granted summary judgment to BNSF on the Estate's FELA claim, and subsequently dismissed the Estate's complaint in its entirety.

{8} The Estate appealed the court's dismissal of its FELA negligence claim and challenged the court's "rejection of each theory of negligence." *Noice*, 2015-NMCA-054, ¶ 8. The Court of Appeals concluded that the district court properly rejected the Estate's non-speed-based theories. *Id.* ¶¶ 20-23. As to the excessive-speed claim, however, the Court determined that the district court erred in concluding that FRSA "pre-empted" the claim. *Id.* ¶¶ 1, 13, 24. The Court determined that the doctrine of pre-emption was inapplicable. *Id.* ¶ 13. Rather, the issue presented was whether one federal statute, FRSA, precluded an action under another federal statute, FELA. *Id.* ¶ 8. The Court held that FRSA did not preclude the Estate's FELA excessive-speed claim. *Id.* ¶ 24.

{9} BNSF filed a petition for a writ of certiorari with this Court. We granted the petition, exercising our jurisdiction under Article VI, Section 3 of the New Mexico Constitution and NMSA 1978, Section 34-5-14(B) (1972), to consider whether FRSA precludes the Estate's FELA excessive-speed claim.

II. DISCUSSION

A. Standard of Review

{10} We review de novo the district court's decision on a motion for summary judgment. *Smith v. Durden*, 2012-NMSC-010, ¶ 5, 276 P.3d 943. "Summary judgment is appropriate when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Id.* (omission in original) (quoting Rule 1-056 NMRA). Whether FRSA precludes the Estate's FELA excessive-speed claim is a pure question of law that we review de novo. *See POM Wonderful LLC v. Coca-Cola Co.*, ___ U.S. ____, ____, 134 S. Ct. 2228, 2236 (2014) (observing that preclusion analysis is driven by the established principles of statutory interpretation); *Bd. of Comm'rs of Rio Arriba Cnty. v. Greacen*, 2000-NMSC-016, ¶ 4, 129 N.M. 177, 3 P.3d 672 (holding that issues of statutory construction are pure questions of law subject to de novo review).

B. Preclusion Analysis

{11} We begin by noting that this is not a pre-emption case. "In pre-emption cases, the question is whether state law is pre-empted by a federal statute, or in some instances, a federal agency action." *POM Wonderful*, ___ U.S. at ____, 134 S. Ct. at 2236. The pre-emption doctrine "flows from the Constitution's Supremacy Clause, U.S. Const., Art. VI, cl. 2, which invalidates state laws that interfere with, or are contrary to, federal law. The doctrine is inapplicable to a potential conflict between two federal statutes." *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 86 (2d Cir. 2006) (internal quotation marks and citation omitted). This is because "the state-federal balance does not frame the inquiry." *POM Wonderful*, ___ U.S. at ____, 134 S. Ct. at 2236.

{12} Rather, because this case concerns two federal acts, it presents an issue of preclusion, not pre-emption. The principles that govern in the preclusion context are well established. "When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). "[C]ourts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This is so even where redundancies across statutes manifest, events that are hardly unusual. *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992).

{13} A later-enacted statute can operate to repeal an earlier statutory provision, but "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton*, 417 U.S. at 550. Repeals by implication are rare, *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001), and should be found only if necessary to make the later-enacted law work, and even then only to the minimum extent necessary. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

{14} In *Pom Wonderful*, a recent preclusion case, the United States Supreme Court clarified that these well-established principles necessitate a two-part inquiry. First, a court must look to the express language of the statutory provisions and determine whether Congress expressly intended preclusion. *Pom Wonderful*, ___ U.S. at ____, 134 S. Ct. at 2237. If no express provision is found, courts must then examine the structure and purposes of the two statutes to determine whether they are complementary or irreconcilable. *Id.* at ____, 134 S. Ct. at 2238-39. "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *Id.* at ____, 134 S. Ct. at 2238. We begin our analysis by examining the two statutes at issue in this case, FELA and FRSA. *See id.* at ____, 134 S. Ct. at 2233 (instructing that a proper beginning point for preclusion analysis "is a description of the statutes").

C. FELA and FRSA

{15} Enacted in 1908, FELA provides the exclusive remedy for railroad employees injured as a result of their employers' negligence. *Wabash R.R. Co. v. Hayes*, 234 U.S. 86, 89 (1914); *Janelle v. Seaboard Coast Line R.R. Co.*, 524 F.2d 1259, 1261 (5th Cir. 1975) ("[D]amages for the death or injury of a railroad employee engaged in interstate commerce, allegedly caused by the negligence of the railroad, are recoverable exclusively from the railroad under FELA, and may not be recovered under state law."). FELA provides railroad employees with a federal cause of action for injuries "resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. This private right of action created by FELA marked a crucial turning point in congressional oversight of the railroad industry. *See generally Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) ("[W]hen Congress enacted FELA in 1908, its attention was focused primarily upon injuries and death resulting from accidents on interstate railroads." (internal quotation marks and citation omitted)).

{16} "[I]t is clear that the general congressional intent [behind FELA] was to provide liberal recovery for injured workers . . . ." *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432 (1958). "The railroad business was exceptionally hazardous at the dawn of the twentieth century." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691 (2011). "Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy that shifted part of the human overhead of doing business from employees to their

employers." *Gottshall*, 512 U.S. at 542 (internal quotation marks and citation omitted).

{17} "[I]t is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of [the railroad] industry's duty toward its workers." *Kernan*, 355 U.S. at 432. As such, courts must liberally construe FELA "to further Congress' remedial goal." *Gottshall*, 512 U.S. at 543. For example, courts have held that FELA creates a relaxed standard of causation. *McBride*, 564 U.S. at 692.

{18} Congress intended FELA to be applied uniformly throughout the nation. *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952). "What constitutes negligence for the [FELA] statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs." *Urie v. Thompson*, 337 U.S. 163, 174 (1949). State courts have concurrent jurisdiction over FELA actions, 45 U.S.C. § 56, and railroad defendants may not "defeat a FELA plaintiff's choice of a state forum by removing the action to federal court." *LaDuke v. Burlington N. R.R. Co.*, 879 F.2d 1556, 1561 (7th Cir. 1989).

{19} FRSA was enacted in 1970 to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. FRSA grants the Secretary of Transportation (the Secretary) authority to "prescribe regulations and issue orders for every area of railroad safety . . . ." 49 U.S.C. § 20103(a). The Secretary has delegated to the Federal Railroad Administration (FRA) regulatory authority over railroad safety. *Union Pac. R.R. Co. v. Cal. Pub. Utilities Comm'n*, 346 F.3d 851, 858 n.8 (9th Cir. 2003); *see also Mich. S. R.R. Co. v. City of Kendallville*, 251 F.3d 1152, 1154 (7th Cir. 2001) ("In the FRSA, the Secretary . . . was given the authority to proscribe regulations and issue orders for every area of railroad safety. Regulations are promulgated and enforced by the [FRA]." (internal quotation marks and citations omitted)). "Federal regulations issued by the Secretary pursuant to FRSA and codified at 49 CFR § 213.9(a) (1992) set maximum allowable operating speeds for all freight and passenger trains for each class of track on which they travel." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673 (1993). "The different classes of track are in turn defined by, *inter alia*, their gage, alignment, curvature, surface uniformity, and the number of crossties per length of track." *Id.*

{20} FRSA includes a pre-emption provision which states that the "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). FRSA further provides that a state "may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). The Supreme Court has construed these provisions as pre-empting state law claims, statutes, and regulations to the extent they intrude into a subject matter covered by federal railroad-safety regulations. *See Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 352 (2000) (citing *Easterwood*, 507 U.S. at 664).

{21} FRSA does not create a private right of action. "[E]nforcement powers under the [FRSA] are vested solely with the Secretary . . . and, under certain conditions, the States or the Attorney General." *Henderson v. Nat'l R.R. Passenger Corp.*, 87 F. Supp. 3d 610, 613 (S.D.N.Y. 2015); *see also Abate v. S. Pac. Transp. Co.*, 928 F.2d 167, 169-70 (5th Cir.1991).

D. FRSA Does Not Expressly Preclude the Estate's FELA Excessive-Speed Claim

{22} FRSA does not expressly preclude FELA excessive-speed claims. In fact, FRSA does not mention FELA. The absence of any express statement in FRSA barring FELA claims is significant. FELA was enacted almost 60 years before FRSA, and if Congress intended FRSA to preclude FELA claims, Congress presumably would have said so. *See Henderson*, 87 F. Supp. 3d. at 617 ("If Congress had intended that the FRSA both preclude covered FELA claims and preempt covered state law claims, it would have said so."); *see also POM Wonderful*, ___ U.S. at ____, 134 S.Ct. at 2237 (concluding that, where one federal statute predated another by many years, the absence of an express statement in the later-enacted statute that claims brought under the earlier-enacted statute are precluded is strong evidence that Congress did not intend preclusion); *cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). Moreover, because Congress included in FRSA an express provision pre-empting only state law and state-law claims, we infer that Congress did not intend FRSA to preclude FELA claims or other federal causes of action. *See POM Wonderful*, ___ U.S. at ____, 134 S. Ct. at 2238 (concluding that Congress's decision to include in a federal statute a state law pre-emption provision suggests that Congress did not intend that statute to preclude a cause of action under another federal statute).

{23} Because we find no express provision within FRSA precluding a FELA claim for excessive speed, we turn to the structure and purposes of the two statutes to determine whether, as BNSF contends in its Brief in Chief, permitting the Estate's FELA excessive-speed claim would "upend" FRSA and "eviscerate the uniformity and regulatory certainty that Congress intended in enacting FRSA."

E. Allowing FELA Excessive-Speed Claims Does Not Create an Irreconcilable Conflict with FRSA

{24} BNSF contends that, at its core, FRSA is concerned with national uniformity in railroad safety standards. The track-speed regulations promulgated by the FRA under the authority granted to it by FRSA are, BNSF claims, intended to be nationally uniform standards. BNSF argues that permitting the Estate's FELA excessive-speed claim to proceed would undermine the uniformity of these standards and derail FRSA's core purpose. Accordingly, BNSF insists that the Estate's FELA claim must be precluded. BNSF relies on several United States Courts of Appeals decisions that have already embraced this reasoning and conclusion and asks us to follow suit. *E.g., Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 442-44 (5th Cir. 2001); *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773, 775-76 (7th Cir. 2000). For the reasons that follow, we decline to follow *Waymire* and its progeny. These federal appellate decisions are founded on *Easterwood*, a seminal United States Supreme Court decision interpreting the pre-emptive (not preclusive) effect of FRSA and the FRA track-speed regulations. And, thus, it is with *Easterwood* that our analysis must begin.

{25} Thomas Easterwood was killed when a CSX train collided with the truck he was driving. *Easterwood*, 507 U.S. at 661. His widow asserted a negligence claim against CSX under state law alleging, among other things, that the train that struck and killed Mr. Easterwood was traveling at an excessive speed. *Id.*

The Supreme Court observed that, under FRSA's express pre-emption provision, federal regulations may pre-empt any state "law, rule, regulation, order, or standard relating to railroad safety," including any duty imposed on railroads by state common law, so long as the federal regulations cover the field, i.e., "substantially subsume the subject matter of the relevant state law." *Id.* at 664. The Court determined that the FRA regulations setting maximum train speeds for different classes of track codified at 49 C.F.R. § 213.9(a) cover the subject matter of train speed with respect to track conditions. *Easterwood*, 507 U.S. at 675. The Court explained that,

> [o]n their face, the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that [Mr. Easterwood's widow] seeks to impose on [CSX].

Id. at 674. Accordingly, the Supreme Court held that the state-tort excessive-speed claim was pre-empted. *Id.* at 676. Significantly, we note that the Supreme Court expressly clarified that it did not address the question of FRSA's pre-emptive effect on suits for breach of other tort duties—such as the duty to slow or stop a train to avoid a "specific, individual hazard." *Id.* at 675 n.15.

{26} Like *Easterwood*, *Waymire* also involved a collision between a train and motor vehicle. *Waymire*, 218 F.3d at 774. The railroad worker conducting the train was injured and sued his railroad employer under FELA, claiming that his employer was negligent for permitting the train to travel at an unsafe speed. *Id.* And as in *Easterwood*, the train never exceeded the maximum permissible track speed established by the FRA regulations. *Waymire*, 218 F.3d at 774.

{27} The *Waymire* court recognized that *Easterwood* did not control the issue before it and that pre-emption analysis was inapplicable. *Waymire*, 218 F.3d at 775-76. The issue before the court concerned the interaction of two federal statutes, not the interplay of state and federal law. *Id.* at 775. Nevertheless, the *Waymire* court determined that *Easterwood*'s reasoning provided the foundation for resolution of the case. *Waymire*, 218 F.3d at 775. The *Waymire* court emphasized both *Easterwood*'s conclusion that the FRA regulations cover the subject matter of train speed, *Waymire*, 218 F.3d at 775-76, and *Easterwood*'s determination that the federal track-speed regulations serve not only as ceilings on the maximum legally permissible train speed, but also prohibit the imposition of liability under state law even where conditions would reasonably call for lower speeds. *Waymire*, 218 F.3d at 776. The *Waymire* court concluded that "in order to uphold FRSA's goal of uniformity we must strike the same result." *Id.* The court explained that,

> [i]n *Easterwood*, the train was operating within the FRSA prescribed 60 miles per hour speed limit, as was [the] train in this case. It would thus seem absurd to reach a contrary conclusion in this case when the operation of both trains was identical and when the Supreme Court has already found that the conduct is not culpable negligence.

Waymire, 218 F.3d at 776. The court added that "[t]o treat cases brought under federal law differently from cases brought under state law would defeat FRSA's goal of uniformity[,]" *Id.* at 777, and illustrated this point with a hypothetical. Imagining a collision between a motorist and train where both driver and conductor are injured, the court could see no defensible justification for barring the motorist's state-tort negligence suit on pre-emption grounds while simultaneously permitting the conductor to proceed with his FELA negligence action. *Id.* "We do not believe," the court stated, that this result is "envisioned by the statute or by the Supreme Court's decisions." *Id.* Accordingly, the *Waymire* court held that the railroad worker's FELA excessive-speed claim was precluded by FRSA. *Id.* at 777. *See also Lane*, 241 F.3d at 442-44 (reaching the same holding for the same reasons under nearly identical facts); *cf. Nickels v. Grand Trunk W. R.R., Inc.*, 560 F.3d 426 (6th Cir. 2009) (concluding that FRSA, and regulations promulgated under FRSA regarding track ballast, precluded two railroad workers from asserting FELA negligence claims for injuries sustained as a result of having to walk continuously on oversized track ballast). *Waymire* and its progeny are unpersuasive for a number of reasons, and BNSF's reliance on these cases is misplaced.

{28} First, the United States Supreme Court has routinely rejected attempts to curtail FELA by inference. *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 558-67 (1987) (agreeing that the Railway Labor Act (RLA), 45 U.S.C. §§ 151-165 (2012), provides a comprehensive framework for resolution of labor disputes in the railroad industry, but nevertheless concluding that FELA was enacted "to serve as the statutory basis for the award of damages to employees injured through an employer's or co-worker's negligence," and concluding that, "absent an intolerable conflict between the two statutes," the RLA shall not be interpreted "as repealing any part of the FELA"); *Urie*, 337 U.S. at 165-95 (reversing the Missouri Supreme Court's decision that injuries arising from an alleged violation of the Boiler Inspection Act (BIA), Act of Feb. 17, 1911, ch. 103, § 2, 36 Stat. 913-14, (repealed 1994) (current version at 49 U.S.C. §§ 20701-20703 (2012)), were not compensable under FELA because the BIA is supplemental to FELA and was intended to facilitate, not restrict, recovery under FELA, and further concluding that any reading of the interplay of these statutes that would restrict FELA by inference would be error). BNSF fails to acknowledge this point, and *Waymire* and its progeny diverge from this tradition.

{29} Second, BNSF's contention that *Waymire* and its progeny control the issue presented in this case overlooks that, in *Easterwood*, the Supreme Court expressly declined to address or decide whether FRSA pre-empts a state-law claim for breach of the duty to slow or stop a train to "avoid a specific, individual hazard." *Easterwood*, 507 U.S. at 675 n.15. To be sure, this is not a pre-emption case, and the Estate's sole remedy is FELA. Nevertheless, footnote 15 in *Easterwood* is significant in light of the Seventh Circuit's reasoning in *Waymire*: because FRSA pre-empts state-law excessive-speed claims, FRSA must also preclude FELA excessive-speed claims. This logic must fail if the underlying FELA claim is premised on the assertion that a specific, individual hazard warranted reduced speed. The claim would not be subject to pre-emption and, thus, not precluded.

{30} Lower federal and state courts "have not been uniform in fleshing out the

content of the specific, individual hazard concept." *Myers v. Missouri Pac. R.R. Co.*, 2002 OK 60, ¶ 27, 52 P.3d 1014.

> Generally, courts considering this issue have ruled that a "specific individual hazard" must be a discrete and truly local hazard, such as a child standing on the railway. They must be aberrations which the Secretary could not have practically considered when determining train speed limits under the FRSA. More precisely phrased, the "local hazard" cannot be statewide in character and cannot be capable of being adequately encompassed within uniform, national standards.

O'Bannon v. Union Pac. R.R. Co., 960 F. Supp. 1411, 1420-21 (W.D. Mo. 1997) (footnote and citations omitted). *Compare Anderson v. Wis. Cent. Transp. Co.*, 327 F. Supp. 2d 969, 978 (E.D. Wis. 2004) ("A specific individual hazard is a unique occurrence which could cause an accident to be imminent rather than a generally dangerous condition.") *with Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 640 (5th Cir. 2005) ("A condition that can be or is present at many, or most sites cannot be a specific, individual hazard."). In *Bakhuyzen v. Nat'l Rail Passenger Corp.*, 20 F. Supp. 2d 1113, 1118 (W.D. Mich. 1996), a case we find instructive, the court held that poor visibility due to snowy weather conditions posed a specific, individual hazard imputing to the train conductor a duty, not pre-empted by FRSA, to operate the train at a speed no greater than would be prudent given the conditions. In reaching this conclusion, the court observed that "[m]aximum train speeds, like automobile speed limits, do not remove from the driver the obligation to exercise due care when and if the circumstances . . . make operation at the maximum speed careless." *Id.* This reasoning is sound.

{31} In the present case, the district court understood the Estate's FELA excessive-speed claim as asserting that BNSF was negligent in permitting Noice's train to travel at or near 55 mph because, at the time the train was permitted to travel at this speed, Noice was outside the lead locomotive cabin, navigating the catwalk of a bucking locomotive, and exposed to high winds and other external forces. In other words, Noice's precarious circumstances constituted a specific, individual hazard that imputed to BNSF a duty to ensure the train traveled at a rate of speed no faster than would be prudent to ensure Noice's safety. The Estate's claim would not be pre-empted if brought as a state-tort action; thus, there is no reason to accept *Waymire's* conclusion that *Easterwood* leads inevitably to the conclusion that excessive-speed claims like the Estate's must be precluded.

{32} Third, *Waymire* and its progeny improperly inject concerns about the supremacy clause, which underlies the federal pre-emption doctrine, into the preclusion context. *Waymire* does so by giving undue weight to *Easterwood*'s conclusion that the FRA regulations cover the field of track speed. But this determination in *Easterwood* merely resolved that a particular kind of state-law excessive-speed claim could not exist in the covered field; the determination is inapposite as to whether FELA can co-exist alongside FRSA. There is no meaningful consideration in *Waymire* and its progeny given to this question, i.e., whether the two statutes may work together to further railroad safety. Rather, both cases conclude that the Supreme Court's pre-emption holding in *Easterwood* leads inescapably to the conclusion that FRSA precludes FELA excessive-speed claims. But this does not follow; *Waymire* and its progeny conflate separate legal doctrines. *See POM Wonderful*, ___ U.S. at ____, 134 S. Ct. at 2238 ("Pre-emption of some state requirements does not suggest an intent to preclude federal claims.").

{33} Fourth, it is an established axiom in the preclusion context that courts are not free to pick and choose among federal enactments. *See Morton*, 417 U.S. at 551. Yet *Waymire* and its progeny do just this. These decisions unnecessarily overemphasize the purposes of FRSA at the expense of the equally valid purposes of FELA, and they ignore the distinct remedial purposes of FELA. Indeed, the "absurdity" *Waymire* perceives arising from the hypothetical scenario where a vehicle and train collide, where both driver and conductor are injured, but where the driver is pre-empted from filing a state-law negligence action based on excessive speed whereas the conductor can proceed on exactly those grounds under FELA, *see Waymire*, 218 F.3d at 777, ignores the possibility that this result is precisely what Congress intended. *See Henderson*, 87 F. Supp. 3d at 617 ("[H]olding railroads to a standard of care with respect to their employees that is higher than the state law standards applicable to the general public is precisely the purpose of the FELA." (citing *Brotherhood of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 3 (1964) (stating that the FELA was enacted "to provide for recovery of damages for injured railroad workers and their families by doing away with harsh and technical common-law rules which sometimes made recovery difficult or even impossible"))); *cf. Crane v. Cedar Rapids & I. C. Ry. Co.*, 395 U.S. 164, 167 (1969) (recognizing the "injustice" of permitting a railroad employee to recover through FELA in circumstances where a non-railroad employee ineligible to sue under FELA could not, but noting that this is the design Congress enacted and courts are not at liberty to rewrite FELA).

{34} Fifth, *Waymire* offers a distorted account of FRSA's purpose. The purpose of FRSA is to enhance railroad safety and reduce accidents. 49 U.S.C. § 20101. *Waymire* narrowly emphasizes the purpose of FRSA's pre-emption provision: to ensure national uniformity of the laws and regulations related to railroad safety. 49 U.S.C. § 20106(a)(1). Unlike the *Waymire* court, and contrary to BNSF's arguments, we do not read FRSA's provision pre-empting state law as expressing FRSA's *central* purpose. *Accord Henderson*, 87 F. Supp. 3d at 617 (observing that "the principal purpose of the FRSA is to promote railroad safety, not to achieve nationally uniform railroad safety laws"); *cf. Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotation marks and citation omitted)).

{35} Nor do we agree that allowing FELA excessive-speed claims will undermine FRSA's ancillary purpose of securing national uniformity. "FRSA—and in particular, its speed regulations—were adopted to address the patchwork effect of each state applying its own set of regulations." *Cowden v. BNSF Ry. Co.*, 690 F.3d 884, 891 (8th Cir. 2012). As BNSF acknowledges, FELA is a federal statute and is to be applied uniformly throughout the country. *Urie*, 337 U.S. at 174. Therefore, "it is not clear how negligence claims brought under the federal common law threaten the uniformity sought by the FRSA." *Cowden*, 690 F.3d at 891. And even if permitting FELA excessive-speed claims to proceed leads to some variability given the possibility of disparate jury verdicts, *see Lane*, 241 F.3d at 443-44, we do not foresee the type of disuniformity that would arise from application of the multitude of state

laws, state regulations, state administrative agency rulings, and state court decisions that are expressly forbidden by FRSA's express pre-emption provision. And the variability that FELA actions would potentially produce is tolerable. *See POM Wonderful*, ___ U.S. at ____, 134 S. Ct. at 2240 ("Congress not infrequently permits a certain amount of variability by authorizing a federal cause of action even in areas of law where national uniformity is important.").

{36} Sixth and lastly, we do not accept BNSF's contention that permitting FELA excessive-speed claims to proceed render the FRA track regulations meaningless. "FRSA's regulations are simply to be treated like any other regulation in that complying with them may provide non-dispositive evidence of due care, while violating them requires a finding of negligence *per se*." *Henderson*, 87 F. Supp. 3d at 617 (internal quotation marks and citations omitted). And, contrary to the arguments advanced by BNSF, we do not agree that the FRA regulations exhaust or define a railroad's duty of care towards its employees. *See Earwood v. Norfolk S. Ry. Co.*, 845 F. Supp. 880, 885 (N.D. Ga. 1993) (observing that the regulations regarding track speed propounded by the Secretary are merely minimum safety requirements for railroad track, and that neither the regulations nor FRSA "purport to define the standard of care with which railroads must act with regard to employees"). "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." Restatement (Second) of Torts § 288C (1965). This well-settled principle of tort law is particularly salient here as the United States Supreme Court has previously recognized that

> the theory of the FELA is that where the employer's conduct falls short of the high standard required of him by this Act, and his fault, in whole or in part, causes injury, liability ensues. And this result follows whether the fault is a violation of a statutory duty *or the more general duty of acting with care*, for the employer owes the employee, as much as the duty of acting with care, the duty of complying with his statutory obligations.

Kernan, 355 U.S. at 438-39 (emphasis added).

F. FELA and FRSA Are Complementary and Permitting the Estate's Excessive-Speed Claim to Proceed Furthers the Purposes of Both Statutes

{37} Rather than being in irreconcilable conflict, we conclude that FRSA and FELA are complementary in purpose and effect. Both statutes further railroad safety in meaningfully distinct ways. *See Henderson*, 87 F. Supp. 3d at 621 ("[T]he FELA and the FRSA complement each other in significant respects, in that each statute is designed to accomplish the same goal of enhancing railroad safety through different means."). FRSA seeks to enhance safety in every area of railroad operation, and to protect the public as well as railroad workers. *See* 49 U.S.C. § 20101. It does so with national, comprehensive regulatory standards which are enforced by government entities. FELA, by comparison, focuses solely on the safety of railroad workers, and does so by providing railroad employees a private right of action. *Cf. Pom Wonderful*, ___ U.S. at ____, 134 S. Ct. at 2236-38 (concluding that specific regulations regarding juice labeling promulgated under the Federal Food, Drug, and Cosmetic Act did not preclude the plaintiff's Lanham Act claim which asserted that the plaintiff's market competitor mislabeled its juice product and emphasizing the two statutes different enforcement mechanisms as one of the grounds for denying preclusion).

{38} Permitting FELA claims like the Estate's to proceed is likely to enhance the overall safety of railroad operation. *Fair v. BNSF Ry. Co.*, 189 Cal. Rptr. 3d 150, 160-61 (2015), *cert. denied*, 136 S. Ct. 1378 (2016) ("Allowing safety-related suits under FELA will enhance FRSA's stated purpose of promoting railroad safety and reducing accidents."). In addition, FELA claims may shed light upon potentially dangerous circumstances that regulators might otherwise not identify or that are less amenable to uniform, regulatory solutions. *See* Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 San Diego L. Rev. 49, 54 (1988) ("The fault-based FELA system, with its compensation exceeding the typical workers' compensation award (particularly for the more serious injuries), is designed to serve as a real and present safety incentive."). In sum, we conclude that what the Supreme Court said in *POM Wonderful* is directly applicable here: allowing FELA suits like the Estate's to proceed "takes advantage of synergies among multiple methods of regulation" and is "consistent with the congressional design to enact two different statutes, each with its own mechanisms to enhance" railroad safety. ___ U.S. at ____, 134 S. Ct. at 2239.

III. CONCLUSION

{39} FRSA does not preclude the Estate's FELA excessive-speed claim. Accordingly, we affirm the Court of Appeals and remand this case to the district court for further proceedings consistent with this opinion.

{40} IT IS SO ORDERED
JUDITH K. NAKAMURA, Justice

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

Certiorari Denied, November 15, 2016, No. S-1-SC-36095

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-094

No. 33,637 (filed August 22, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
VERONICA GRANILLO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
DANIEL VIRAMONTES, District Judge

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Opinion

Stephen G. French, Judge

{1} This appeal requires us to construe the *mens rea* for intentional child abuse by endangerment. NMSA 1978, § 30-6-1(D)(1) (2009). Veronica Granillo (Defendant) appeals her conviction for intentional child abuse by endangerment, arguing that (1) the evidence was insufficient; (2) the jury was improperly instructed as to the elements of the crime; and (3) the district court improperly limited her closing argument. Defendant's insufficiency of the evidence argument raises the main issue in this case—the requisite *mens rea* for intentional child abuse by endangerment. We hold that intentional child abuse by endangerment requires a conscious objective to endanger the child. Because we agree with Defendant that the evidence was insufficient to prove the requisite *mens rea*, we reverse her conviction for intentional child abuse by endangerment. We do not reach Defendant's remaining arguments.

BACKGROUND

{2} A witness testified at trial that a car veered onto the wrong side of the road, continued driving that way for approximately five or six blocks, and in so doing forced "quite a few cars off the road." The witness noted the license plate number, called the police, and kept the car within eyesight.

{3} Upon arrival, Lieutenant Conrad Jacquez of the City of Deming Police Department observed the car stop in the center of the road, then start and stop twice more, eventually coming to rest on the wrong side of the road. Lieutenant Jacquez initiated a traffic stop.

{4} Lieutenant Jacquez knocked on the driver's side window, received no response, and knocked again. When Defendant rolled down the window, she had a strong odor of alcohol, bloodshot and watery eyes, slurred speech, and did not focus her eyesight on Lieutenant Jacquez while they spoke. There was an open, half-empty bottle of whiskey on the passenger seat and a full bottle of whiskey on the floor of the front passenger seat.

{5} A three-year-old child was in the back of the car. Officer Robert Ramirez, who had arrived to assist, observed the child unbuckle himself from his child seat, stand up, and turn around.

{6} Lieutenant Jacquez made two attempts to administer field sobriety tests to Defendant, but abandoned both because Defendant was unable to stand. Lieutenant Jacquez placed Defendant under arrest.

{7} Once arrested, Defendant became verbally and physically belligerent. Lieutenant Jacquez read Defendant the New Mexico Implied Consent Act and she agreed to a blood test. At the hospital, Defendant—still verbally abusive and physically uncooperative—refused to exit the police car. Defendant was not tested for the presence of alcohol or drugs.

{8} Defendant was charged and tried not only for intentional child abuse, of which she was convicted, but also for: aggravated driving under the influence of intoxicating liquor or drugs under NMSA 1978, § 66-8-102(D) (2010, amended 2016), on which the jury was unable to reach a verdict; driving with a suspended or revoked license under NMSA 1978 § 66-5-39 (2013), on which the jury acquitted; and failure to maintain a lane on a laned road under NMSA 1978, § 66-7-317 (1978), on which the district court directed a verdict in favor of the Defendant.

SUFFICIENCY OF THE EVIDENCE

{9} Defendant argues that her conviction for intentional child abuse by endangerment must be reversed because the State failed to present sufficient evidence that the child was endangered, and even if Defendant endangered the child, she did not do so with the requisite state of mind. Essentially, Defendant argues that evidence was lacking of both the *actus reus* and the *mens rea*. Either insufficiency requires this Court to reverse. *See State v. Vigil*, 2010-NMSC-003, ¶ 15, 147 N.M. 537, 226 P.3d 636 ("[O]bserving that [A] conviction of child abuse cannot be sustained in the absence of sufficient evidence of both [the *actus reus* and the *mens rea*.]"), (citing *State v. Schoonmaker*, 2008-NMSC-010, ¶ 48, 143 N.M. 373, 176 P.3d 1105 (*Schoonmaker II*)); *State v. Padilla*, 2008-NMSC-006, ¶ 12, 143 N.M. 310, 176 P.3d 299 ("Typically, criminal liability is premised upon a defendant's culpable conduct, the *actus reus*, coupled with a defendant's culpable mental state, the *mens rea*.").

Standard of Review

{10} We review a challenge to the sufficiency of the evidence to determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. "[Appellate courts] view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Astorga*, 2015-NMSC-007, ¶ 57, 343 P.3d 1245 (internal quotation marks and

citation omitted). The ultimate question is "whether a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *Id.* (internal quotation marks and citation omitted).

{11} We review any question of statutory interpretation raised by Defendant's argument de novo as a question of law. *State v. Chavez*, 2009-NMSC-035, ¶ 10, 146 N.M. 434, 211 P.3d 891.When we interpret a statute, "[the appellate court's] main goal . . . is to give effect to the Legislature's intent." *State v. Almanzar*, 2014-NMSC-001, ¶ 14, 316 P.3d 183 (alteration in original) (internal quotation marks and citation omitted). Textual ambiguity is resolved in favor of the defendant, in accordance with the rule of lenity. *State v. Consaul*, 2014-NMSC-030, ¶ 40, 332 P.3d 850.

Child Abuse by Endangerment

{12} Child abuse by endangerment "consists of a person knowingly, intentionally or [recklessly],[1] and without justifiable cause, causing or permitting a child to be . . . placed in a situation that may endanger the child's life or health[.]" Section 30-6-1(D)(1). Abuse by endangerment is a special class of child abuse designed to punish conduct that "exposes a child to a significant *risk* of harm, even though the child does not suffer a physical injury." *Chavez*, 2009-NMSC-035, ¶ 15 (internal quotation marks and citation omitted); *see also State v. Gonzales*, 2011-NMCA-081, ¶ 20, 150 N.M. 494, 263 P.3d 271 ("[E]ndangerment is something that exists as an antecedent to any harm that might befall a child."), *aff'd on other grounds by* 2013-NMSC-016, 301 P.3d 380. Our Supreme Court concluded that "by classifying child [abuse by] endangerment as a third-degree felony, our Legislature anticipated that criminal prosecution would be reserved for the most serious occurrences, and not for minor or theoretical dangers." *Chavez*, 2009-NMSC-035, ¶ 16. In accordance with the purpose of the child abuse by endangerment statute to "punish conduct that creates a truly significant risk of serious harm to children[,]" *id.* ¶ 22, a child is considered endangered only when placed at "a *substantial and foreseeable risk* of harm." *Id.* (internal quotation marks and citation omitted).

***Mens Rea* for Intentional Child Abuse by Endangerment**

{13} We analyze first whether any rational jury could have concluded beyond a reasonable doubt that Defendant acted with the requisite mental state. The Legislature established three specific mental states by which a person may commit child abuse by endangerment: intentionally, knowingly, and recklessly. *See State v. Montoya*, 2015-NMSC-010, ¶ 40, 345 P.3d 1056. In this case, Defendant was charged only with intentional child abuse by endangerment. She was not charged with knowing or reckless child abuse by endangerment, nor was the jury presented with a step-down instruction for endangerment committed knowingly or recklessly.[2] Thus, Defendant's conviction required sufficient evidence that she committed the *actus reus* intentionally. *Cf. Gonzales*, 2011-NMCA-081, ¶ 30 (stating that a conviction for child abuse by endangerment requires proof that the defendant's "culpable mental state coincided with the act"). Before analyzing whether there was sufficient evidence that Defendant acted intentionally, we must first define the *mens rea* applicable to the crime of intentional child abuse by endangerment. This is a question of law that we examine de novo. *See Chavez*, 2009-NMSC-035, ¶ 10.

{14} The Legislature does not define the mental state "intentionally" in Section 30-6-1. *State v. Cabezuela*, 2011-NMSC-041, ¶ 23, 150 N.M. 654, 265 P.3d 705. Nor have our appellate courts interpreted the *mens rea* requirement for intentional child abuse by endangerment. The State argues that because child abuse is not a specific intent crime but instead a general intent crime, the mental state required for intentional child abuse by endangerment is "only a 'conscious wrongdoing,' or 'the purposeful doing of an act that the law declares to be a crime.' " *State v. Brown*, 1996-NMSC-073, ¶ 22, 122 N.M. 724, 931 P.2d 69. Therefore, argues the State, an intentional *mens rea* in this context requires that a person intend the underlying conduct that might support a finding that a child was endangered—e.g., that Defendant intended to drive her vehicle while intoxicated, with a child in the car—but not that a person intended to endanger the child. We disagree and explain below.

{15} The common-law classification of crimes as requiring either "specific intent"or "general intent" has been the cause of considerable confusion.[3] As a consequence, there is a movement away from the determination of *mens rea* by reference to the "venerable" specific intent/general intent dichotomy. *Bailey*, 444 U.S. at 403. As an alternative to the traditional dichotomy, the Model Penal Code defines four specific culpable states of mind: purposely, knowingly, recklessly, and negligently. *See Model Penal Code* § 2.02 (2015). Our child abuse statute refers to multiple specific culpable states of mind: intentionally, knowingly, and as clarified by our Supreme

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[1]In *Consaul*, our Supreme Court stated that, in the criminal context, "negligent child abuse" should thereafter be labeled "reckless child abuse" without future reference to negligence. 2014-NMSC-030, ¶ 37. We comply with that instruction in this opinion, while acknowledging that the statutory text reads "negligently."

[2]Given that the Legislature chose identical punishment for reckless, knowing, and intentional child abuse by endangerment, the reason that the State chose to exclusively pursue an intentional theory is unclear. *See Montoya*, 2015-NMSC-010, ¶ 33 (stating that "the Legislature has chosen to punish all types of child abuse the same with respect to the defendant's mental state").

[3]The United States Supreme Court has pointed out in detail some of the confusion caused by reliance on common law terminology:

> Sometimes 'general intent' is used in the same way as 'criminal intent' to mean the general notion of *mens rea*, while 'specific intent' is taken to mean the mental state required for a particular crime. Or, 'general intent' may be used to encompass all forms of the mental state requirement, while 'specific intent' is limited to the one mental state of intent. Another possibility is that 'general intent' will be used to characterize an intent to do something on an undetermined occasion, and 'specific intent' to denote an intent to do that thing at a particular time and place.

United States v. Bailey, 444 U.S. 394, 403 (1980) (internal quotation marks and citation omitted). Our Supreme Court also cautions: "[the] specific-general intent approach has been criticized because it is not always clear whether a particular offense is a specific-intent crime or a general-intent crime[,]" *Brown*, 1996-NMSC-073, ¶ 23, and importantly, "[t]he specific-general intent common-law approach does not take into consideration the existence of a heightened *mens rea* aside from specific intent." *Id.* ¶ 27 (internal quotation marks and citation omitted).

Court, recklessly. *Montoya*, 2015-NMSC-010, ¶ 40. The tiered *mens rea* structure of our child abuse statute is akin to that of the Model Penal Code. Structurally, our child abuse statute leans away from the common law approach, and instead, is more consistent with the approach of the Model Penal Code.

{16} Because of the *mens rea* structure of Section 30-6-1(D), and following our appellate courts and the United States Supreme Court that have relied on the Model Penal Code, we look to the Model Penal Code to inform our definition of an intentional *mens rea*. *See, e.g., Consaul*, 2014-NMSC-030, ¶ 37 (citing the Model Penal Code in establishing another *mens rea* standard for the child abuse statute); *State v. Carrasco*, 1997-NMSC-047, ¶¶ 8, 17-18, 36, 124 N.M. 64, 946 P.2d 1075 (referring to provisions of the Model Penal Code discussing accomplice liability and conspiracy); *see also United States v. United States Gypsum Co.*, 438 U.S. 422, 444 (1978) (referring to the Model Penal Code as a source of guidance on the "requisite but elusive mental element of criminal offenses") (internal quotation marks and citation omitted). As used in the Model Penal Code, an intentional state of mind corresponds to purpose. *See Model Penal Code* § 1.13(12) (2015) (" 'intentionally' or 'with intent' means purposely"); *see also* 1 Wayne R. LaFave, *Substantive Criminal Law,* § 5.1(c) at 337 (2d ed. 2003) (stating that "*intention* (or *purpose*) to do the forbidden act (omission) or cause the forbidden result" is one of the four types of *mens rea*). A person acts purposely (intentionally) under the Model Penal Code if it is the person's "conscious object to engage in conduct of that nature or to cause such a result." *Model Penal Code* § 2.02(2)(a)(i). In order to determine whether in the context of Section 30-6-1(D)(1) a person's conscious object must be directed toward the result of endangering a child or, as the State argues, the underlying conduct, we examine the intent of the Legislature in enacting Section 30-6-1(D)(1). In essence, we must determine what sort of social harm has been proscribed by the Legislature—conduct or a result. *See* Joshua Dressler, *Understanding Criminal Law*, § 9.10(D) (5th ed. 2009) (stating that the social harm proscribed by a criminal statute may consist of wrongful conduct, wrongful results, or both).

{17} We conclude the social harm proscribed by the Legislature with Section 30-6-1(D)(1) is a result, not conduct. The legislative purpose of the statute is to address the social harm caused when children are put at "truly significant risk of serious harm." *State v. Schaaf,* 2013-NMCA-082, ¶ 8, 308 P.3d 160 (internal quotation marks and citation omitted). This purpose is achieved by proscribing the result of endangering a child. *See* § 30-6-1(D)(1) (prohibiting a person from "causing or permitting a child to be . . . placed in a situation that may endanger the child's life or health" without justifiable cause). That is unlike criminal statutes that proscribe harmful conduct. *See Understanding Criminal Law,* § 9.10(D) at 114-15 (explaining that a criminal statute that proscribes harmful conduct without regard to a prohibited result establishes a "conduct crime" and, by contrast, a criminal statute that prohibits a harmful result without reference to how the result occurs establishes a "result crime"); *compare* § 66-8-102(C)(1) (2010) (defining driving under the influence of alcohol as, in relevant part, "driv[ing] a vehicle . . . if the person has an alcohol concentration of eight one hundredths or more in the person's blood[,]" thereby proscribing conduct without regard to a result of the conduct) *with* NMSA 1978, § 30-2-1(A) (1994) (defining murder as, in relevant part, "the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused[,]" thereby proscribing a harmful result without regard to the conduct leading to the result). A criminal conviction requires that the proscribed social harm (the *actus reus*), whether a result or conduct, be performed with the requisite mental state. *See Padilla*, 2008-NMSC-006, ¶ 12 ("Typically, criminal liability is premised upon a defendant's culpable conduct, the *actus reus*, coupled with a defendant's culpable mental state, the *mens rea*."). Because the social harm proscribed by Section 30-6-1(D)(1) is a result—endangering a child—we hold that the *mens rea* for intentional child abuse by endangerment requires a conscious objective to achieve a result—endanger the child. The State's proffered definition of the *mens rea* for intentional child abuse by endangerment, requiring no more than volitional conduct, is not directed at the proscribed social harm and does not require the level of culpability intended by the Legislature under the proper Model Penal Code analysis.

{18} Our interpretation of an intentional *mens rea* requirement in the context of Section 30-6-1(D)(1) is in accord with the statutory definition of an intentional *mens rea* requirement used by numerous other states. For example, by Colorado statute, a person acts intentionally "when [that person's] conscious objective is to cause the specific result proscribed by the statute defining the offense." Colo. Rev. Stat. Ann. § 18-1-501(5) (1977). And in Texas, a person acts intentionally "with respect to the nature of his conduct or to a result of his conduct when it is [that person's] conscious objective or desire to engage in the conduct or cause the result." Tex. Penal Code Ann. § 6.03(a) (1994); *see also, e.g.*, Ariz. Rev. Stat. Ann. § 13-105(10)(a) (1994) (defining " intentionally " to mean "with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct"); N.Y. Penal Law § 15.05(1) (McKinney 1965) ("A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when [that person's] conscious objective is to cause such result or to engage in such conduct."). Those definitions are not compatible with the State's understanding of an intentional *mens rea* that requires no more than proof that the person had an awareness of what he was doing.

{19} Our related case law does not dissuade us from our interpretation of Section 30-6-1(D)(1). This Court's interpretation in *State v. Schoonmaker* of the *mens rea* for intentional child abuse resulting in great bodily harm is consonant with our interpretation of the *mens rea* for intentional child abuse by endangerment. 2005-NMCA-012, ¶¶ 25-26, 136 N.M. 749, 105 P.3d 302 (*Schoonmaker I*), *reasoning disavowed on other grounds by Montoya*, 2015-NMSC-010, ¶ 41, *rev'd on other grounds by Schoonmaker II*, 2008-NMSC-010, ¶¶ 1, 54, *overruled by Consaul*, 2014-NMSC-030, ¶ 38. In *Schoonmaker I*, this Court stated that intentional child abuse resulting in great bodily harm requires "a voluntary act . . . such as violently shaking a baby, when it is his or her intent, purpose, or conscious object to engage in a harmful act (shake the baby) or to cause the harmful consequence." 2005-NMCA-012, ¶ 26. Our analysis in *Schoonmaker I* emphasized the conscious object or intention to act harmfully or cause harm, and the voluntary nature of the underlying actions that cause the harm was de-emphasized. The *Schoonmaker I* Court's construction of the

mens rea for intentional child abuse resulting in great bodily harm is in harmony with our interpretation of the *mens rea* for intentional child abuse by endangerment.

{20} Although both Defendant and the State rely on *Montoya*, that case does not guide our interpretation of the *mens rea* for intentional child abuse. 2015-NMSC-010. In *Montoya*, our Supreme Court stated that intentional and reckless child abuse by endangerment generally do not require separate jury instructions. *Id.* ¶ 33. That conclusion was grounded in the fact that our Legislature elected equal punishment for child abuse by endangerment committed with any of the three statutorily delineated mental states. *Id.* Nonetheless, intentional, knowing, and reckless are distinct mental states. *Cf. id.* ¶ 38 (stating that child abuse resulting in the death of a child under twelve committed recklessly is a lesser-included offense of that act committed intentionally); *see also Bailey*, 444 U.S. at 404 (noting that recklessness, knowledge, and purpose ascend in level of culpability). The relevant question contemplated by the *Montoya* Court was not the substance of the *mens rea* for, specifically, intentional child abuse by endangerment, but whether the Constitution would allow a jury verdict for child abuse by endangerment when committed intentionally, knowingly, or recklessly if the jury was instructed on the requirements of each in a single instruction. 2015-NMSC-010, ¶¶ 32-33. In response to that question, the *Montoya* Court provided the following guidance:

> in most cases when the abuse does not result in the death of a child under twelve, it is not necessary to specify the defendant's mental state or to provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted knowingly, intentionally or recklessly will suffice to support a conviction.

(alteration, emphasis, internal quotation marks, and citation omitted). *Id.* ¶ 33; *cf. Schad v. Ariz.*, 501 U.S. 624, 632 (1991) (stating that the state can construct statutes allowing juries to convict despite disagreeing about the means/theory of the commission of a crime, including the *mens rea*, but that power is limited by the due process clause); *id.* at 649 (Scalia, J., concurring in part and concurring in the judgment) (stating that "it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission"). That guidance does not impact this case, where Defendant was charged under one specific *mens rea* theory and the jury instructed only under that theory. Defendant's jury did not decide that she was guilty of child abuse by endangerment knowingly, intentionally, or recklessly but, instead, rendered a verdict that Defendant committed intentional child abuse. Thus, *Montoya* does not speak to the question we face—the *mens rea* of intentional child abuse, specifically. Neither *Montoya* nor *Schoonmaker I* dissuades us from our interpretation of the *mens rea* for intentional child abuse by endangerment.

{21} In sum, we conclude that the State's proposed definition of intentional is moored to the inapplicable common-law general intent/specific intent dichotomy. The Legislature specifically heightened the different *mens reas* for commission of child abuse by endangerment. *See Montoya*, 2015-NMSC-010, ¶ 40 (stating that child abuse by endangerment can be committed intentionally, knowingly, or recklessly). Because "[t]he specific-general intent common-law approach does not take into consideration the existence of a heightened *mens rea* aside from specific intent[,]" *Brown*, 1996-NMSC-073, ¶ 27 (internal quotation marks omitted), we reject the State's approach to Section 30-6-1(D)(1). Instead, because the Legislature has provided heightened *mens reas* in a tiered structure, the definitions of an intentional mental state from the Model Penal Code and other jurisdictions require a conscious objective to cause the proscribed social harm, and the social harm proscribed by the Legislature is the result of endangering a child, we hold that the *mens rea* for intentional child abuse by endangerment requires a conscious objective to endanger a child.

{22} Having concluded that the *mens rea* for intentional child abuse by endangerment requires a conscious objective to endanger the child, we analyze whether there was sufficient evidence to meet that standard.

Sufficiency of the Evidence of the *Mens Rea*

{23} In the absence of direct evidence of intent, we look to the circumstantial evidence to determine whether any rational jury could have found beyond a reasonable doubt that Defendant had a conscious objective to endanger the child. *See State v. Martinez*, 2006-NMSC-007, ¶ 16, 139 N.M. 152 , 130 P.3d 731 (stating that intent may be proven by circumstantial evidence and is often inferred from facts of the case).

{24} Importantly, the child was strapped into a child seat. That is inconsistent with the conscious creation of a substantial and foreseeable risk to the child. Evidence was presented that Defendant drove poorly, but not in a way that suggested that she was purposely courting danger. Rather, she drove haltingly. No testimony was offered that she swerved at another car or any other target. Nor did the car hit anything. Defendant's evident intoxication, like her driving, created risk for the child that was well beyond ordinary but that, without more, does not indicate a conscious objective to endanger the child. Nor do we find that the evidence when viewed in combination—Defendant's poor but not aggressive driving while intoxicated, with a child strapped in a car seat—allows a reasonable inference that Defendant had a conscious objective to endanger the child.

{25} Perhaps substantial evidence was present to support a *mens rea* based on recklessness, but such a theory was not charged by the State; thus, the jury was not instructed regarding recklessness nor may we consider it on review. We hold that the evidence was insufficient to support the jury's verdict that Defendant committed child abuse by endangerment intentionally, because no evidence was presented that it was Defendant's conscious objective to endanger the child. Accordingly, we reverse Defendant's conviction. We do not reach Defendant's argument that she did not endanger the child or Defendant's other contentions of error.

CONCLUSION

{26} We hold that the *mens rea* for intentional child abuse by endangerment, Section 30-6-(D)(1), requires a conscious objective to endanger a child. There was insufficient evidence that Defendant met that standard. Accordingly, we reverse and remand to the district court with instructions to vacate Defendant's conviction.

{27} IT IS SO ORDERED.

STEPHEN G. FRENCH, Judge

WE CONCUR:
TIMOTHY L. GARCIA, Judge
J. MILES HANISEE, Judge

Certiorari Denied, October 27, 2016, No. S-1-SC-36077

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-095

No. 33,940 (filed August 4, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
KENNETH EUGENE GRAY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
JAMES WAYLON COUNTS, District Judge

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Opinion

Jonathan B. Sutin, Judge

{1} This appeal involves Defendant Kenneth Gray's criminal liability under NMSA 1978, Section 66-8-101)C( )2004, amended 2016( )current version at Section 66-8-101)E((, for a third degree felony of driving while intoxicated)DWI(causing great bodily harm to a human being. The human being was Defendant. The appeal also involves a sixteen-year enhancement to a three-year basic sentence. The enhancement was based on four prior DWI convictions. Defendant questions the applicability of the liability and sentencing provisions of Section 66-8-101, and the failures of his counsel and the district court to advise him at the plea stage of the enhancement.

{2} We hold that Section 66-8-101)C(does not apply to Defendant, the perpetrator, where the great bodily injury resulting from his unlawful conduct was to himself and not to others. Although this holding requires reversal and vacation of the judgment and sentence associated with Defendant's plea, we choose also to discuss the sentencing statute, Section 66-8-101)D( )current version at Section 66-8-101)F((, under which Defendant was sentenced, and we hold that Defendant was improperly sentenced. Further, we take this opportunity to once again remind lower courts and defense counsel of their obligations in plea circumstances.

BACKGROUND

{3} When the arresting officer responded to a report of a possible drunk driver, he found Defendant sitting in the right front seat of a truck that had collided with another vehicle. Defendant was bleeding from his face and head, holding his chest and head, and appeared to be in great pain, and the steering wheel was severely bent inward. Two persons in the other vehicle were also injured, but the injuries to these victims were not the subject of the charge under Section 66-8-101(C) to which Defendant pleaded guilty.[1] Based on clear evidence of DWI, Defendant was charged with violating Section 66-8-101(B) and (D) and, in a written plea and disposition agreement, pleaded guilty to Section 66-8-101(B) based on having committed great bodily harm to himself in the collision.[2] Defendant was also charged with DWI fourth or subsequent offense, a fourth degree felony, contrary to NMSA 1978, Section 66-8-102(D)(2), (G) (2010, amended 2016). Defendant's plea agreement recites that a DWI charge under Section 66-8-102(A), a special fourth degree felony, "will be dismissed."

{4} Section 66-8-101(C), the provision to which Defendant pleaded guilty during his plea hearing, reads:

> A person who commits . . . great bodily harm by vehicle while under the influence of intoxicating liquor . . . is guilty of a third degree felony and shall be sentenced pursuant to the provisions of [NMSA 1978,] Section 31-18-15 [(2007, amended 2016).]

"Great bodily harm by vehicle" is defined in Section 66-8-101(B) as "the injuring of a human being, to the extent defined in [NMSA 1978,] Section 30-1-12 [(1963)], in the unlawful operation of a motor vehicle." Section 30-1-12(A) defines "great bodily harm" as "an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body[.]"

{5} For a Section 66-8-101(C) third degree felony, the basic sentence as set out in Section 31-18-15(A)(9) (current version at Section 31-18-15(A)(11)) is three years imprisonment. Section 66-8-101(D) provides enhancements to the basic sentence as follows:

> A person who commits . . . great bodily harm by vehicle while under the influence of intoxicating liquor . . . as provided in Subsection C of this section, and who has incurred a prior DWI

[1]In a plea-related hearing, the district court noted that the original charge against Defendant stated that two named victims had suffered great bodily harm. The prosecution told the court that those victims' injuries did not rise to the level of great bodily harm. The original charge was amended to reflect that it was Defendant's injuries that amounted to great bodily harm.

[2]During the plea hearing, the district court asked Defendant for his plea to Count 1, "great bodily harm by vehicle, driving while under the influence of intoxicating liquor or any drug," as described in Section 66-8-101(C). At this hearing, Defendant initially pleaded no contest. The State noted that the plea and disposition agreement called for Defendant to plead guilty. The court asked Defendant again for his plea to Counts 1 and 4, and Defendant pleaded guilty. The court's judgment marked the "no contest" box.

> conviction within ten years of the occurrence for which he is being sentenced under this section shall have his basic sentence increased by four years for each prior DWI conviction.

{6} Defendant does not dispute that he admitted in his plea agreement and at the plea hearing that he drove under the influence of alcohol causing the collision. Further, in pleading to a violation of Section 66-8-101(C), he necessarily admitted that his injuries rose to the level of great bodily harm under Section 66-8-101(B) and (C). And he admitted that he had four prior DWI convictions dated in 1987, 1996, 2006, and 2008. At sentencing, the prosecution argued that under Section 66-8-101(D) and (E) the four prior DWI convictions should add four four-year enhancements to Defendant's basic three-year sentence, totaling nineteen years. The district court agreed.

{7} The circumstances underlying the plea and sentencing concerns are telling. After first using the injuries of others to charge Defendant in magistrate court, in district court, the State switched to Defendant's own injuries—a ruptured aorta valve and a dislocated hip—as the factual basis to support the charge and the plea. The crime required that "a human being" suffer great bodily harm. *See* § 66-8-101(B). Although not made a point of error on appeal, throughout the proceedings defense counsel did not argue and Defendant was unaware that the statute's wording, "the injuring of a human being," could be viewed as unclear.[3] Defendant contends on appeal that the statute is, indeed, unclear and must be interpreted to exclude the perpetrator within the intended coverage of "human being," and therefore, the crime to which Defendant pleaded guilty was nonexistent, requiring vacation of his conviction.

{8} Further, it is undisputed that Defendant was not informed by his counsel, the prosecution, or the district court that his having admitted in his plea and disposition agreement to the existence of four prior DWI convictions would trigger enhancement of his basic three-year sentence and how much additional prison time he would face. The plea and disposition agreement stated only that the maximum penalties for the charge were "[third] degree felony—3 years/$5,000 fine[.]" At the plea point in time, Defendant had been informed only that he would receive a three-year basic sentence for the DWI offense. Before he was sentenced, a pre-sentence report recommended that Defendant's total prison time for the DWI third degree felony be three years followed by two years parole.

{9} At sentencing, the prosecution argued for enhancement of Defendant's basic three-year sentence by sixteen additional years. It was clear that two of the four prior convictions occurred outside of the ten-year limitation in Section 66-8-101(D). While defense counsel argued that only two of the four prior DWI convictions should be considered in sentencing, that the statute was ambiguous, and that the rule of lenity should apply, there is no indication that defense counsel or the district court discussed with Defendant whether he might want to consider withdrawing his plea, when the district court interpreted the statute to include all four of the prior convictions and sentenced Defendant to nineteen years.

{10} Finally, along the same lines, at sentencing the prosecution argued that two persons, in addition to Defendant, were severely injured in the collision. The district court believed that to be so, and as a result, designated the crime as a serious violent offense under the Earned Meritorious Deductions Act, NMSA 1978, § 33-2-34 (2006, amended 2015), thereby substantially limiting Defendant's good time credit. Defense counsel did not argue against that determination.

{11} Based on the underlying circumstances, Defendant asserts the following six points on appeal: (1) Defendant should be allowed to withdraw his plea because the plea was based on a nonexistent crime; (2) this Court should reverse and remand to enforce the plea agreement pursuant to Defendant's reasonable understanding of that agreement; (3) alternatively, the district court's failure to inform Defendant of the possible sentencing enhancements he faced by pleading guilty renders the plea involuntary; (4) as a second alternative, because the record establishes a prima facie case of ineffective assistance of counsel, this Court should reverse to allow Defendant to withdraw his plea; (5) the sixteen-year enhancement was erroneous; and (6) the district court's misunderstanding of the factual basis of the plea led to sentencing errors requiring reversal. Defendant asks this Court to "vacate his conviction[to] allow him to withdraw his plea[] or grant him a new sentencing."

DISCUSSION

The Dispositive Issue of Application of "Human Being" to the Perpetrator

{12} Defendant asserts that Section 66-8-101(C) is inapplicable to his conduct, and as such, he was charged with and convicted of a "nonexistent crime." Pursuant to statutory construction, we review de novo whether a statute is correctly applied to a person's conduct. *See State v. Office of the Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029, ¶ 13, 285 P.3d 622.

{13} The State sets out various arguments to persuade us that the Legislature intended "a human being" in Section 66-8-101(C) to include the perpetrator. First, is the State's plain-language argument that nothing in the text of the statute limits the crime to injuries inflicted on others and that we are not to read new language into a statute. Along the same lines, the State argues that the Legislature knows how to limit the scope of a crime when it means to, has not limited the scope here, and has enacted statutes that explicitly apply only when the perpetrator harms another person. *See* NMSA 1978, § 66-8-101.1(A) (1985) (regarding injury to a pregnant woman by vehicle); NMSA 1978, § 30-3-5(A) (1969) ("Aggravated battery consists of the unlawful touching or application of force to the person of another[.]"); NMSA 1978, § 30-15-1 (1963) ("Criminal damage to property consists of intentionally damaging . . . property of another[.]"); NMSA 1978, § 30-9-12(A) (1993) ("Criminal sexual contact is the unlawful and intentional touching of or application of force . . . to the . . . intimate parts of another[.]"); NMSA 1978, § 30-17-5(A)(3) (2006) ("Arson consists of a person maliciously or willfully starting a fire . . . with the purpose of destroying or damaging . . . the property

[3] Interestingly, at the plea hearing, the district court appeared somewhat skeptical as to whether the statute meant great bodily harm to Defendant. The discussion was:

Court: Who had the great bodily harm, him?
State: It was actually, him, Your Honor.
Court: Even if it's your own self, huh?
State: I didn't find anything to indicate that I could not charge it that way.

of another[.]"). The State's point is that the Legislature deliberately chose not to use the word "another" in Section 66-8-101(B).

{14} Section 66-8-101.1(A) relates specifically to injury by vehicle that criminalizes injury to a pregnant woman. Section 66-8-101.1(A) states that "[i]njury to pregnant woman by vehicle is injury to a pregnant woman by a person other than the woman in the unlawful operation of a motor vehicle causing her to suffer a miscarriage or stillbirth as a result of that injury." Under Section 66-8-101.1(C), a perpetrator who causes such injury while under the influence of intoxicating liquor is guilty of a third degree felony. As highlighted by the State, Section 66-8-101.1(A) does not criminalize the act of an intoxicated driver who is pregnant and who causes herself to suffer a miscarriage or stillbirth.

{15} Second, is a policy argument. The State argues that the Legislature could rationally have concluded that it was appropriate to punish the creation of the severe risk because the harm "imposes costs on society greater than the run-of-the-mill DWI." And third, the State argues that the statute is not ambiguous, and therefore, lenity does not demand a result in Defendant's favor.

{16} The State's arguments, while reasonable, are not persuasive. We see no unstated or implicit intention under the Criminal and Motor Vehicle Codes that a DWI driver is to be considered the victim and imprisoned for having committed great bodily harm to himself.

{17} The social evil of DWI is rationally related to the monstrous consequences that occur when the perpetrator kills or harms others, whether they are pedestrians, passengers, or persons in other vehicles. *See State v. Roper*, 1996-NMCA-073, ¶ 17, 122 N.M. 126, 921 P.2d 322 (stating that DWI has a "great potential for serious injury or death" and that the act of DWI "represents a reckless and inexcusable disregard for the rights of other members of the [traveling] public" (internal quotation marks and citation omitted)); *see also* § 66-8-101.1(A) (indicating an intent that the pregnant driver is not considered a victim or to be imprisoned for having injured herself). Extending our social policy as embodied in criminal law to persons who harm themselves while driving while intoxicated should be made clear through carefully worded statutory language. We do not agree that monetary costs and possible traffic delays or closures support a social policy that in turn supports the interpretation that Section 66-8-101(B) embodies our Legislature's intent to imprison a DWI perpetrator who causes harm to himself. We construe Section 66-8-101(C) as applying only when a driver while under the influence of an intoxicant has caused great bodily harm to another human being.

Validity of Sixteen-Year Enhancement Issue

{18} Because the issue of whether, under Section 66-8-101(D), prior DWI convictions outside of the ten-year period will enhance a defendant's basic sentence for a Section 66-8-101(C) conviction will likely arise in a future case, we will address the issue here. Defendant asserts that, as a matter of law, the district court lacked statutory authority to enhance his sentence by sixteen years. Defendant shows and the State does not dispute that only two of the four prior convictions occurred within the ten-year period preceding his present conviction. Defendant argues that the district court could lawfully impose only two four-year enhancements. Defendant adds that, at the very least, we should determine that Section 66-8-101(D) is ambiguous and hold that the rule of lenity requires resolution of the issue in his favor. Our review is de novo when we engage in statutory construction. *See, e.g.*, *State v. Telles*, 1999-NMCA-013, ¶ 21, 126 N.M. 593, 973 P.2d 845.

{19} We agree with Defendant. The language of the statute at issue is that the perpetrator "who has incurred *a* prior DWI conviction within ten years of the occurrence for which he is being sentenced . . . shall have his basic sentence increased by four years for *each* prior DWI conviction." Section 66-8-101(D) (2004) (emphasis added). We interpret the existence of "*a* prior DWI conviction within ten years" to allow an enhancement for *each such* conviction within that ten-year period. Thus, the enhancement can be added only for those prior convictions occurring within the ten-year period. To read the statute to need only one conviction within the ten-year period in order to include one or more convictions outside the period is absurd. If the statute were construed to trigger inclusion of all prior convictions when only one comes within the ten-year period, there would be little, if any, reason for the "within ten years" language. Further, accepting the State's argument would result in a much more harsh enhancement regime than is allowed by the felony habitual offender provisions of NMSA 1978, Section 31-18-17 (2003). To the extent the statute can possibly be read as interpreted by both the State and Defendant, the statute is ambiguous and the doctrine of lenity demands that we construe the statute in Defendant's favor. *State v. Ogden*, 1994-NMSC-029, ¶ 25, 118 N.M. 234, 880 P.2d 845 ("The rule of lenity counsels that criminal statutes should be interpreted in the defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute.").

{20} The State attempts to defeat Defendant's view of the enhancement statute by discussing the "triggers" for enhancement in various other statutes, namely, NMSA 1978, Section 31-18-16(A) (1993) (firearm used in commission of a noncapital felony), and Section 31-18-17(A)-(C) (habitual offender enhancements). What is critical here is solely the interpretation of the language in Section 66-8-101(D). The attempted comparison of triggers is neither logically nor rationally helpful. We disagree with the State's unsupported interpretation of Section 66-8-101(D) and conclude that its interpretation is neither required by the text of the statute nor supported by an overall purpose of increasing penalties for recidivist offenders.

The Plea Issues

{21} The plea issues involve the district court's and defense counsel's failures to advise Defendant of critical information in relation to Defendant's plea. Because we reverse Defendant's conviction and allow Defendant's plea withdrawal, we do not need to decide whether to reverse on Defendant's Points 3 and 4 relating to ineffective assistance of counsel and court error with respect to their failures to advise him of the consequences of his plea. We address these issues only to reiterate embedded law on the duties and responsibilities of defense counsel and the district court in plea circumstances.

{22} As indicated earlier in this Opinion, the State concedes that defense counsel and the district court failed to advise Defendant of the Section 66-8-101(D) sentencing consequence of pleading guilty with admission of prior DWIs. Defendant admitted four prior DWI convictions but nothing in the plea process or in the express language of the plea agreement indicated any consequences flowing from that admission. The question is not whether error occurred but whether Defendant is entitled to relief based on the error.

{23} The rules are set and clear. "A plea is not knowing, intelligent, and voluntary

unless the defendant understands his guilty plea and its consequences." *State v. Ramirez*, 2011-NMSC-025, ¶ 9, 149 N.M. 698, 254 P.3d 649 (alteration, internal quotation marks, and citation omitted). The court is not to accept a plea of guilty or no contest without first "informing the defendant of and determining that the defendant understands the . . . mandatory minimum penalty . . . and the maximum possible penalty . . ., including any possible sentence enhancements." *Id.* (alteration, internal quotation marks, and citation omitted); *see also Marquez v. Hatch*, 2009-NMSC-040, ¶ 13, 146 N.M. 556, 212 P.3d 1110 (recognizing the district court's "obligation to adequately inform the defendant of sentencing enhancements based on prior convictions"). Our Supreme Court has held "that the [district] court's failure to advise the defendant regarding the range of possible sentences associated with his plea constituted error." *Ramirez*, 2011-NMSC-025, ¶ 19. "Failure to advise a defendant of the potential penalties presumptively affects [the] defendant's substantial rights and renders the plea unknowing and involuntary." *State v. Garcia*, 1996-NMSC-013, ¶ 23, 121 N.M. 544, 915 P.2d 300.

{24} Were we not to reverse because Defendant was improperly convicted under a crime that did not cover his conduct, the circumstances of this case would make it a good candidate for allowing Defendant to withdraw his plea. No evidence exists to indicate any understanding on Defendant's part of the sentencing consequences or to support a voluntary plea.

The District Court's Misapprehension of Fact and Classification of Crime as Serious Violent Offense

{25} Defendant asserts that, in sentencing him, the district court relied on the State's misrepresentation that the two people in the other car in the collision suffered great bodily injury, and based on that reliance, the court exercised its discretion in running Defendant's basic sentence and all four enhancement terms consecutively. Defendant considers the district court's error to be of constitutional due process magnitude, citing *United States v. Tucker*, 404 U.S. 443, 447 (1972), which indicates, according to Defendant, that "a defendant's constitutional right to due process is violated when the sentence is 'founded at least in part upon misinformation of constitutional magnitude.'"

{26} With respect to the same asserted mistaken belief that great bodily harm was inflicted on two people in the collision, Defendant contends that the district court's findings in regard to the application of the Earned Meritorious Deductions Act (EMDA), Section 33-2-34, were "an inaccurate representation of [the] factual basis for [his] plea[,]" insufficient because the findings "relied entirely on the elements of [the] crime[,]" and insufficient to inform Defendant how his actions "constituted recklessness in the face of knowledge that the acts were reasonably likely to result in serious harm." *State v. Loretto*, 2006-NMCA-142, ¶¶ 14-19, 140 N.M. 705, 147 P.3d 1138 (indicating that the district court should be descriptive in regard to harm and how the defendant's acts amounted to a serious violent offense under the EMDA). Therefore, according to Defendant, the court's determination of serious violent offense was erroneous as insufficient to support a serious violent offense designation under the EMDA, requiring reversal of that determination. Under the EMDA, those convicted of a serious violent offense may earn a maximum of four days per month of good time for participating in various programs, while those convicted of a non-violent offense may earn a maximum of thirty days per month. Section 33-2-34(A).

{27} We see no reason to address these issues as important for future cases and given our reversal of Defendant's conviction as set out earlier in this Opinion.

The Issue of Enforcing the Plea Agreement Pursuant to Defendant's Understanding of It

{28} Defendant contends that he understood the plea agreement to impose only a maximum exposure of three years and ninety days and that the agreement must be enforced as he understood it. *See State v. Fairbanks*, 2004-NMCA-005, ¶ 15, 134 N.M. 783, 82 P.3d 954 ("Upon review, we construe the terms of the plea agreement according to what [the d]efendant reasonably understood when he entered the plea." (internal quotation marks and citation omitted)). He asserts that the sentence imposed must be reversed, and he asks this Court to reverse and remand with instructions to the district court to enforce the "maximum three-year and ninety-day exposure" and nothing more. Because we are reversing Defendant's Section 66-8-101 conviction and sentence entered pursuant to that agreement, we see no basis on which to address this issue.

CONCLUSION

{29} Defendant was wrongfully convicted under Section 66-8-101(B) and (C), statutory subsections that do not criminalize his actions. We therefore reverse Defendant's judgment and sentence based on the plea agreement. We remand with instructions to the district court to vacate the conviction and sentence imposed based on that conviction. Defendant is permitted to withdraw his plea.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
J. MILES HANISEE, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-096

No. 34,347 (filed August 4, 2016)

SHERRY MILLIRON,
Plaintiff-Appellant,
v.
THE COUNTY OF SAN JUAN, THE SAN JUAN SHERIFF'S DEPARTMENT, and RICHARD STEVENS,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
DAYLENE MARSH, District Judge

DONALD G. GILPIN
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Albuquerque, New Mexico
for Appellant

MARK J. KLECAN
LAW OFFICES OF MARK J. KLECAN
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for Appellees

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Opinion

James J. Wechsler, Judge

{1} Appellant Sherry Milliron appeals from the district court's dismissal of her negligence claim, brought pursuant to the New Mexico Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (1976, as amended through 2015), against Appellees San Juan County, San Juan County Sheriff's Department, and San Juan County Sheriff's Department Deputy Richard Stevens. The district court ruled that, under any legal theory, the facts alleged were insufficient to establish a waiver of the governmental immunity granted by Section 41-4-4(A). Appellant argues on appeal that the district court's Rule 1-012(B)(6) NMRA dismissal was error because the complaint pleaded facts entitling Appellant to relief for damages caused by Appellees' negligence. Appellant also argues that the district court's ruling indicates a failure to accept the facts alleged as true as required by Rule 1-012(B)(6).

{2} Having reviewed the complaint and applicable law, we conclude that Appellant's well-pleaded facts, while potentially sufficient to support a claim of negligence, are insufficient to establish a waiver of the governmental immunity granted by Section 41-4-4(A). Because Appellees are immune from suit under the facts of the case, Appellant has not stated a claim upon which relief may be granted. Given this conclusion, we need not review Appellant's additional Rule 1-012(B)(6) argument. We affirm.

BACKGROUND

{3} On or about January 1, 2012, Appellant was traveling on Highway 550 south of Bloomfield, New Mexico, when her vehicle struck a pedestrian, Jasper Lopez. Appellant, alleging negligence, brought this action for personal injuries and property damage against Appellees. Appellees filed a motion to dismiss that was granted by the district court. This appeal resulted. To avoid unnecessary repetition, we have incorporated Appellant's factual allegations into our discussion of Rule 1-012(B)(6).

STANDARD OF REVIEW

{4} In reviewing a district court's dismissal of a complaint for failure to state a claim upon which relief can be granted, we "accept as true all facts well pleaded and question only whether the plaintiff might prevail under any state of facts provable under the claim." *Cal. First Bank v. State*, 1990-NMSC-106, ¶ 2, 111 N.M. 64, 801 P.2d 646 (internal quotation marks and citation omitted). In doing so, "the complaint must be construed in a light most favorable to [the non-moving party] and with all doubts resolved in favor of its sufficiency." *Pillsbury v. Blumenthal*, 1954-NMSC-066, ¶ 6, 58 N.M. 422, 272 P.2d 326.

APPLICATION OF RULE 1-012(B)(6)

{5} New Mexico is a notice pleading state. *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 10, 335 P.3d 1243. While this standard generally benefits plaintiffs in civil litigation, *see Credit Inst. v. Nutrition Corp.*, 2003-NMCA-010, ¶ 22, 133 N.M. 248, 62 P.3d 339 (holding that "our liberal rules of notice pleading do not require that specific evidentiary detail be alleged in the complaint"), Rule 1-012(B)(6) nonetheless requires application of the facts pleaded in the complaint to the applicable law. *Cal. First Bank*, 1990-NMSC-106, ¶ 2. This Court is required to make inferences in favor of the sufficiency of the complaint. *Pillsbury*, 1954-NMSC-066, ¶ 6. But, in doing so, we are not permitted to consider facts not pleaded in order to make a plaintiff's claim provable. *See Prot. and Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156, 195 P.3d 1 ("[T]he court generally may not consider materials outside the pleadings on a [federal] Rule 12(b)(6) motion[.]").

Appellant's Well-Pleaded Facts

{6} The sole count alleged in Appellant's complaint was for negligence resulting in personal injuries and property damage. This allegation of negligence was predicated upon Deputy Stevens' conduct with respect to Lopez, specifically his decision to leave Lopez unsupervised near Highway 550.

{7} In support of this allegation, Appellant's complaint pleaded the following facts: (1) a motorist called 911 to report a potentially intoxicated pedestrian "wandering on" Highway 550; (2) the caller expressed concern that the pedestrian would be struck by passing traffic; (3) Deputy Stevens responded and contacted the pedestrian, Jasper Lopez; (4) Deputy Stevens took Lopez into his "custody and control" for the purpose of transporting him home; (5) Deputy Stevens received an emergency call related to a traffic accident; (6) Deputy Stevens told Lopez to exit the vehicle near a gas station along Highway 550; (7) Lopez did not enter the gas station, but instead reentered Highway 550, at which time he was struck by Appellant's vehicle; and (8) Appellant suffered property damage, physical injuries, and emotional injuries as a result of the collision.

{8} Despite stating that Deputy Stevens took Lopez into his "custody and control[,]" the complaint did not state as fact

that the roadside interaction between Deputy Stevens and Lopez resulted in Lopez being placed under custodial arrest for any crime, or that Lopez was being transported under the authority of the Detoxification Reform Act, NMSA 1978, §§ 43-2-1.1 to -23 (1976, as amended through 2005). Nor does the complaint state as fact that Lopez intentionally collided with Appellant's vehicle.

WAIVER OF IMMUNITY UNDER THE TORT CLAIMS ACT

{9} As a general rule, governmental entities are immune from tort liability as provided in Section 41-4-4(A). *See* § 41-4-4(A) ("A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort[.]"). This immunity is waived with respect to law enforcement officers acting within the scope of their duties by Section 41-4-12, which provides,

> [t]he immunity granted pursuant to [Section 41-4-4(A)] does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico[.]

{10} It is well-established that a law enforcement officer need not be the direct cause of injury to trigger a waiver of immunity under Section 41-4-12. *Blea v. City of Espanola*, 1994-NMCA-008, ¶ 14, 117 N.M. 217, 870 P.2d 755. Thus, even if a third party is the direct cause of an injury, the immunity granted by Section 41-4-4(A) is waived if a plaintiff "demonstrate[s] that the defendants were law enforcement officers acting within the scope of their duties, and that the plaintiff's injuries arose out of either a tort enumerated in [Section 41-4-12] or a deprivation of a right secured by law." *Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't*, 1996-NMSC-021, ¶ 7, 121 N.M. 646, 916 P.2d 1313. It is, however, equally well-established that the mere negligence of a law enforcement officer is insufficient to waive the tort immunity granted by Section 41-4-4(A) unless such negligence results in one of the torts enumerated in Section 41-4-12 or a deprivation of a statutory right. *See Blea*, 1994-NMCA-008, ¶ 12 ("[W]e continue to hold there is no waiver of immunity under Section 41-4-12 for mere negligence of law enforcement officers that does not result in one of the enumerated acts."); *Caillouette v. Hercules, Inc.*, 1992-NMCA-008, ¶ 18, 113 N.M. 492, 827 P.2d 1306 ("[T]he negligence complained of must cause a specified tort or violation of rights; immunity is not waived for negligence standing alone."). Against this backdrop, we determine whether Appellant's complaint pleaded facts sufficient to trigger a waiver of the immunity granted to Appellees by Section 41-4-4(A).

Duty Owed to Appellant by Deputy Stevens

{11} A common-law negligence claim "requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff's damages." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181. Factual determinations related to breach of duty and proximate causation are properly left to the jury. *Lessard v. Coronado Paint & Decorating Ctr.*, 2007-NMCA-122, ¶ 27, 142 N.M. 583, 168 P.3d 155. However, whether a defendant owes a duty to a plaintiff is a legal question to be determined by the court. *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, ¶ 8, 341 P.3d 1. Our Supreme Court recently clarified that "foreseeability is not a factor for courts to consider when determining the existence of a duty[.]" *Rodriguez v. Del Sol Shopping Ctr. Assocs.*, 2014-NMSC-014, ¶ 1, 326 P.3d 465. Under this standard, the existence of duty is policy, rather than fact driven. *Id.* ¶¶ 1, 3.

{12} After being dispatched in response to a 911 call, Deputy Sanders located and contacted the allegedly intoxicated Lopez. Deputy Stevens took Lopez into his "custody and control[,]" for the purpose of transporting him home. After receiving an emergency call, Deputy Stevens let Lopez out of the vehicle near a gas station. Appellant argues that Deputy Stevens' decision to provide transportation to Lopez created a duty that was breached by his subsequent decision to terminate the transportation without ensuring that Lopez no longer posed a threat to himself or others.

{13} In *Cross v. City of Clovis*, our Supreme Court held that "a law enforcement officer has the duty in any activity actually undertaken to exercise for the safety of others that care ordinarily exercised by a reasonably prudent and qualified officer in light of the nature of what is being done." 1988-NMSC-045, ¶ 6, 107 N.M. 251, 755 P.2d 589 (footnote omitted). Deputy Stevens actually undertook to transport Lopez. Accepting all well-pleaded facts as true, we must view this undertaking as motivated by either a concern for the safety of Lopez himself or for that of other motorists on Highway 550. Under *Cross*, a reasonably prudent and qualified officer would not have released Lopez back into the dangerous situation from which he was initially removed.

{14} This determination does not, however, conclude our inquiry. As discussed in detail below, even if Deputy Stevens breached a duty owed to Appellant, the immunity granted by Section 41-4-4(A) is only waived if Appellant suffered a tort enumerated in Section 41-4-12 or a deprivation of a statutory right. *See Caillouette*, 1992-NMCA-008, ¶ 18 ("[T]he negligence complained of must cause a specified tort or violation of rights; immunity is not waived for negligence standing alone.").

Waiver of Immunity Arising From the Commission of an Enumerated Tort

{15} With respect to the torts enumerated in Section 41-4-12, the only one that could be reasonably inferred from the complaint is battery. Appellant argued, both in a pretrial motion hearing and at oral argument before this Court, that Lopez's conduct—that is, the act of entering Highway 550 and colliding with Appellant's vehicle—constituted a battery. Appellant's brief in chief also argues that this case is analogous to *Blea*, in which an intoxicated driver caused a fatal traffic accident. 1994-NMCA-008, ¶ 6.

{16} In *Blea*, Espanola Police Department officers were alerted to a disturbance at a local gas station and instructed to search for the suspect's vehicle. *Id.* ¶ 3. Within a few minutes, the vehicle was located and a traffic stop was conducted. *Id.* During this stop, the suspect was "extremely intoxicated" and "exhibited impaired judgment, impaired coordination, and inability to operate a motor vehicle in a safe and lawful manner." *Id.* ¶ 4. The suspect additionally admitted both consuming and possessing marijuana. *Id.* Instead of arresting the suspect, the officers ordered him to surrender the alcohol and marijuana in the vehicle and allowed him to continue driving his vehicle. *Id.* ¶¶ 4-5. The suspect subsequently caused a traffic accident, killing a young woman. *Id.* ¶ 6.

{17} At trial in *Blea*, the district court ruled that immunity was not waived under

Section 41-4-12 because neither the officers nor the suspect had the requisite intent to prove battery. *Blea*, 1994-NMCA-008, ¶ 13. This Court reversed, noting that our Supreme Court's discussion of battery in *California First Bank* was controlling. *Blea*, 1994-NMCA-008, ¶ 15 (citing *Cal. First Bank*, 1990-NMSC-106, ¶ 34, n.6).

{18} "Battery is the unlawful, *intentional* touching or application of force to the person of another, when done in a rude, insolent or angry manner." NMSA 1978, § 30-3-4 (1963) (emphasis added). A tortfeasor is liable for battery if "(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results." *State v. Ortega*, 1992-NMCA-003, ¶ 12, 113 N.M. 437, 827 P.2d 152 (internal quotation marks and citation omitted). The intent required to commit battery extends only to the physical touching at issue and not to the resulting harm. *See Peña v. Greffet*, 108 F.Supp.3d 1030, 1048 (D.N.M. 2015) ("As to the intent required to commit a battery, the Restatement (Second) of Torts is ambiguous whether intent means showing merely an intent to touch that person—and that the touching turns out to be offensive or harmful need not be intended—or if the plaintiff must also show that the harm or offense was intended. It is clear, however, that an intent to touch in a way that the defendant understands is not consented to is sufficient, as is an actual intent to harm."). *California First Bank*, which imputed the requisite intent to commit battery to drunk drivers, and its progeny stand as exceptions to the general rule that both the crime and tort of battery require proof of intent. *See* 1990-NMSC-106, ¶ 34, n.6 (stating that the intent element of battery is satisfied if "the actor believes that the consequences are substantially certain to result from the action taken." (alteration, internal quotation marks, and citation omitted)); *Blea*, 1994-NMCA-008, ¶ 15 ("[A]n allegation that a party is intentionally intoxicated and driving could be sufficient intent for battery because all that is necessary is the party's substantial certainty that a particular result will occur.").

{19} While the rationale of *California First Bank*'s footnote six clearly applies to intoxicated drivers, it is inapplicable to the facts of the present case. Lopez was not an intoxicated driver, but instead, an intoxicated pedestrian. To impute the intent to commit a battery to Lopez, as our Supreme Court discussed in *California First Bank*, we must conclude that injury to a passing motorist was a "substantially certain outcome" of Lopez's conduct. 1990-NMSC-106, ¶ 34, n.6. We are unwilling to draw this conclusion. *See State v. Jones*, 895 P.2d 643, 644 (Nev. 1995) ("[I]ntoxicated pedestrians do not present the serious public safety hazard that results from drunk drivers.").

{20} Lopez's decision to enter Highway 550 in an allegedly intoxicated state led to an accidental collision and to his untimely death. However, even reading the complaint in the manner most favorable to Appellant as required by Rule 1-012(B)(6), we are unable to infer intent on the part of Lopez to cause a collision as required to support a claim of battery under New Mexico law. Because Appellant did not suffer a battery, or any other enumerated tort, Appellees' immunity from tort liability granted by Section 41-4-4(A) is not waived on this theory.

Waiver of Immunity Arising From the Deprivation of a Statutory Right

{21} Appellant argues in the alternative that her injuries resulted from a deprivation of a statutory right. "Section 41-4-12 of the Tort Claims Act waives immunity when injury has resulted from a deprivation of any right secured by the statutory law of the United States or New Mexico . . . if caused by a law enforcement officer." *Cal. First Bank*, 1990-NMSC-106, ¶ 32 (internal quotation marks omitted). A plaintiff may bring a "direct claim for personal injury . . . arising from a violation of a statutory right." *Weinstein*, 1996-NMSC-021, ¶ 26. Such personal injury need not arise from one of the torts enumerated in Section 41-4-12. *See Weinstein*, 1996-NMSC-021, ¶ 26 (citing favorably the proposition that damages for emotional distress are recoverable under Section 41-4-12 if arising from a violation of a statutory right). NMSA 1978, Section 29-1-1 (1979), which requires that law enforcement officers "investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware," is commonly invoked to demonstrate the deprivation of a statutory right and has been described by our Supreme Court as "designed to protect individual citizens from harm." *Weinstein*, 1996-NMSC-021, ¶ 37.

{22} For example, in *California First Bank*, deputies observed an intoxicated individual, Harrison Shorty, fire several gun shots outside a bar in Gallup, New Mexico. 1990-NMSC-106, ¶ 3. Despite observing conduct in violation of New Mexico law, the deputies elected not to arrest Shorty.[1] *Id.* Shorty subsequently left the bar and, while driving through a marked intersection, crossed the center line and collided with another vehicle, killing three people. *Id.* ¶ 4. Applying Section 29-1-1, our Supreme Court held that the deputies' failure "to apprehend Shorty or investigate the disturbance at [the] bar" proximately caused the injuries and constituted "a negligent violation of a right secured under New Mexico law[.]" *Cal. First Bank*, 1990-NMSC-106, ¶ 37. Since *California First Bank*, our appellate courts have applied Section 29-1-1 in this manner. *See, e.g.*, *Blea*, 1994-NMCA-008, ¶¶ 4-6, 19 (applying Section 29-1-1 in holding tort immunity to be waived when law enforcement officers detained but failed to arrest an "extremely intoxicated" driver who, later the same evening, caused a collision that killed a young woman); *Weinstein*, 1996-NMSC-021, ¶¶ 3, 38 (applying Section 29-1-1 in holding tort immunity to be waived when law enforcement officers' failure to diligently file a criminal complaint resulted in the release of a rape suspect who subsequently raped the plaintiffs' daughter).

{23} Appellant argues that Deputy Stevens' failure to detain or arrest the allegedly intoxicated Lopez constituted a breach of a statutory duty imposed by Section 29-1-1. Given the pleaded facts, Deputy Stevens' duty to detain or arrest could arguably derive from either the Detoxification Reform Act or the Motor Vehicle Code, NMSA 1978, §§ 66-1-1 to -8-141 (1978, as amended through 2015). We discuss the interplay between these statutes and Section 29-1-1 in turn.

A. The Detoxification Reform Act

{24} Appellant's complaint alleged that Lopez was "wandering on" Highway 550 in an intoxicated state. *See Cal. First Bank*, 1990-NMSC-106, ¶ 2 (requiring this Court to accept as true all well-pleaded facts in the complaint). Our Legislature has not enacted a criminal statute prohibiting public intoxication. *See* § 43-2-3 ("It is the policy of this state that intoxicated and incapacitated persons may not be subjected to criminal prosecution, but

[1]*See* NMSA 1978, § 30-7-4 (1979, amended 1993) (prohibiting the negligent use of a deadly weapon).

rather should be afforded protection."). As such, Lopez was not in violation of a criminal statute, and therefore subject to custodial arrest, simply because he was intoxicated.

{25} In her reply brief and during oral argument before this Court, Appellant argued that the Detoxification Reform Act creates a duty on the part of law enforcement officers to detain and transport intoxicated persons to safety. We disagree. Section 43-2-8(A)(1)-(7) provides that

> [a]n intoxicated or incapacitated person *may* be committed to a treatment facility at the request of an authorized person for protective custody, if the authorized person has probable cause to believe that the person to be committed:
>
> (1) is disorderly in a public place;
> (2) is unable to care for the person's own safety;
> (3) has threatened, attempted or inflicted physical harm on himself or another;
> (4) has threatened, attempted or inflicted damage to the property of another;
> (5) is likely to inflict serious physical harm on himself;
> (6) is likely to inflict serious physical harm on another; or
> (7) is incapacitated by alcohol or drugs.

(Emphasis added). The Legislature's use of the permissive "may" rather than the mandatory "shall" indicates the discretionary nature of a law enforcement officer's authority under Section 43-2-8(A). *See Cerrillos Gravel Prods., Inc. v. Bd. of Cty. Comm'rs of Santa Fe Cty.*, 2004-NMCA-096, ¶ 10, 136 N.M. 247, 96 P.3d 1167 ("The word 'may' is permissive, and is not the equivalent of 'shall,' which is mandatory."). In *State v. Phillips*, this Court held that Section 43-2-8(A) provided law enforcement officers with "actual authority" to take intoxicated persons into protective custody. 2009-NMCA-021, ¶ 23, 145 N.M. 615, 203 P.3d 146. Contrary to Appellant's argument, however, *Phillips* makes no comment on a law enforcement officer's obligation to do so. *See generally id.*

{26} Because Deputy Stevens was under no statutory obligation to detain or transport Lopez under Section 43-2-8(A), his decision to discontinue such transportation cannot constitute a deprivation of a statutory right imposed by Section 29-1-1.[2] Because Deputy Stevens' conduct did not breach a statutory duty owed to Appellant, Appellees' immunity from tort liability granted by Section 41-4-4(A) is not waived on this theory.

B. The Motor Vehicle Code

{27} Appellant additionally argues that Deputy Stevens' failure to arrest Lopez for violations of the Motor Vehicle Code constituted a breach of a statutory duty imposed by Section 29-1-1. We review the Motor Vehicle Code to determine whether Lopez's alleged conduct justified his being placed under custodial arrest by Deputy Stevens.

{28} Applying again the language of the complaint, violation of certain traffic statutes would subject Lopez to citation for "wandering on" Highway 550. *See* § 66-7-339 (describing required conduct while walking along highways that lack sidewalks); Section 66-7-334(B) (prohibiting pedestrians from "walk[ing] or run[ing] into the path of a vehicle"). However, a violation of one or both of these statutes, particularly a violation that was not witnessed by a law enforcement officer, would not subject Lopez to custodial arrest. *See* NMSA 1978, § 66-8-123 (2013) (requiring, subject to specific exceptions, that an individual arrested for a misdemeanor violation of the Motor Vehicle Code be cited and released); *State v. Reger*, 2010-NMCA-056, ¶ 13, 148 N.M. 342, 236 P.3d 654 ("The [misdemeanor arrest] rule provides that generally, in New Mexico, an officer may execute a warrantless misdemeanor arrest only if the offense was committed in the officer's presence." (alteration, internal quotation marks, and citation omitted)).

{29} Cases cited by Appellant, including *Blea* and *Torres v. State*, 1995-NMSC-025, ¶ 24, 119 N.M. 609, 894 P.2d 386 (holding that the duty to investigate applied to a specific murder suspect), in support of her argument that Deputy Stevens breached a statutory duty imposed by 29-1-1 are distinguishable. In *Blea*, the defendant officers had probable cause to arrest the suspect for numerous statutory violations during the initial traffic stop; a course of action that would have removed a significant threat to the public from the roadways. 1994-NMCA-008, ¶ 19. Similarly, in *Torres*, our Supreme Court held that the defendant officers had a statutory duty to investigate a specific murder suspect prior to his flight to Los Angeles where he murdered two additional people. 1995-NMSC-025, ¶¶ 6, 25.

{30} In the present case, Deputy Stevens investigated a report of a potentially intoxicated pedestrian "wandering on" Highway 550. Applying these facts as pleaded, Deputy Stevens lacked statutory authority to place Lopez under custodial arrest for a violation of the Motor Vehicle Code.

{31} Absent the authority to place Lopez under custodial arrest for a statutory violation, Deputy Stevens did not breach a statutory duty imposed by Section 29-1-1 by releasing Lopez from his vehicle. Because Deputy Stevens' conduct did not breach a statutory duty owed to Appellant, Appellees' immunity from tort liability granted by Section 41-4-4(A) is not waived on this theory.

CONCLUSION

{32} Because Appellant's complaint did not allege facts sufficient to establish a waiver of the governmental immunity granted by Section 41-4-4(A), Appellees are immune from tort liability. We therefore affirm the district court's Rule 1-012(B)(6) dismissal.

{33} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
STEPHEN G. FRENCH, Judge

[2]While Deputy Stevens' decision to transport Lopez could be interpreted as action under Section 43-2-8(A), Appellant's factual allegations contradict this argument. Section 43-2-8(A) authorizes a law enforcement officer to transport an intoxicated or incapacitated person to "a treatment facility." Appellant's complaint alleged that Deputy Stevens was transporting Lopez "home."

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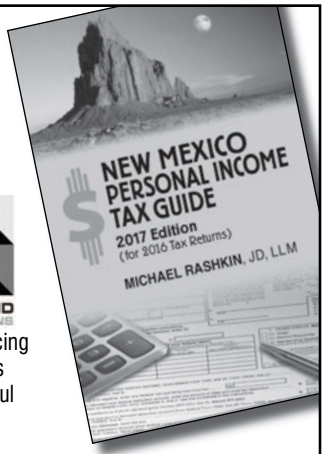

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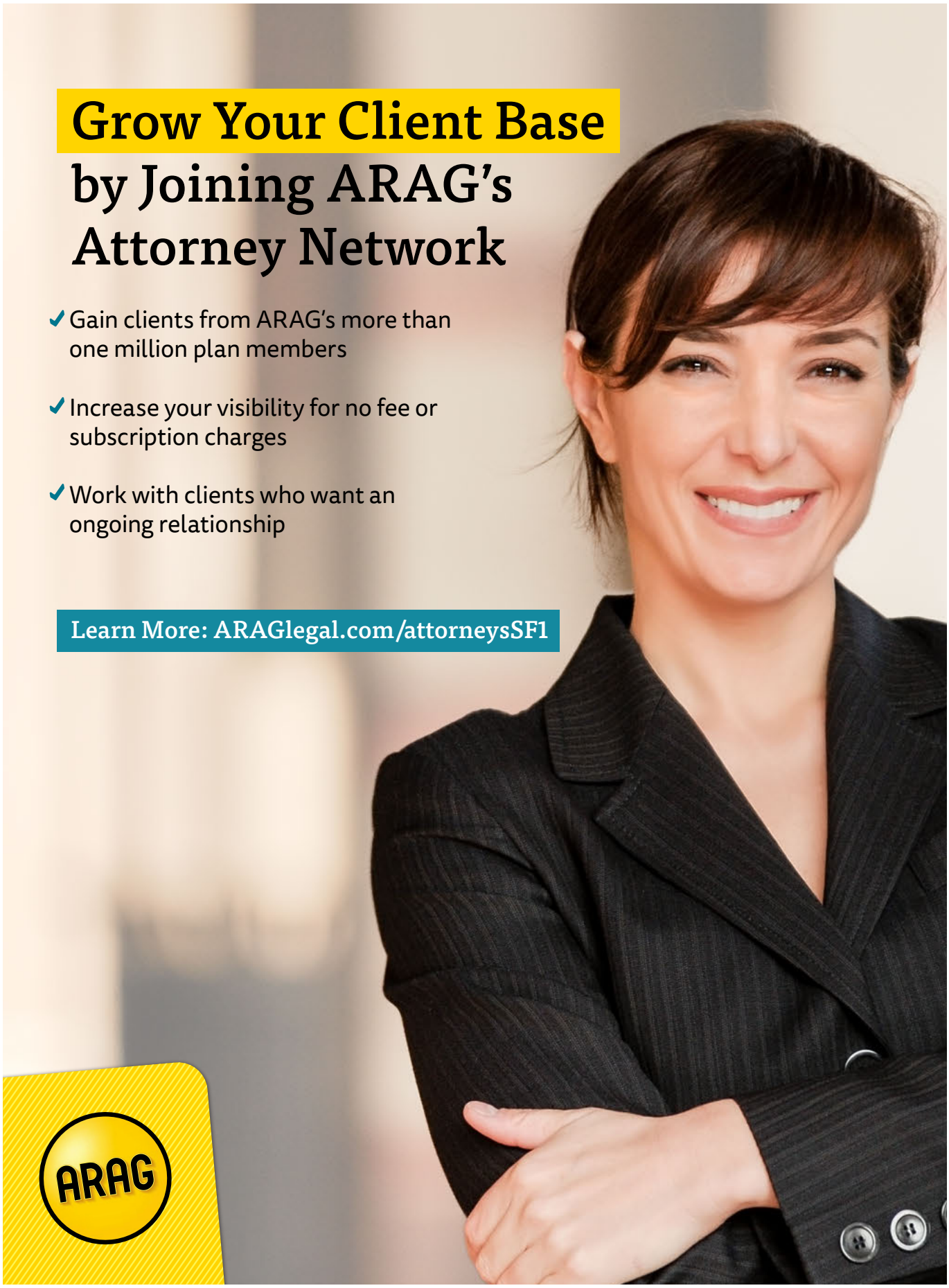
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