

BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

January 25, 2017 • Volume 56, No. 4



The Wild Ones, by Kat Livengood (see page 3)

Dark Bird Studio, Santa Fe

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Friday, Jan. 27

See back cover for details.

Rodey Law Firm

is very pleased to announce that

Debora E. Ramirez

has joined the firm.

A professional headshot of Debora E. Ramirez, a woman with dark, shoulder-length hair, smiling. She is wearing a dark blazer over a patterned top.

Debora E. Ramirez
505.766.7566
dramirez@rodey.com
Offices in Albuquerque
and Santa Fe

Ms. Ramirez advises clients in connection with financing transactions, real estate transactions, mergers and acquisitions, securities law issues, leases and contracts, and general corporate matters. Her experience ranges from representing individuals in start-up ventures to representing multinational corporations in complex financing, real estate and other transactions. She also counsels non-profit and tax-exempt organizations.

Ms. Ramirez is recognized in *Chambers USA Directories of America's Leading Lawyers for Business* for her expertise in real estate and is a Fellow of the American College of Mortgage Attorneys.

RODEY

L a w

505.765.5900

www.rodey.com

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Meetings

January

25
Natural Resources, Energy and Environmental Law Section Board
Noon, Teleconference

26
Alternative Methods of Dispute Resolution Committee
Noon, State Bar Center

27
Immigration Law Section Board
Noon, State Bar Center

February

1
Employment and Labor Law Section Board
Noon, State Bar Center

7
Bankruptcy Law Section Board
Noon, U.S. Bankruptcy Court

7
Health Law Section Board
9 a.m., teleconference

8
Children's Law Section Board
Noon, Juvenile Justice Center, Albuquerque

8
Taxation Section Board
11 a.m., teleconference

9
Public Law Section Board
Noon, Montgomery & Andrews, Santa Fe

Workshops and Legal Clinics

January

25
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

February

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

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

22
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

March

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

Cover Artist: Photographer Kat Livengood lives and works in the high desert of Santa Fe. When she's not at her Canyon Road studio, she's traveling all over the west with her partner, artist Kelly Moore, looking for wild horses and capturing images of wildlife and southwestern landscapes. Livengood is known for sensitively conveying spirit and soul in her work. To view more of her work, visit www.katlivengood.com.

Notices

COURT NEWS

New Mexico Court of Appeals Governor Appoints Henry Bohnhoff to Fill Vacancy

On Jan. 13, Gov. Susana Martinez announced the appointment of Henry "Hank" Bohnhoff of Albuquerque to the New Mexico Court of Appeals, filling the vacancy created by the retirement of Hon. Roderick T. Kennedy.

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 defendant(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.

Third Judicial District Court Announcement of Vacancy

A vacancy on the Third Judicial District Court will exist as of Feb. 1 due to the resignation of Hon. Darren M. Kugler effective Jan. 31. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. Alfred Mathewson, chair of the Third Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Download applications at lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., Feb. 16. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Third Judicial District Court Judicial Nominat-

Professionalism Tip

With respect to my clients:

I will be loyal and committed to my client's cause, and I will provide my client with objective and independent advice.

ing Commission will meet at 9 a.m. on Feb. 23 to interview applicants for the position in Las Cruces. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

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.)
- 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.

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.

OTHER BARS

Albuquerque Lawyers Club

Lunch and ‘Security Concerns in the Arctic’

Keith Stinebaugh, senior fellow at the Institute of the North, will present “Security Concerns in the Arctic” at the next Albuquerque Lawyers Club meeting at noon, Feb. 1, at Seasons Rotisserie and

Grille in Albuquerque. Members as well as non-members are invited to attend. The cost is \$30 in advance or \$35 at the door. For more information, contact Yasmin Dennig at ydennig@yahoo.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.

State Bar Lawyer Referral Services

Updates and Changes

This issue contains a description of the **State Bar General Referral Program** and the **Legal Resources for the Elderly Program** plus the outline of two changes to these programs that the State Bar is implementing in 2017.

View page 9 for more information.

NEW MEXICO LAWYERS AND JUDGES ASSISTANCE PROGRAM (JLAP)

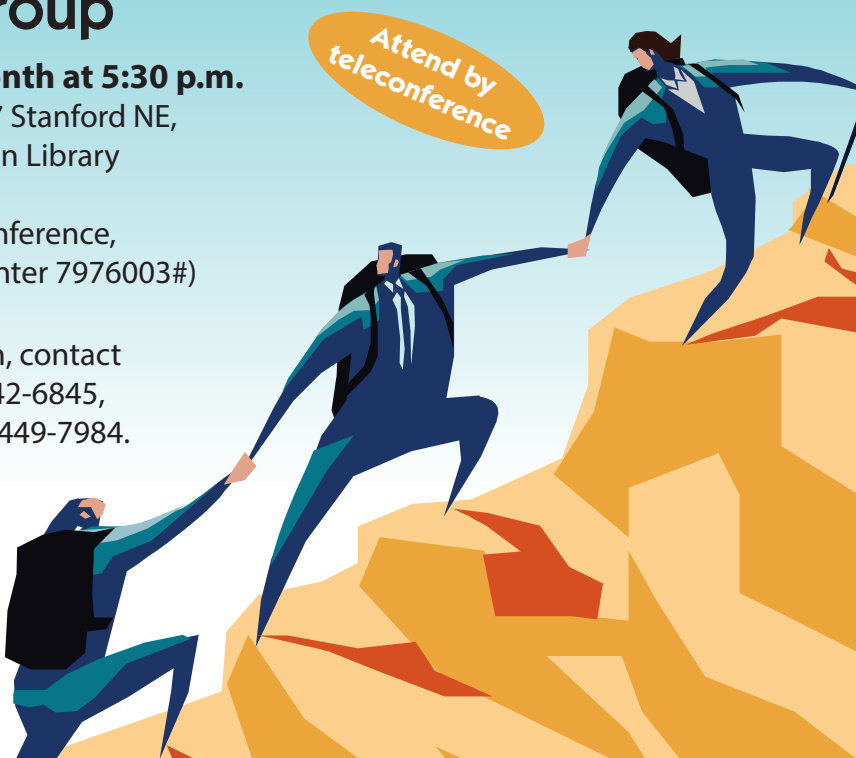
Support Group

Second Monday of the month at 5:30 p.m.

UNM School of Law, 1117 Stanford NE,
King Reading Room in Library

(To attend by teleconference,
dial 1-866-640-4044 and enter 7976003#)

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



Legal Education

January

- | | | |
|--|--|---|
| <p>25 Risky Business: Avoiding Discrimination When Completing the Form I-9 or E-Verify Processes
1.5 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>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</p> | <p>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</p> |
| <p>25 UCC Issues in Real Estate
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>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</p> | <p>31 Just Between Us: Drafting Effective Confidentiality & Non-disclosure Agreements
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>26 Drafting Special Needs Trusts
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | | |

February

- | | | |
|---|---|---|
| <p>7 2017 Ethics Update, Part 1
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>10 Gender and Justice (2016 Annual Meeting)
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>23 Ethics in Negotiations
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 2017 Ethics Update, Part 2
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>10 Estate Planning for Digital Assets
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 Justice with Compassion—Facility Dogs Improving the Legal System (2016)
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 Essentials of Employment Law
5.6 G
Live Seminar, Las Cruces
Sterling Education Services Inc.
www.sterlingeducation.com</p> | <p>16 Use of Trust Protectors in Trust and Estate Planning
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 2016 Employment and Labor Law Institute
6.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>10 Drugs in the Workplace (2016)
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 Ethics in Billing and Collecting Fees
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 The Ethics of Managing and Operating an Attorney Trust Account (2016 Ethicspalooza)
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>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</p> | <p>23 Reciprocity—Introduction to the Practice of Law in New Mexico
4.5 G, 2.5 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 Lawyers' Duties of Fairness and Honesty (Fair or Foul: 2016)
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |

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 13, 2017

PUBLISHED OPINIONS

No. 33852 2nd Jud Dist Bernalillo CV-11-7627, K ROBEY v L PARNELL (affirm in part, reverse in part) 1/10/2017

UNPUBLISHED OPINIONS

No. 35659 5th Jud Dist Eddy CV-15-1091, SOUTHWESTERN v RLR INVESTMENT (reverse and remand) 1/9/2017
No. 35804 1st Jud Dist Santa Fe CR-15-646, STATE v G ALDERETE (reverse) 1/9/2017
No. 35890 WCA-14-54213, F HALFORD v STATE OF NM HSD (dismiss) 1/10/2017
No. 35108 1st Jud Dist Santa Fe PB-11-219, S ULLRICH v R ULLRICH (affirm) 1/10/2017
No. 35702 8th Jud Dist Taos CV-07-541, T ABRAMS v S ALMSBERGER (affirm) 1/11/2017
No. 34798 12th Jud Dist Otero CV-14-213, M DOLVIN v M RUECKHAUS (affirm) 1/12/2017
No. 35222 11th Jud Dist San Juan CR-15-242, STATE v S SMITH (affirm) 1/12/2017
No. 33914 3rd Jud Dist Dona Ana CV-10-2511, J SANGSTER v G ORTIZ (affirm) 1/12/2017

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 January 10, 2017:
Laura Ackermann
8124 Avenida la Prestina NE
Albuquerque, NM 87109
602-402-3001
lauraack@gmail.com

On January 10, 2017:
Harrel L. Davis
Gordon Davis Johnson
& Shane PC
4695 N. Mesa
El Paso, TX 79912
915-225-0529
915-545-4433 (fax)
hdavis@eplawyers.com

On January 10, 2017:
LaMar F. Jost
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street,
Suite 4500
Denver, CO 80202
303-244-1800
303-244-1879 (fax)
jost@wtotrial.com

On January 10, 2017:
Joshua P. Quartararo
RAS Boriskin LLC
900 Merchants Concourse
Westbury, NY 11590
516-280-7675
jqartararo@rasboriskin.com

On January 10, 2017:
Michael L. Whitener
VLP Law Group LLP
1629 K Street NW, Suite 300
Washington, DC 20006
202-817-2022
mwhitener@vlpawgroup.com

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective December 30, 2016:
Charlotte Greenfield
6790 Via Campestre
Las Cruces, NM 88007

Effective December 30, 2016:
Hazen M. Hammel
3603 Gun Club Road SW
Albuquerque, NM 87121

CLERK'S CERTIFICATE OF SUMMARY SUSPENSION FROM MEMBERSHIP IN THE STATE BAR OF NEW MEXICO

Effective Jan. 4, 2017, the fol-
lowing attorney is **Administratively**
Suspended from the State
Bar of New Mexico pursuant to
Rule 17-207(B) NMRA:
Matthew E. Ortiz
The Ortiz Law Firm
1704 Llano Street, Suite B #109
Santa Fe, NM 87505
505-986-2881
fax: 505-986-2811
mortizlaw@msn.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

As of January 2, 2017:
Vicki S. Plevin
1 Ridge Court
Placitas, NM 87043
505-459-1776
vicplvn@gmail.com

IN MEMORIAM

As of December 20, 2016:
Bruce Harl Strotz
PO Box 35400
Albuquerque, NM 87176

CLERK'S CERTIFICATE OF NAME CHANGE

As of January 3, 2017
Ellen Venegas f/k/a Ellen Frick
Pueblo of Pojoaque
58 Cities of Gold Road, Suite 5
Santa Fe, NM 87506
505-455-2271
efrick@pojoaque.org

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective November 1, 2016:
David S. Campbell
8345 N.W. 66th Street #B2496
Miami, FL 33195

Effective December 12, 2016:
Marianne Lee Bowers
PO Box 7674
Chula Vista, CA 91912

Jane Good Rowe
1162 Laurel Loop NE
Albuquerque, NM 87122

Effective December 20, 2016:
Galen M. Buller
19 Picaflor Path
Santa Fe, NM 87506

Peter S. Burns
1509 Aspen Drive, Apt. A
Alamogordo, NM 88310

Effective December 21, 2016:
Macie J. Hawkes
1237 S Val Vista Drive, Ste 120
Mesa, AZ 85204

Effective December 24, 2016:
Jennifer Ann Christopher
1849 C Street NW, Room 6524,
Mail-Stop 6513
Washington, DC 20240

Effective December 31, 2016:
David A. Baca
PO Box 20364
Albuquerque, NM 87154

Steven R. Bone
PO Box 28639
Santa Fe, NM 87592

M. Lea Brownfield
PO Box 57
Mesilla, NM 88046

Thomas R. Logan
645 Don Gaspar Avenue
Santa Fe, NM 87505

John P. Massey
3616 Campus Blvd. NE
Albuquerque, NM 87106

Peter F. Staiti
PO Box 12242
Albuquerque, NM 87195

Jesse Howard Witt
PO Box 18900
Boulder, CO 80308

Effective December 31, 2016:
Duane C. Gilkey
4333 Cobblestone Place NE
Albuquerque, NM 87109

Dale R. Ruge
3 Deer Meadow Court
Tijeras, NM 87059

Cheryl Pick Sommer
PO Box 2835
Santa Fe, NM 87504

Effective January 1, 2017:
Kathleen M. Brandt
1212 Pennsylvania Street NE
Albuquerque, NM 87110

John J. Britt
2700 Green Ridge Street
Fort Worth, TX 76133

Hon. John A. Darden III (ret.)
200 W. Las Cruces Avenue,
Suite C
Las Cruces, NM 88005

Jong Bum Kim
#702 Morning Ville,
Oksu-dong, Seongdong-gu
Dokseodang-ro 155
Seoul, Korea 04732

Molly B. McIntosh
PO Box 36300
Albuquerque, NM 87176

Mary M. McMahon
10190 Country Club Curve
Woodbury, MN 55129

State Bar

Lawyer Referral Services

Updates and Changes

First, I want to thank the many attorneys statewide who actively participate in the State Bar's two Lawyer Referral Services (LRS): the **State Bar General Referral Program** and the **Legal Resources for the Elderly Program**. You provide a valuable service to members of the public who contact the State Bar for help with their legal matters.

In addition to providing a valuable public service, the LRS provide benefits to you as a referral panel attorney. The LRS are a great way to increase your client base and to accumulate pro bono time. **In the past year, the LRS have placed approximately 1,000 referrals with our panel attorneys. In many cases, these referrals have become fee-generating cases.** If you are not already familiar with the State Bar's LRS, they are described in detail on the next page.

Second, I want to outline two changes to the Lawyer Referral Services that the State Bar is implementing in 2017:

1. Panel Membership Renewal: The State Bar is asking **all current LRS panel attorneys to renew their membership in the referral programs no later than Feb. 28, 2017**. Membership in the State Bar's LRS is free. To renew your membership, go to **www.nmbar.org/LRS** and fill out the application. You will receive an email confirmation of your renewed membership in the LRS.

If you do not renew your membership by **Feb. 28, 2017**, your name will automatically be removed from the State Bar's LRS referral panel. You can re-enroll in the programs at any time at **www.nmbar.org/LRS**. This renewal process will help us ensure that our referral panel membership lists are up to date, and that we have an accurate listing of each attorney's practice areas.

2. Panel Membership Eligibility: In 2017, State Bar LRS referral panel attorneys must have malpractice insurance in the minimum amount recommended by NMRA 16-104 (\$100,000 per occurrence / \$300,000 aggregate), and certify that they have sufficient expertise in each practice area in which they agree to accept referrals.

Please feel free to contact me or the LRS Program Coordinator Maria Tanner at 505-797-6047 if you have any questions or need additional information.

Thank you again for all you do for the State Bar of New Mexico, the State Bar Foundation, and members of the public in need of legal services.

Sincerely,



Stormy K. Ralstin
Director of Legal Services, New Mexico State Bar Foundation

State Bar General Referral Program (SBGR)

The SBGR Program receives over 10,000 calls a year from members of the public seeking legal assistance. The (non-attorney) intake person for the program screens the calls to determine the caller's legal issue and what type of service best suits the caller's needs. Callers who are eligible for one of the State's Civil Legal Service programs are referred to those programs. Otherwise, if the SBGR has panel attorneys who practice in the area in which the caller needs assistance, SBGR attempts to place the referral with the next attorney in rotation for that practice area.

As a LRS panel attorney, when you accept a SBGR Program referral, you are agreeing to provide the caller with a free, 30-minute consultation (while you may not charge a fee for the initial 30-minute consultation, you can count the consultation as part of your annual pro bono time). If you and the client agree that you will provide additional services beyond the 30-minute consultation, the client is responsible for payment of your regular fees for those additional services.

Once you have accepted a referral, we contact the caller and give them your name and phone number. The caller will then contact you directly to set up a time for the 30-minute consultation. We ask that you only accept referrals in cases where you will be able to consult with the client within 1 week of the referral date.

Legal Resources for the Elderly Program (LREP)

LREP is a free, statewide legal helpline and referral service for New Mexico residents age 55 and older. LREP referrals to panel attorneys are made only after an LREP staff attorney has spoken with the client and assessed the case.

If the client's legal needs are beyond the services provided by the helpline and additional, full legal assistance is appropriate, the case is referred to a referral panel attorney. LREP refers several hundred cases each year to LRS panel attorneys. Referrals are made for full-fee, reduced fee, and pro bono services. Please note that referrals for advance health care directives (AHCD) and powers of attorneys (POA) are always made on a pro bono basis.

Each referral is emailed to several referral panel attorneys who practice in the appropriate legal and geographic areas. LREP places the referral with the first attorney to respond to the email.

Once you have accepted the referral, LREP will send you the LREP staff attorney's notes and assessment of the case. LREP will also contact the client with your name and phone number. The client will then contact you directly to make an appointment.

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 25, 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
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From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-033

No. S-1-SC-35286 (filed August 18, 2016)

JAMES FLORES and MANNY VILDASOL,
Plaintiffs-Respondents,

v.

MARY HERRERA, individually and as
Secretary of State of the State of New Mexico,
and SECRETARY OF STATE'S OFFICE,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI

Sarah M. Singleton and Raymond Z. Ortiz, District Judges

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Opinion

Judith K. Nakamura, Justice

{1} In this case, we are called upon for the first time to interpret the Whistleblower Protection Act (WPA), NMSA 1978, §§ 10-16C-1 to -6 (2010), to resolve a single issue: Does the WPA allow a state employee to assert a claim against a state officer in the officer's individual capacity? Mary Herrera, when acting as the Secretary of State, terminated the employment of two employees of the Secretary of State's office, James Flores and Manny Vildasol. In separate actions, Flores and Vildasol each asserted a WPA claim against Herrera in her individual capacity. Herrera is no longer the Secretary of State; nevertheless, Flores and Vildasol seek to proceed with their individual-capacity WPA claims against her. The Court of Appeals concluded that the WPA allowed them to do so. *See Flores v. Herrera*, 2015-NMCA-072, ¶ 2, 352 P.3d 695, cert. granted, 2015-NMCERT-006 (No. 35,286, Jun. 19, 2015). We disagree.

The WPA does not permit a public employee to assert a claim against a state officer in his or her individual capacity. Accordingly, we reverse the decision of the Court of Appeals and remand Flores's and Vildasol's cases to their respective district courts for proceedings consistent with this opinion. Specifically, in Flores's case, we instruct the First Judicial District Court to dismiss Flores's individual-capacity claim against Herrera and, with respect to Flores's official-capacity claim against Herrera, to enter a substitution order as provided by Rule 1-025(D)(1) NMRA. In Vildasol's case, we instruct the First Judicial District Court to dismiss Vildasol's individual-capacity claim against Herrera and to proceed with Vildasol's claim against the Secretary of State's office.

I. BACKGROUND

{2} Herrera served as the Secretary of State from January 2007 until January 2011. On January 1, 2007, Herrera appointed Vildasol as an office administrator. During his tenure, Vildasol suspected that Secretary of State staff misused public funds and that

Herrera violated election laws. Vildasol reported the suspected misconduct to the Federal Bureau of Investigation and the New Mexico Attorney General's Office. On September 4, 2010, Vildasol received a letter from Herrera terminating his employment.

{3} Flores began working as a public information officer for the Secretary of State when Herrera assumed office in 2007. On August 17, 2010, Herrera placed Flores on administrative leave for allegedly placing two individuals on Flores's press release distribution list. While on administrative leave, Flores was interviewed by FBI Special Agent Leroy Chavez, who was investigating Vildasol's allegations of Herrera's misconduct in office. On August 25, 2010, Flores's attorney prepared a letter addressed to Herrera. The letter advised Herrera that Flores had been identified as a necessary witness in the ongoing FBI investigation concerning Herrera's activity as the Secretary of State and that Flores had been interviewed by the FBI regarding Herrera's conduct. On September 4, 2010, Flores received a letter from Herrera that terminated his employment. Herrera lost the general election in November 2010 and left office at the end of that year.

{4} On December 22, 2010, Flores sued Herrera in her individual and official capacities, alleging a violation of Section 10-16C-3. Herrera filed an amended answer on January 6, 2012, and moved to dismiss Flores's WPA claim on February 6, 2012. In her motion to dismiss, Herrera stressed that the WPA prohibits a "public employer" from retaliating against a public employee. Herrera argued that because the WPA does not define "public employer" to include either governmental employees acting in their individual capacities or former elected officials, the district court lacked subject matter jurisdiction over Flores's WPA claim. The district court agreed and granted Herrera's motion to dismiss for lack of subject matter jurisdiction. The district court concluded that Flores cannot recover against Herrera "because she is no longer Secretary of State." Flores timely noticed his appeal.

{5} On April 1, 2011, Vildasol filed a separate complaint against both the Secretary of State's office and Herrera in her individual capacity. In his complaint, Vildasol asserted a claim for violation of the WPA. Herrera moved to dismiss Vildasol's WPA claim, arguing that the statutory term

“public employer” did not encompass Herrera, either as a former public employer or in her individual capacity. On December 9, 2013, the district court denied Herrera’s motion to dismiss Vildasol’s WPA claim and certified the matter for interlocutory appeal. Herrera timely filed an application for interlocutory appeal. The Court of Appeals granted that application and assigned the case to its general calendar.

{6} The Court of Appeals consolidated the appeals in Flores’s and Vildasol’s cases and addressed the issues presented in a single opinion. *Flores*, 2015-NMCA-072, ¶ 1. The Court of Appeals concluded that Herrera’s status as a former state officer did not immunize her from liability under the WPA and that Herrera “may be sued pursuant to the Act in her individual capacity.” *Id.* ¶ 2 (internal quotation marks omitted). The Court of Appeals affirmed the district court’s denial of Herrera’s motion to dismiss Vildasol’s WPA claim and, after correctly noting that the issues presented do not implicate subject matter jurisdiction, reversed the district court’s dismissal of Flores’s WPA claim. *Id.* ¶¶ 2, 11-12.

{7} Herrera petitioned for a writ of certiorari. This Court granted Herrera’s 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 the WPA allows a public employee to assert a whistleblower-retaliation claim against a state officer in his or her individual capacity.

II. ANALYSIS

A. Standard of Review

{8} This Court reviews issues of statutory interpretation de novo. *Faber v. King*, 2015-NMSC-015, ¶ 8, 348 P.3d 173. We construe a statute “in light of its purpose and interpret it to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it.” *Id.* (internal quotation marks and citation omitted). “In discerning the Legislature’s intent, we are aided by classic canons of statutory construction, and we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended.” *Id.* ¶ 9 (alteration omitted) (internal quotation marks and citation omitted). “We examine the overall structure of the statute and its function in the comprehensive legislative scheme.” *Id.*

B. The Whistleblower Protection Act

{9} In 2010, the Legislature enacted the WPA, §§ 10-16C-1 to -6, “to encourage

employees to report illegal practices without fear of reprisal by their employers.” *Janet v. Marshall*, 2013-NMCA-037, ¶ 21, 296 P.3d 1253 (internal quotation marks and citation omitted). The WPA promotes transparent government and the rule of law. Its provisions are simple: Section 10-16C-3 prohibits a public employer from taking retaliatory action against a public employee because the public employee communicates information about conduct that the public employee believes in good faith to be unlawful or improper, provides information to a public body as part of an inquiry into an unlawful or improper act, or “objects to or refuses to participate in an activity . . . that constitutes an unlawful or improper act.” Section 10-16C-4(A), in turn, creates liability for a “public employer that violates the provisions of the [WPA] . . . for actual damages, reinstatement with the same seniority status that the employee would have had but for the violation, two times the amount of back pay with interest on the back pay and compensation for any special damage sustained as a result of the violation.” NMSA 1978, § 10-16C-4(A) (2010). In short, Section 10-16C-3 imposes duties on a “public employer,” and Section 10-16C-4(A) subjects a “public employer” to liability for breach of those duties. And the WPA broadly defines “public employer” to include any entity of state government and “every office or officer” of any governmental entity. *See* § 10-16C-2(C)(1)-(4).

C. The WPA Does Not Permit a Public Employee to Assert a Claim Against a State Officer in His or Her Individual Capacity

{10} At its root, this case concerns whether the WPA creates a right of action that a state employee may assert against a current or former state officer in his or her individual capacity, as opposed to the officer’s official capacity. In *Kentucky v. Graham*, the United States Supreme Court expounded upon the difference between a suit against a government official in his or her individual or personal capacity and a suit against a government official in his or her official capacity:

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an of-

ficer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official’s personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. . . . Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent’s estate. In an official-capacity action . . . , death or replacement of the named official will result in automatic substitution of the official’s successor in office.

473 U.S. 159, 165-66, 166 n.11 (1985) (internal quotation marks and citations omitted). This distinction aptly frames the parties’ positions: Flores and Vildasol maintain that Herrera is liable under the WPA even though she is no longer the Secretary of State and, therefore, the WPA subjects Herrera to a personal-capacity action. Herrera argues that the statute creates an official-capacity suit only.

{11} We hold that the WPA does not create a right of action against a current or former state officer in his or her personal capacity. An abundance of reasons supports this interpretation. First, the text of the WPA provides no indication that the Legislature intended to create a personal-capacity officer suit. The New Mexico Legislature knows how to expressly impose personal liability on a public employee. *See, e.g.*, NMSA 1978, § 41-4-4(E) (2001) (providing that a state entity has the right to recover from a public employee the costs of litigation and damages where the public employee acted fraudulently or with actual malice). And, generally, legislatures know how to expressly create personal-capacity officer suits. The federal statute creating a civil action for the deprivation of federal rights, 42 U.S.C. § 1983 (2012), offers both a quintessential example of a statute creating a personal-capacity officer suit and an illustrative counterpoint to the WPA. Section 1983 provides that “[e]very person who, under color of any statute . . . of any

State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .” 42 U.S.C. § 1983. In *Hafer v. Melo*, the United States Supreme Court determined that “[a] government official in the role of personal-capacity defendant . . . fits comfortably within the statutory term ‘person.’” 502 U.S. 21, 27 (1991). Accordingly, this Court has expressly stated that “[g]overnment officials can be sued in their individual capacities for damages under Section 1983 . . .” *Loya v. Gutierrez*, 2015-NMSC-017, ¶ 45, 350 P.3d 1155.

{12} In contrast to 42 U.S.C. § 1983, when enacting the WPA, the Legislature provided no textual indication of any intent to impose personal liability on a state officer. The Legislature did not create liability in a “person” who violates the provisions of the WPA. *Cf.* 42 U.S.C. § 1983. Rather, Section 10-16C-4(A) creates liability for a “public employer” who violates the WPA’s substantive provisions, and Section 10-16C-2(C)(4) defines a “public employer” to include “every office or officer” of any entity of state government. Those persons who occupy the offices of state government clearly do not act in their individual capacities when they take actions affecting the employment of public employees. When a state officer acts as a “public employer,” he or she acts in an official capacity. Thus, without an express indication to the contrary, when the Legislature created liability in a “public employer,” § 10-16C-4(A), it created a right of action that runs against a state officer only in his or her official capacity.

{13} Second, the remedies that Section 10-16C-4(A) provides demonstrate that the WPA creates an official-capacity suit against state officers. Section 10-16C-4(A) creates two kinds of remedies—*viz.*, monetary damages and the injunctive relief of reinstatement of a public employee to his or her former position of employment. The reinstatement remedy may only be effectuated by an officer acting in his or her official capacity and, therefore, connotes that Section 10-16C-4(A) creates an action against state officers only in their official capacities. *See N.M. Pharm. Ass’n v. State*, 1987-NMSC-054, ¶ 8, 106 N.M. 73, 738 P.2d 1318 (“In interpreting statutes, we should read the entire statute as a whole so that each provision may be considered in relation to every other part.”). Other state appellate courts have similarly interpreted

the complement of remedies created by analogous whistleblower statutes to indicate that those statutes do not create individual liability in state officers. *E.g., Cabinet for Families & Children v. Cummings*, 163 S.W.3d 425, 431 (Ky. 2005) (“The fact that only the Commonwealth or one of its political subdivisions could grant much of the relief afforded by the Act, i.e., ‘reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, exemplary or punitive damages, or any combination thereof,’ . . . reinforces this Court’s conclusion that the Legislature did not intend for policy makers and managers to be individually liable under the Act.” (citation omitted)); *Alejandro v. Robstown Indep. Sch. Dist.*, 131 S.W.3d 663, 669 (Tex. App. 2004) (“[A]ppellant has no private right of action against any of the appellees in their individual capacities.”).

{14} Third, to effectuate the remedial purpose of Section 10-16C-4(A), it is simply unnecessary to interpret the WPA to allow personal-capacity officer suits. Statutory claims that are available against governmental officials in their personal capacities offer avenues of relief that circumvent state sovereign immunity. *See, e.g., Reames v. Oklahoma ex rel. Okla. Health Care Auth.*, 411 F.3d 1164, 1168 (10th Cir. 2005) (“The Eleventh Amendment does not prevent plaintiffs from bringing suits against state officials . . . in their individual and personal capacities.”). In the WPA, the Legislature did *not* choose to preserve New Mexico’s sovereign immunity from suit while concomitantly allowing a form of relief for public employees who suffer retaliatory action at the hands of state officers. To the contrary, in enacting the WPA, the Legislature was manifestly clear that a public employee who suffers a violation of his or her right against retaliatory action may recover directly from a state entity. *See* §§ 10-16C-2(C)(1)-(4), 10-16C-4(A). The WPA expressly permits a public employee to seek against “any department, agency, office, institution, board, commission, committee, branch or district of state government,” “any political subdivision of the state,” “any entity or instrumentality of the state,” and “every office or officer of any entity” of state government. *See* § 10-16C-2(C)(1)-(4). Where, as in the WPA, the Legislature consents to suit by creating a claim that may be asserted against either state entities or the officers of those entities, we find no reason to interpret the statute as implicitly authorizing personal-

capacity officer suits. Such an interpretation is unnecessary to effectuate the WPA’s remedy; the Legislature made it plain that a plaintiff may seek recovery directly from the State. Thus, should Flores and Vildasol ultimately prove that Herrera violated Section 10-16C-3, they would recover their respective damages from the Secretary of State’s office. Flores and Vildasol conceded this point at oral argument.

{15} Flores and Vildasol offer no convincing reason why we should interpret the WPA to allow them to recover against Herrera’s personal assets. Vildasol suggests that because Sections 10-16C-2(C)(1)-(4) and 10-16C-4(A) provide for suits against governmental entities, the inclusion of “officer” in Section 10-16C-2(C)(4)’s definition of “public employer” is surplusage if not interpreted to authorize a personal-capacity officer suit. We are unpersuaded.

{16} Section 10-16C-2(C)(4)’s inclusion of the term “officer” has operative effect even though it does not permit a personal-capacity officer suit. The WPA does not require a plaintiff to name a state entity as a defendant. Hence, in cases where a plaintiff elects not to name a state entity as a defendant, the statutory term “officer” in Section 10-16C-2(C)(4) works to create vicarious liability in a state entity for retaliatory actions taken by officers of that state entity. The inclusion of the statutory term “officer” in the definition of “public employer” ensures that a state entity will be liable if an officer of that entity violates the requirements of the WPA and that a state entity cannot avoid liability merely by arguing that the retaliatory action taken by an officer is outside the scope of his or her employment. *Cf. Cummings*, 163 S.W.3d at 431 (holding that a similar statutory provision in Kentucky’s whistleblower-protection act was not surplusage because it “ensure[d] that the Commonwealth . . . will be liable if . . . managers take actions later to be found a violation of the Act, but also to ensure that the Commonwealth . . . cannot avoid liability by arguing that a . . . manager acted outside the scope of his or her employment”). Therefore, this Court is not required to read the WPA as allowing suits against state officers in their personal capacities in order to ensure that the statutory term “officer” has operative effect.

{17} Vildasol also contends that if the WPA only allowed for official-capacity officer suits, then a state officer’s departure from public employment would preclude a plaintiff’s relief. We disagree. If a state

officer who is named as a defendant in a WPA suit dies or leaves office pending the final resolution of the plaintiff's action, the defendant's departure from public office would merely result in an automatic substitution of his or her successor in office, and the plaintiff's suit would proceed against the current officer. *See* Rule 1-025(D)(1). If the state officer responsible for the retaliatory action dies or leaves office before the plaintiff commences suit on a WPA claim, then the plaintiff may seek relief from the state entity for which the officer served, so long as the action is brought within two years of the retaliatory action. *See* § 10-16C-6. Accordingly, we disagree with Vildasol's contention that if the WPA did not allow personal-capacity officer suits, its purpose to encourage governmental employees to report illegal or improper conduct would be undermined. The remedies provided for by Section 10-16C-4(A) guarantee against a prospective whistleblower's fear of retaliation, and we need not read the WPA to allow a plaintiff to recover against a state officer's personal assets to ensure the availability of those remedies.

{18} Moreover, to interpret the WPA to allow a plaintiff to seek recovery against a state officer's personal assets could entail undesirable consequences for the operation of state government. Such an interpretation could subject state officers to burdensome and distracting litigation, which, as the Tenth Circuit has noted in other contexts, "could lead to undesirable *ex ante* effects . . . [including] a general disaffection with public service, rooted in the calculation that its costs simply outweigh its benefits." *Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013). Because statutes that impose individual liability on state officers threaten detrimental effects for the operation of state government, when the Legislature has elected to create such personal liability, it has done so explicitly. *See* § 41-4-4(E). In enacting the WPA, the Legislature did not expressly authorize suits against state officers in their personal capacities, and we find no reason to impute such an intention to the statute.

III. CONCLUSION

{19} The WPA does not allow a plaintiff to sue a state officer in the officer's per-

sonal capacity. Accordingly, we reverse the decision of the Court of Appeals and remand Flores's and Vildasol's cases to their respective district courts for proceedings consistent with this opinion. In Flores's case, we instruct the district court to dismiss Flores's individual-capacity claim against Herrera and, with respect to Flores's official-capacity claim against Herrera, to enter a substitution order as provided by Rule 1-025(D)(1). In Vildasol's case, we instruct the district court to dismiss Vildasol's individual-capacity claim against Herrera and to proceed with Vildasol's claim against the Secretary of State's office.

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

JUDITH K. NAKAMURA, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

EDWARD L. CHÁVEZ, Justice

BARBARA J. VIGIL, Justice

**C. SHANNON BACON, Judge, sitting
by designation**

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-034

No. S-1-SC-35451 (filed August 25, 2016)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
PATRICIA GARCIA,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

DANIEL VIRAMONTES, District Judge

HECTOR H. BALDERAS
Attorney General
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for Petitioner

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Opinion

Judith K. Nakamura, Justice

{1} Patricia Garcia, a fifty-two-year-old teacher, induced Page Kent, an eighty-four-year-old widower, to believe that she was his loving partner and thereby gained access to his bank accounts and depleted over \$50,000 of his life's savings. A jury convicted Garcia of Fraud, in violation of NMSA 1978, Section 30-16-6 (2006), and Computer Access with Intent to Defraud, in violation of NMSA 1978, Section 30-45-3 (2006). The Court of Appeals reversed, finding insufficient evidence to support the convictions. *State v. Garcia*, 2015-NMCA-094, ¶ 1, 356 P.3d 45, cert. granted, 2015-NMCERT-008 (No. 35,451, Aug. 26, 2015). The State sought certiorari review only with respect to the fraud conviction. We conclude that sufficient evidence supports the jury's findings that Kent relied on Garcia's misrepresentation and that, because of Garcia's misrepresentation and Kent's reliance, Garcia fraudulently obtained over \$20,000. Accordingly, we reinstate the jury's verdict with respect to the fraud conviction, reverse the Court of Appeals's decision regarding the same, and remand to the Court of Appeals to consider the other issues raised by Garcia in her appeal.

I. BACKGROUND

{2} Page Kent retired to Columbus, New Mexico in 1986. In January 2010, Lois,

his spouse of 36 years, passed away. At the time of Lois's death, Kent was nearly 84 years old. Lois had handled the family finances. When Lois died, Kent had over \$100,000 in his bank accounts. Lois's death left Kent with no relatives in New Mexico. He had also been diagnosed with Parkinson's disease.

{3} Later in 2010, while at the post office, Kent met Garcia, a fifty-two-year-old school teacher. During this encounter, Kent asked Garcia if she was married. Garcia told Kent that she was not married but that she had had a few husbands and was then currently divorced. On that first day, Garcia also asked Kent for \$5,000 for cosmetic breast surgery. He wrote her a check for that amount.

{4} Kent and Garcia formed a close relationship, or so Kent thought. Garcia knew that Kent had recently lost his spouse and that he was vulnerable. She visited Kent for several hours a few times each week. Garcia told Kent that she would take care of him and would take him to his doctor's appointments and to the hospital if needed. Kent came to think of Garcia as his girlfriend, his partner. He had a romantic interest in her. As Kent described it, Garcia was not quite his "lover" because he was in his eighties. Yet, according to Kent, their relationship was "very nice," they were both "content," and they "just liked each other." Kent also represented to others that Garcia was his "girlfriend."

{5} Garcia knew that Kent thought of her in a loving and trusting way, as a girlfriend or romantic partner. She encouraged it. At one point, late in their relationship, Garcia even proposed marriage to Kent.

{6} Garcia, however, did not think of herself as Kent's girlfriend or romantic partner. Nevertheless, she feigned an amicable if not amorous relationship with Kent, and, having gained his trust, Garcia asked Kent if she could use his Wells Fargo bank account. Kent acceded. While Kent neither had a computer nor knew how to operate a computer, at least by October 2010, he had allowed Garcia to transfer his savings to her account through online banking. Later, on December 15, 2010, Kent added Garcia as a joint owner on his checking and savings accounts. Kent added Garcia as a joint owner because, as he thought, it would be easier for Garcia's own "bookkeeping," and it would be easier for her to replace the money that she had already taken.

{7} Garcia took control of Kent's bank accounts. She engaged in a campaign to transfer and spend his life savings. Garcia routinely transferred funds from Kent's saving account into his checking account, and then transferred funds from his checking account into her checking account. She also habitually used his ATM card. Garcia did not inform Kent how much of his money she regularly withdrew, and Kent did not know how much money Garcia took until he received his bank statement in the mail at the end of each month.

{8} In January 2011, Garcia married Gerardo Marquez. Garcia and Marquez had also cohabitated for some time prior to their marriage and during the period when Garcia was developing a relationship with Kent. Garcia was careful to keep Kent unaware of her marriage to Marquez. During the time she feigned a relationship with Kent, she did not tell Kent that she had married Marquez. Furthermore, Garcia deceived Kent when Kent first met Marquez. This occurred in May 2011, when Marquez, at Garcia's request, traveled to Kent's house to repair Kent's roof. At this meeting, Garcia introduced Marquez to Kent as her "gay friend," not as her spouse. Until Marquez later informed him, Kent never realized that Garcia had married and was never, in fact, his girlfriend or partner.

{9} At some point in 2011, a representative at Wells Fargo, concerned with the activity on Kent's accounts, made inquiries with Kent regarding his banking activity. The bank's intervention "woke [Kent] up" to

the precipitous erosion of his savings, and he asked Garcia to curtail her actions on his accounts. Then, at the bank's instigation, in May and June 2011, Kent opened a new checking and savings account with Wells Fargo and then closed the prior accounts to which he had added Garcia as a joint owner. But, after a while, Garcia convinced Kent to again add her onto his accounts; she told Kent that she would be careful. On October 13, 2011, Kent added Garcia as a beneficiary on his checking and savings accounts. And Garcia continued to deplete Kent's savings.

{10} In late 2011 or early 2012, a representative at the Wells Fargo Elder Abuse Department sent a report to New Mexico Adult Protective Services. The report was referred to a caseworker, Irene Chacón. Chacón contacted Kent and spoke with him about Garcia's activities on his bank accounts. Then, in late January or early February 2012, after Marquez and Garcia had separated, Marquez informed Kent not only that he and Garcia had been married during 2011, but also of Garcia's "suspicious activity" on Kent's bank accounts. Kent was shocked. He later described the fact of Garcia's marriage as "very pertinent." Shortly after being made aware of Garcia's marriage, Kent suspended contact with her. Then, on February 18, 2012, he removed Garcia as a beneficiary on his bank accounts. On February 21, 2012, Kent submitted an affidavit of online fraud with Wells Fargo. In that affidavit, Kent represented that Garcia had "manipulated" him, and "convinced [him] to trust her . . ." From the time of their meeting in 2010, until February 2012, Garcia had depleted at least \$52,000 from Kent's bank accounts.

{11} On June 20, 2012, the State filed a criminal information against Garcia, alleging one count of Fraud (Over \$20,000), a second-degree felony in violation of Section 30-16-6, and one count of Computer Access with Intent to Defraud or Embezzle (Over \$20,000), a second-degree felony in violation of Section 30-45-3. After a two-day trial, a jury convicted Garcia on both counts.

{12} The Sixth Judicial District Court sentenced Garcia to a term of nine years for each count, to run consecutively. The district court then suspended ten years from Garcia's sentence for a total of eight years of imprisonment. The district court also imposed a five-year period of supervised probation and ordered Garcia to pay \$53,800 in restitution.

{13} Garcia timely appealed, and the Court of Appeals reversed Garcia's convictions. *Garcia*, 2015-NMCA-094, ¶ 1. In a divided opinion, the Court held that the State did not offer sufficient evidence to establish that "Kent relied on [Garcia's] deception about her relationship and marriage status" when he allowed her access to his bank accounts. *Id.* ¶¶ 14, 26. The Court also held that the evidence presented at trial was insufficient to prove "the elements of computer access with intent to defraud." *Id.* ¶ 29. In a dissenting opinion, Judge Sutin concluded that the jury was presented with sufficient evidence to support its finding that "Kent's willingness to allow [Garcia] access to his accounts was grounded in Mr. Kent's impression that [Garcia] was his 'girlfriend'" *Id.* ¶ 44 (Sutin, J., dissenting).

{14} On July 28, 2015, the State petitioned for a writ of certiorari, which this Court granted, exercising its jurisdiction under Article VI, Section 3 of the New Mexico Constitution and NMSA 1978, Section 34-5-14(B) (1972). This Court issued the writ to consider two questions: First, whether the Court of Appeals erred by determining that the element of reliance in a fraud count must be proved by direct and not circumstantial evidence? Second, whether the Court of Appeals erred in concluding that the jury's finding that Kent relied on Garcia's misrepresentations was not supported by sufficient evidence?

II. DISCUSSION

A. Standard of review

{15} The standard by which an appellate court reviews a jury verdict for sufficiency of the evidence is well-established. "Evidence is viewed 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. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (internal quotation marks and citations omitted). We then 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." *Id.* We have made clear that "[b]ecause an appellate tribunal does not enjoy the same exposure to the evidence and witnesses as the jury at trial, our review for sufficiency of the evidence is deferential to the jury's findings." *Id.* And we have explicitly said that:

New Mexico appellate courts will not invade the jury's province as

fact-finder by second-guess[ing] the jury's decision concerning the credibility of witnesses, reweigh[ing] the evidence, or substitut[ing] its judgment for that of the jury. So long as a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction, we will not upset a jury's conclusions.

Id. (alterations in original) (internal quotation marks and citations omitted).

B. A jury may permissibly rely on circumstantial evidence to find the reliance element of a fraud count

{16} The State argues that the Court of Appeals erroneously held that the State must prove reliance by direct evidence. Garcia replies that the State has misconstrued the Court of Appeals's holding, but agrees that reliance may be proven by circumstantial evidence. Both parties are correct: "Circumstantial evidence may be used to establish an element of a crime." *State v. McGhee*, 1985-NMSC-47, ¶ 17, 103 N.M. 100, 703 P.2d 877 (internal citation omitted). The elements of "[f]raud may be established by direct or circumstantial evidence." *State v. Ross*, 1986-NMCA-015, ¶ 24, 104 N.M. 23, 715 P.2d 471 (internal citation omitted). Therefore, the State may prove the reliance element of a fraud count by presenting circumstantial evidence.

C. There was sufficient evidence for the jury to convict Garcia of fraud

{17} The parties differ over whether the State presented sufficient evidence to support the jury's finding that Kent relied on a misrepresentation made by Garcia and whether, because of that reliance, Garcia obtained Kent's savings. "[J]ury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Arrendondo*, 2012-NMSC-013, ¶ 18, 278 P.3d 517 (internal quotation marks and citations omitted). In this case, the jury instruction as to the fraud count provided:

For you to find the defendant guilty of fraud as charged in Count 1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant, by any words or conduct, misrepresented a fact to Page Kent, intending to deceive or cheat Page Kent;
2. Because of the misrepresentation and Page Kent's reliance on it, defendant obtained over \$20,000

See generally UJI 14-1640 NMRA. Therefore, to convict Garcia of fraud, the jury had to find beyond a reasonable doubt that Kent relied on Garcia's misrepresentation and, because of that reliance, Garcia obtained in excess of \$20,000.

1. To establish fraud, the State must prove that a particular misrepresentation of fact induced the victim to act in a way the victim would not have otherwise acted

{18} Two aspects of the reliance element of fraud deserve attention. First, to establish reliance, the State must prove that a misrepresentation induced the victim to act in a way that the victim would not have otherwise acted, "that is, that he took a different course of action because of the misrepresentation." *Hunt Petroleum Corp. v. State*, 901 So. 2d 1, 5 (Ala. 2004); see also Wayne LaFare, 3 *Substantive Criminal Law* § 19.7(C) (2d ed. 2003) (noting that to establish the reliance element for the crime of false pretenses, "it is necessary that the swindler's misrepresentation cause that victim to pass title to his property or money to the swindler").

{19} Second, reliance must be premised on a particular misrepresentation of fact. Garcia couches the relevant misrepresentation as pertaining to her marital status or her "availability for an exclusive relationship." As such, she argues that to demonstrate reliance, the State must establish that Kent would not have allowed her access to his bank accounts "had he known about her marital status." Garcia contends that there was no evidence that Kent "only allowed her access to his funds because he thought he was in an exclusive relationship with her" or that "his willingness to give . . . [Garcia] funds was predicated upon her availability for an exclusive relationship with him." Garcia, however, does not focus on her most salient misrepresentation.

2. The jury was presented with sufficient evidence that Kent relied on Garcia's misrepresentation that she was his loving partner

{20} Despite Garcia's framing of the relevant misrepresentation, the jury was presented with sufficient evidence that Garcia misrepresented another fact—viz., that she was his girlfriend or loving partner. The jury heard Adult Protective Services caseworker Chacón testify that, based upon her conversation with Garcia, Garcia was aware that Kent thought of her in a loving and trusting way, as a girlfriend or romantic partner. She encouraged it:

the jury heard Kent testify that Garcia proposed marriage. And Kent represented that Garcia was his "girlfriend."

{21} The jury was also presented with ample evidence to conclude that, by misrepresenting that she was his loving partner, Garcia induced Kent to allow her access to his bank accounts and that he would not have allowed her such access had he known either that she had married (and thus was not his loving partner) or that she never truly considered herself his partner. First, Kent placed Garcia on his bank accounts and made her a beneficiary of the same, a designation which is usually reserved for loved ones. Second, Kent submitted an affidavit of online fraud in which he claimed that Garcia had "manipulated" him and "convinced [him] to trust her . . ." Third, Kent suspended contact with Garcia and removed her from his bank accounts shortly after Marquez informed Kent that Garcia and he had married. Although Kent did not directly testify that but for Garcia's misrepresentation he would not have allowed her access to his savings, the jury was permitted to ground its inference of reliance on Kent's affidavit.

{22} Moreover, the jury heard that Garcia was careful to conceal from Kent her relationship with and marriage to Marquez. Marquez testified that Garcia "made a point to keep us very apart, you know, it was like a whole different life for her . . . It was almost intentional that she didn't want us to meet." From Marquez's testimony, the jury also could reasonably infer that Garcia believed that had Kent known the truth about her marriage, her access to Kent's savings would have been jeopardized. Thus, the jury was permitted to infer that Kent's willingness to allow Garcia access to his accounts was grounded on the misrepresentation that she was his loving partner. See, e.g., *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930, cert. granted, 2014-NMCERT-008 (No. 34,764, Aug. 1, 2014), cert. quashed, 2015-NMCERT-001 (Table) (No. 34,764, Jan. 28, 2015) ("A reasonable inference is a conclusion arrived at by a process of reasoning [which is] a rational and logical deduction from facts admitted or established by the evidence[.]" (alterations in original) (internal quotation marks and citation omitted)). Based on the foregoing evidence, the jury was permitted to infer that Kent came to consider Garcia as his loving partner and that he would not have allowed her access to his bank accounts if

he had thought otherwise. Accordingly, the jury's finding of reliance was supported by sufficient evidence.

3. A New Mexico appellate court may not upset a jury's verdict because the appellate court finds that evidence presented at trial is consistent with a hypothesis of innocence

{23} Garcia's arguments do not demonstrate otherwise. Garcia echoes the Court of Appeals's holding that the circumstantial evidence presented was insufficient to establish reliance beyond a reasonable doubt. The Court of Appeals reached this conclusion because it determined that the evidence offered at trial was equally consistent with a hypothesis of Garcia's innocence. *Garcia*, 2015-NMCA-094, ¶ 23 (citing *State v. Garcia*, 2005-NMSC-017, ¶ 12, 138 N.M. 1, 116 P.3d 72). The Court of Appeals determined that the evidence was as supportive of Kent's reliance as of the alternative finding that, "irrespective of [Garcia's] marital status, . . . [Kent] would have allowed [Garcia] to access his money to assist with her children's financial needs because they were close friends, he felt sorry for her, and because she provided him with assistance and companionship." *Id.*

{24} We clarify that the Court of Appeals misapplied the sufficiency-of-the-evidence standard of review in reversing Garcia's fraud conviction. The Court of Appeals relied on this Court's dicta in which we noted that we had previously observed that "[e]vidence equally consistent with two inferences [one of which establishes a defendant's innocence] does not, without more, provide a basis for adopting either one—especially beyond a reasonable doubt." *Garcia*, 2015-NMCA-094, ¶ 17 (quoting *Garcia*, 2005-NMSC-017, ¶ 12 (quoting *State v. Garcia*, 1992-NMSC-048, ¶ 32, 114 N.M. 269, 837 P.2d 862 (internal quotation marks omitted))). Yet, the Court of Appeals overlooked this Court's lengthy discussion in the same 2005 *Garcia* opinion concerning appellate review of the evidence sufficient to support a conviction. See 2005-NMSC-017, ¶¶ 16-20. There, we explicitly rejected as "no longer an appropriate standard for a New Mexico appellate court" the proposition that "[w]here the evidence . . . supports a reasonable hypothesis of innocence, the State, by definition, has failed to prove its case beyond a reasonable doubt . . ." *Id.* ¶ 19 (emphasis added). This Court said "it is unproductive to try to formulate a

standard of appellate review in terms of a hypothesis of innocence, because inevitably it appears to intrude upon the role of the jury.” *Id.* ¶ 20. Since rejecting that standard, to avoid second-guessing the jury, we have expressly established a “two-step process” that requires an appellate court to draw every reasonable inference in favor of the jury’s verdict *and then* to evaluate whether the evidence, so viewed, supports the verdict beyond a reasonable doubt. *State v. Cantrell*, 2008-NMSC-016, ¶ 26, 143 N.M. 606, 179 P.3d 1214; *accord Garcia*, 2011-NMSC-003, ¶ 5 (providing the applicable standard of review). Accordingly, the Court of Appeals’s determination that the evidence presented at trial was insufficient to support the jury’s verdict because it was “equally consistent with two hypotheses on the factual element of reliance” was error. *Garcia*, 2015-NMSC-094, ¶ 23; *see also Garcia*, 2005-NMSC-017, ¶ 20 (rejecting standard of appellate review for sufficiency of the evidence formulated “in terms of a hypothesis of innocence”).

{25} Garcia does not convince us otherwise. She contends that “[i]t is at least as plausible that Mr. Kent either did not care about or did not want to know about [her] other romantic interests given his failure to ever discuss the issue with her . . .” This argument is not only based on a discredited standard of appellate review, but also is belied by the evidence presented to the jury. At their initial meeting, Kent asked Garcia about her marital status. Kent also testified that once they had formed a relationship, he did not ask Garcia whether she had married, because she already had said that she was not married. In light of

this testimony, a jury was permitted to infer that Kent justifiably relied on Garcia’s initial representation of her marriage status because, given the relationship that Garcia feigned, the issue of her marriage to another man was the sort of thing that would have come up. And Garcia’s claim that the evidence establishes that Kent did not care about Garcia’s marital status is undermined by his testimony that it was “very pertinent.”

{26} Garcia also argues that, in its effort to establish reliance, the State “is expressly attempting to subsume the element of reliance entirely within the distinct elements of misrepresentation and [Garcia’s] fraudulent intent . . .” According to Garcia, the State cannot prove the reliance element by asking the jury to infer from evidence that shows she “made misrepresentations and intended to deceive [Kent] to obtain money.” We are unpersuaded. It is true that the State must prove each element beyond a reasonable doubt. *See, e.g., State v. Smith*, 2016-NMSC-007, ¶ 19, 367 P.3d 420 (“Evidence is sufficient . . . when there exists substantial evidence of a direct or circumstantial nature to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” (internal quotation marks and citation omitted)). But it is also true that a jury may justifiably infer more than one element of a crime from the same evidentiary basis. *See, e.g., State v. Flores*, 2010-NMSC-002, ¶ 22, 147 N.M. 542, 226 P.3d 641 (evidence proved not only the *actus reus* of first-degree murder but also the element of deliberate intent); *State v. Salazar*, 1997-NMSC-044, ¶ 46, 123 N.M. 778, 945

P.2d 996 (same). From evidence showing that Garcia deceived Kent and concealed her marriage to Marquez from Kent, the jury was permitted to infer not only that Garcia misrepresented an amorous regard for Kent, but also that Kent relied on that misrepresentation in allowing Garcia access to his bank accounts. Accordingly, the jury was presented with sufficient evidence to support its finding that Kent relied on Garcia’s misrepresentation.

{27} Lastly, the State did not seek certiorari review of the Court of Appeals’s reversal of Garcia’s conviction for Computer Access with Intent to Defraud or Embezzle (Over \$20,000) in violation of Section 30-45-3. Accordingly, that issue is not before this Court. *See Mortgage Inv. Co. of El Paso v. Griego*, 1989-NMSC-014, ¶ 16, 108 N.M. 240, 771 P.2d 173 (“We need not address the issue . . . not included in the petition for writ of certiorari.”); Rule 12-502(C)(2)(b) NMRA (“[T]he Court will consider only the questions set forth in the petition.”).

III. CONCLUSION

{28} For the foregoing reasons, we reinstate Garcia’s conviction for Fraud in violation of Section 30-16-6, reverse the Court of Appeals’s reversal of the same, and remand to the Court of Appeals to consider the other issues raised by Garcia in her appeal.

{29} **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



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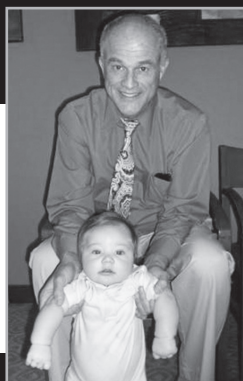
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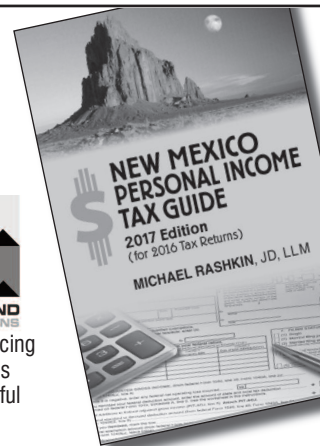
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Senior Trial Attorney - This position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence, as well as the ability to handle a full-time complex felony caseload. Admission to the New Mexico State Bar and a minimum of five years as a practicing attorney are also required. Trial Attorney - The 13th Judicial District Attorney's Office is accepting applications for an entry to mid-level attorney to fill the positions of Assistant Trial Attorney. This position requires misdemeanor and felony caseload experience. Assistant Trial Attorney - an entry level position for Cibola (Grants), Sandoval (Bernalillo) or Valencia (Belen) County Offices. The position requires misdemeanor, juvenile and possible felony cases. Upon request, be prepared to provide a summary of cases tried. Salary for each position is commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, PO Box 1750, Bernalillo, NM 87004, or via E-Mail to: RAragon@da.state.nm.us. Deadline for submission of resumes: Open until positions are filled.

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