BAR BULLETIN
Official Publication of the State Bar of New Mexico
March 22, 2017 • Volume 56, No. 12

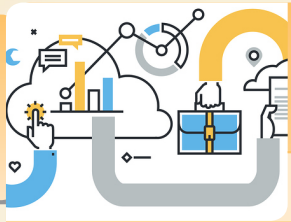
Greens of Summer, by Janice St. Marie (see page 3)

Purple Sage Gallery, Albuquerque
Johnsons of Madrid, Madrid

Inside This Issue

CLE Planner

March 23-24



Improving Client Relations in your Practice: Using Microsoft Word, Excel and PDF Files Efficiently with Barron Henley

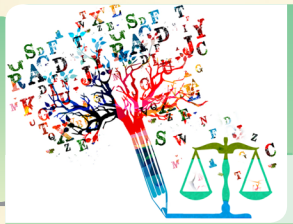
12.3 G

Thursday, March 23, 2017 • 9 a.m.–5 p.m. and Friday, March 24, 2017 • 9 a.m.–4:20 p.m.
State Bar Center, Albuquerque

Already up-to-date on Microsoft Word? Attend on Friday only!

This hands-on, two-day course will teach you all you need to know about Microsoft Word, Excel and PDF files in the context of a legal practice. Bring your laptop to gain practical knowledge while learning to utilize basic and advanced techniques in your existing legal documents. Attend this program and learn to conquer Word formatting and styles, as well as mastering techniques in Excel and PDF's to save time, create better legal documents and streamline your legal process. **You must bring your laptop with you. For the best hands-on learning experience, in person attendance is encouraged.**

April 11



Add a Little Fiction to Your Legal Writing with Steve Berry

2.0 G

Tuesday, April 11, 2017 • 3-5 p.m. (Meet and Greet and Book Signing: 2–3 p.m.)
State Bar Center, Albuquerque

Add a little fiction into your legal writing—Sounds like a contradiction? Not necessarily. Before Steve Berry was a *New York Times* and #1 international bestselling author, he was a trial lawyer. 30 years of active practice taught him about legal writing—what works and what doesn't— and 15 bestselling novels taught Berry how to engage a reader. Legal writing is designed to persuade and novelists entertain. But these two goals are not mutually exclusive. In a compelling program Berry brings both skills together in a CLE-eligible hour designed to help lawyers not only grab their reader's attention, but make their point. The program includes:

- 11 rules of legal writing (bet you didn't know there were that many!)
- Practical advice on how to apply those rules for clear, concise and compelling arguments.
- A review of some definite dos and dont's.

April 28

Third Annual Symposium on Diversity and Inclusion Diversity Issues Ripped from the Headlines

5.0 G 1.0 EP

Friday, April 28, 2017 • 8:55 a.m.–4:45 p.m.
State Bar Center, Albuquerque

Co-sponsors: *Committee on Diversity in the Legal Profession, Young Lawyers Division, Indian Law Section, New Mexico Black Lawyers Association, New Mexico Hispanic Bar Association, New Mexico Gay & Lesbian Lawyers Association, Federal Bar Association*

This program will discuss a multitude of legal issues related to today's headlines including national security and immigration, transgender issues, the future of DACA, and mass incarceration in the U.S. The program will also discuss ethical and constitutional issues related to access to interpreters for Native Americans and the real world impact of all these issues to the legal profession.

Register online at **www.nmbar.org** or call 505-797-6020.

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

STATE BAR of NEW MEXICO

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email: address@nmbar.org • www.nmbar.org

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March

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Noon, Lewis Roca Rothgerber Christie, Albuquerque

31
Immigration Law Section Board,
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2
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4
Bankruptcy Law Section Board
Noon, U.S. Bankruptcy Court

4
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Workshops and Legal Clinics

March

22
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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

April

5
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

5
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

7
Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

14
Metropolitan Court Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

About Cover Image and Artist: *Greens of Summer*, pastel, 9 by 12, Janice St. Marie
Janice St. Marie paints and draws tradtional, representational landscapes in addition to her carrer in graphic design, based in Santa Fe. The drama of sky and earth and light and shadow entrances St. Marie. Living in New Mexico has provided her with an abundance of beautiful destinations for landscape painting. Returning to the same location allows her to explore the many variations of form and rhythms that the scene has to offer. She combines her love of travel with her love of art and has been fortunate to paint in Spain, Italy, Ireland, Sri Lanka and many other places. She paints en plein air as well as in the studio, with pen and ink, watercolor, pencil and acrylic but has always loved pastels which are her primary medium. For more of her work visit www.janicestmarie.com.

Notices

Court News

New Mexico Supreme Court

Proposed Amendments to Rules of Practice and Procedure

In accordance with the Supreme Court's annual rulemaking process under Rule 23 106.1 NMRA, which includes an annual publication of proposed rule amendments for public comment every spring, the following Supreme Court Committees are proposing to recommend for the Supreme Court's consideration proposed amendments to the rules of practice and procedure summarized below. If you would like to view and comment on the proposed amendments summarized in the March 8 issue of the *Bar Bulletin* (Vol. 56, No. 10) before they are submitted to the Court for final consideration, you may do so by submitting your comment electronically through the Supreme Court's website at supremecourt.nmcourts.gov/open-for-comment.aspx, by email to nmsupremecourtclerk@nmcourts.gov, by fax to 505-827-4837, or by mail to Joey D. Moya, Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, New Mexico 87504-0848. Comments must be received by the Clerk on or before April 5 to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

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.

Employment/Labor Law
Thomas L. Stahl

Secured Odyssey Public Access

New Registration Required for SOPA System

The Supreme Court has approved the New Mexico Judiciary Case Access Policy for Online Court Records to expand online access to court records for attorneys and their staff, governmental justice partners, and the press through the Secured Odyssey Public Access webiste. To register as an attorney, visit www.nmcourts.gov/public-access-help.aspx and choose Public Access to Court Records > Tier 1 SOPA Applications > Attorney Application.

Sixth Judicial District Court

Announcement of Vacancy

A vacancy on the Sixth Judicial District Court will exist as of March 27 due to the resignation of Hon. H.R. Quintero effective March 24. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Alfred Mathewson, chair of the Sixth Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., April 13. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Sixth Judicial District Court Judicial Nominating Commission will meet beginning at 9 a.m. on April 27 to interview applicants for the position in Silver City. The Commission meeting is open to the public and anyone who has comments will be heard.

Retirement for Judge Quintero, Janet Ford and Tony Carreon

The Sixth Judicial District Court invites members of the legal community to the retirement reception in honor of Judge H.R. Quintero, Janet Ford and Tony Carreon. The Reception will be 2-4 p.m., March 24, at the Sixth Judicial District Court, 201 N Cooper St, Silver City.

Bernalillo County Metropolitan Court

Investiture Ceremony of Judge Christine E. Rodriguez

The judges and employees of the Bernalillo County Metropolitan Court invite members of the legal community and the public to attend the investiture of the Hon. Christine E. Rodriguez, Division II. The ceremony will be held at 5:15 p.m., April 6 , in the Bernalillo County Metropolitan Court Rotunda. Following the investiture, the reception will be held at the Slate Street Café, 515 Slate Avenue NW. Judges who wish to participate in the ceremony, should bring their robes and report to the 1st Floor Viewing Room by 5 p.m.

Professionalism Tip

With respect to my clients:

I will charge only a reasonable attorney's fee for services rendered.

State Bar News

Attorney Support Groups

- April 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- April 10, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- April 17, 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.

Animal Law Section

Animal Talk: City of ABQ Trap, Neuter and Return Program

Join the Animal Law Section for a lively discussion of the legal issues arising out of the City of Albuquerque's Trap, Neuter and Return Program. The Animal Talk will be from noon-1 p.m., March 31, at the State Bar Center. The speakers for this event represented the parties in *Britton v. Bruin*, et al., decided by the New Mexico Court of Appeals on Feb. 22, 2016. Professor Marsha Baum of the UNM School of Law will moderate the discussion between A. Blair Dunn and Nicholas H. Bullock, the attorneys who represented the parties in *Britton v. Bruin*. Dunn, of Western Agriculture Resource and Business Advocates LLP, represented Petitioner-Appellant Marci Britton. Bullock, assistant city attorney for the City of Albuquerque, represented

2017–2018 Bench & Bar Directory

Update Your Contact Information by March 24

To verify your current information: www.nmbar.org/FindAnAttorney

To submit changes (must be made in writing):
Online: Visit www.nmbar.org > for Members > Change of Address
Mail: Address Changes, PO Box 92860, Albuquerque, NM 87199-2860
Fax: 505-828-3765
Email: address@nmbar.org

Publication is not guaranteed for information submitted after March 24.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline
Attorneys/Law Students
505-228-1948 • 800-860-4914
Judges 888-502-1289
www.nmbar.org/JLAP

Respondent-Appellee City of Albuquerque. Contact Breanna Henley at bhenley@nmbar.org to indicate your attendance.

Invitation to Participate in Survey: Law Practice in New Mexico

The Board of Bar Commissioners of the State Bar of New Mexico has contracted with Research & Polling to conduct an Economics of Law Practice in New Mexico Survey. By now, attorney members should have received an email from Research & Polling (emails went out the week of March 6) with a link and password to the survey. The results from the survey will provide members of the State Bar with a detailed analysis of information on the types of law practices and compensation, in addition to perceived barriers to practicing law, in New Mexico. It will gauge whether various legal services are charged to clients, including legal research, duplicating, support staff/paralegal time, travel, etc. The survey will also assist members to better understand the economics of law practice, activities, services, time keeping and billing methods in New Mexico. We encourage you to complete the survey; everyone who completes the survey will have an opportunity to be entered into a drawing for a $200 or $100 gift card. Please be assured that no one with the State Bar will have access to any individual results, so you will remain anonymous and your individual results will remain confidential. The survey instrument is completely confidential; however, participation is crucial to ensure the thoroughness and accuracy of the study. Upon completion of the survey, we will publish the summary results on the State Bar website so that the entire membership will have access.

Jackrabbit Bar Conference
Registration Now Open

The Jackrabbit Bar is an association of state bars of the Northwestern Plains and mountains including Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah and Wyoming. This year's conference is hosted by the State Bar of New Mexico June 1–3 at the Inn and Spa at Loretto in Santa Fe. The conference is open to anyone. Call 866-582-1646 to reserve a room at the Inn at Loretto. Rooms under the group rate are $189 (cutoff date: May 2). To register and view a tentative agenda, visit www.nmbar.org/nmstatebar/JBC.aspx. For more information about the conference, contact Kris Becker at 505-797-6083 or kbecker@nmbar.org.

Solo and Small Firm Section
March Presentation Features Former DA Kari Brandenburg

The next Solo and Small Firm Section luncheon presentation on unique law-related subjects will be from noon-1 p.m., March 22, at the State Bar Center. Kari Brandenburg, who recently completed four terms as Second Judicial District Attorney, will share impressions, experiences and prospects for criminal justice reforms. A vigorous question and discussion period is expected. All are welcome and lunch will be provided. Regular attendees are reminded that this month's meeting is specially scheduled for a Wednesday. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

Young Lawyers Division
ABA YLD Mountain West Regional Summit Registration Open

Join neighboring young lawyer entities from Colorado, Texas, Utah and Wyoming for educational programming and fun during the ABA YLD Mountain West Regional Summit on March 30-April 2 at Hotel Albuquerque in Old Town. Programming includes trial skills for young lawyers, an ethical examination of recently-enacted marijuana recreational use statutes and the inevitable conflict with Federal law and ethical rules governing the practice of law, the perceived and actual challenges regarding the UBE an implementation of reciprocity, diversity and inclusion in the legal profession and in bar leadership, and more! Earn up to 9.5 G and 3.5 EP for only $80. Law students may attend for free. The regional summit will also include a welcome reception on Thursday evening, optional excursion activities and a closing dinner on Saturday. To register, visit www.nmbar.org/regionalsummit.

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.

Abbreviated Hours for Spring Break

March 12–19	
Monday–Friday	9 a.m.–6 p.m.

Women's Law Caucus
Justice Mary Walters Award

Each year the Women's Law Caucus at the UNM School of Law chooses two outstanding women in the New Mexico legal community to honor in the name of former

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Opinions

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

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

Effective March 10, 2017

Unpublished Opinions

No. 35195	12th Jud Dist Otero CR-13-605, STATE v D BELKNAP (reverse and remand)	3/6/2017
No. 35313	9th Jud Dist Roosevelt CV-12-51, S SNYDER v F VALENZUELA (dismiss)	3/6/2017
No. 35662	12th Jud Dist Lincoln CR-14-175, STATE v S ADEOGBA (affirm)	3/6/2017
No. 33592	9th Jud Dist Curry CR-11-718, STATE v A BRIGHAM (affirm in part, reverse in part and remand)	3/7/2017
No. 35778	1st Jud Dist Santa Fe LR-16-4, STATE v J EDWARDS (affirm)	3/7/2017
No. 35127	6th Jud Dist Hidalgo CR-11-20, STATE v J OWENS (affirm in part, reverse in part)	3/7/2017
No. 35283	2nd Jud Dist Bernalillo CR-11-5196, STATE v S DYE (affirm)	3/7/2017
No. 35809	2nd Jud Dist Bernalillo LR-15-28, STATE v I NORMAN (affirm)	3/7/2017
No. 35183	1st Jud Dist Santa Fe LR-15-2, STATE v R CHAVEZ (affirm)	3/8/2017
No. 35428	2nd Jud Dist Bernalillo DM-13-3646, R ANDRADE v M ANDRADE (affirm)	3/8/2017
No. 35480	2nd Jud Dist Bernalillo CR-11-568, STATE v S JOHNSON (affirm)	3/9/2017

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

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Justice Mary Walters, the first woman appointed to the New Mexico Supreme Court. In 2017 the WLC will honor Chief Judge Nan Nash of the Second Judicial District and First Assistant Federal Public Defender Margaret Katze at the Awards Dinner on March 22 at the Student Union Building on UNM's main campus. Individual tickets for the dinner can be purchased for $50. Tables can be purchased for $400 and seat approximately 10 people. Visit http://goto.unm.edu/walters to purchase tickets and receive additional information. For more information, email WLC President Lindsey Goodwin goodwili@law.unm.edu.

Other Bars

Albuquerque Lawyers Club

April Luncheon Topic: Reporting on Guardianships/Conservatorships

The Albuquerque Lawyers Club invites members of the legal community to its next lunch meeting featuring a panel discussion entitled "The Truth Underlying the Reporting on Guardianships/Conservatorships in New Mexico" led by Greg MacKenzie and including Judge Alan Malott, Ellen Leitzer and Mary Galvez. The meeting will be held at noon on April 5 at Seasons Rotisserie and Grill. For more information, contact Yasmin Dennig at ydennig@Sandia.gov or 505-844-3558.

New Mexico Criminal Defense

Trial Skills College

The New Mexico Criminal Defense Lawyers Association's highly popular Trial Skills College is back March 30–April 1 with a new case file and an incredible faculty lineup. Hear lectures and demonstrations by some of the best trial attorneys in the state, then move into small groups for focused practice and feedback. Only 35 seats available at this two-day intensive workshop, with some seats available to civil attorneys as well. Visit www.nmcdla.org to register, or call 505-992-0050 for more information.

Other News

New Mexico Workers' Compensation Administration

New Judge Reassignment

Effective April 10, all pending and administratively closed cases before the New Mexico Workers' Compensation Administration previously assigned to Judge Terry Kramer will be reassigned to newly appointed Judge Rachel Bayless. Parties who have not yet exercised their right to challenge or excuse will have 10 days from April 10, to challenge or excuse Judge Bayless pursuant to N.M.A.C. Rule 11.4.4.13. Questions about case assignments should be directed to WCA Clerk of the Court Heather Jordan at 505-841-6028.

STATE BAR of NEW MEXICO

2017 Annual Meeting– Bench & Bar Conference

Call for Nominations

State Bar of New Mexico 2017 Annual Awards

Nominations are being accepted for the 2017 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2016 or 2017. The awards will be presented July 28 during the 2017 Annual Meeting—Bench and Bar Conference at the Inn of the Mountains Gods in Mescalero. All awards are limited to one recipient per year, whether living or deceased. *Previous recipients for the past five years are listed below.*

Distinguished Bar Service Award-Lawyer

Recognizes attorneys who have provided valuable service and contributions to the legal profession and the State Bar of New Mexico over a significant period of time.

Previous recipients: Hannah B. Best, Jeffrey H. Albright, Carol Skiba, Ian Bezpalko, John D. Robb Jr.

Distinguished Bar Service Award–Nonlawyer

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: Tina L. Kelbe, Kim Posich, Rear Admiral Jon Michael Barr (ret.), Hon. Buddy J. Hall, Sandra Bauman

Justice Pamela B. Minzner* Professionalism Award

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: Arturo L. Jaramillo, S. Thomas Overstreet, Catherine T. Goldberg, Cas F. Tabor, Henry A. Kelly

*Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

Outstanding Legal Organization or Program Award

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Self Help Center at the Third Judicial District Court, Pegasus Legal Services for Children, Corinne Wolfe Children's Law Center, Divorce Options Workshop, United South Broadway Corp. Fair Lending Center

Outstanding Young Lawyer of the Year Award

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: Denise M. Chanez, Tania S. Silva, Marshall J. Ray, Greg L. Gambill, Robert L. Lucero Jr.

Robert H. LaFollette* Pro Bono Award

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

Previous recipients: Billy K. Burgett, Robert M. Bristol, Erin A. Olson, Jared G. Kallunki, Alan Wainwright

*Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

Seth D. Montgomery* Distinguished Judicial Service Award

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and bar; generally given to judges who have or soon will be retiring.

Previous recipients: Justice Richard C. Bosson (ret.), Hon. Cynthia A. Fry, Hon. Rozier E. Sanchez, Hon. Bruce D. Black, Justice Patricio M. Serna (ret.)

*Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

A letter of nomination for each nominee should be sent to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email jconte@nmbar.org. **Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.**

Deadline for Nominations: May 12

Legal Education

March

23 **Drafting Demand Letters**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23–24 **Improving Client Relations in Your Practice: Using Microsoft Word, Excel and PDF Files**
12.3 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Microsoft Excel for Lawyers and Legal Staff**
2.8 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **What a Lawyer Needs to Know About PDF Files**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Wildlife/Endangered Species on Public and Private Lands (2016)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Keynote Address with Justice Ruth Bader Ginsburg (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **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

29 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

29 **Fear Factor: How Good Lawyers Get Into Ethical Trouble (2016)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **BDITs: Beneficiary Defective Inheritor's Trusts—Reducing Taxes, Retaining Control**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Family Law Investigative and Legal Research on a Budget**
2.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **2016 Trial Know-How! (The Reboot)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Trial Skills College**
14.7 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

30 **The U.S. District Court: Appealing Disability Denials (2015)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **SALT: How State and Local Tax Impacts Major Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Ethics for Government Attorneys**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **ABA YLD Mountain West States Regional Summit**
9.5 G, 3.5 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **The Trial Variety: Juries, Experts and Litigation (2015)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **Ethically Managing Your Law Practice (2016 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **Living with Turmoil in the Oil Patch (2016)**
5.8 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

April

4 **Retail Leases: Drafting Tips and Negotiating Traps**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **All About Basis Planning for Trust and Estate Planners**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Basics of Adoption Law**
1.0 G
Live Seminar, Albuquerque
Volunteer Attorney Program
505-814-5038

11 **Add a Little Fiction to Your Legal Writing**
2.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **H-1B Cap Subject Visa 2017: Exploring Key Issues, Trends and Alternatives**
2.0 G
Live Webcast
The Knowledge Group LLC
theknowledgegroup.org/event-homepage/?event_id=2154

19 **Estate Planning and Elder Law**
5.6 G, 1.0 EP
Live Seminar, Albuquerque
Sterling Education Services, Inc.
www.sterlingeducation.com

19 **Examining the Excessive Cost of Lawyer Stress**
2.0 EP
Live Seminar, Albuquerque
TRT CLE
www.trtcle.com

21 **Ethics of Representing the Elderly**
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26 **Landlord Tenant Law**
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Live Seminar, Albuquerque
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28 **Diversity Issues Ripped From the Headlines**
5.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
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May

5 **32nd Annual Bankruptcy Year in Review (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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5 **Deposition Practice in Federal Cases (2016)**
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5 **2016 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
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5 **Lawyer Ethics and Client Development**
1.0 EP
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9 **Undue Influence and Duress in Estate Planning**
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12 **Ethics of Co-Counsel and Referral Relationships**
1.0 EP
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18 **Annual Estate Planning Update**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
Wilcox Law Firm
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19 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
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19 **NM DWI Cases: From the Initial Stop to Sentencing; Evaluating Your Case (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
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19 **Human Trafficking (2016)**
3.0 G
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19 **Ethics in Discovery Practice**
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23 **Drafting Gun Wills and Trusts—and Preventing Executor Liability**
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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 March 22, 2017

Pending Proposed Rule Changes Open for Comment:

See the special summary of proposed rule amendments published in the March 8, 2017, issue of the Bar Bulletin. *The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is April 5, 2017.*

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-123	Public inspection and sealing of court records	03/31/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Procedure for the Municipal Courts		
8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
Criminal Forms		
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Children's Court Rules and Forms		
10-166	Public inspection and sealing of court records	03/31/2017
Rules of Appellate Procedure		
12-314	Public inspection and sealing of court records	03/31/2017

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

In the Supreme Court of the State of New Mexico

March 10, 2017

No. 17-8500-003

In the Matter of Revisions to Local Bail Schedules and Other Measures to Preclude Release of Defendants While a Detention Motion is Pending or a Detention Order is in Effect Pursuant to Article II, Section 13 of the New Mexico Constitution

Order

WHEREAS, Article II, Section 13, of the New Mexico Constitution was amended by New Mexico voters in November 2016 to authorize a court of record to deny pretrial release of a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community;

WHEREAS, guidance to all courts authorized to determine release conditions, and to designees of courts authorized to release defendants on standardized bail schedules, is necessary in order to preclude inadvertent release of defendants while a detention proceeding is pending or while a detention order is in effect; and WHEREAS, the Court recognizes this issue demands immediate action pending review and amendment of relevant release and detention rules, and the Court being sufficiently advised, Chief Justice Charles W. Daniels, Justice Petra Jimenez Maes, Justice Edward L. Chavez, Justice Barbara J. Vigil, and Justice Judith K. Nakamura concurring;

NOW, THEREFORE, IT IS ORDERED that upon receipt of notice of the filing of a motion for pretrial detention of a defendant, all authority of a court, detention center, law enforcement agency, or other designee authorized to permit pretrial release is suspended until receipt of an order of a district or appellate court denying or terminating pretrial detention or a dismissal of the charges on which the defendant is incarcerated;

IT IS FURTHER ORDERED that all district, magistrate, or metropolitan courts with standardized bail schedules currently in effect shall immediately notify all detention centers, law enforcement agencies, and other designees authorized to release defendants pursuant to Rules 5-401(L), 6-401(J), and 7-401(J) NMRA, or any other authority, that this order shall constitute a restriction on any authority to release a defendant; and

IT IS FURTHER ORDERED that this order is effective immediately.

IT IS SO ORDERED.
WITNESS, Honorable Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 10th day of March, 2017.

Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-002

No. S-1-SC-35035 (filed September 26, 2016)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
JENNIFER STEPHENSON,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
MICHAEL E. VIGIL, District Judge

HECTOR H. BALDERAS
Attorney General
JOEL JACOBSEN
Assistant Attorney General
MARIS VEIDEMANIS
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

BENNETT J. BAUR
Chief Public Defender
B. DOUGLAS WOOD, III
Assistant Appellate Defender
Santa Fe, New Mexico
for Respondent

Opinion

Edward L. Chávez, Justice

{1} Defendant Jennifer Stephenson placed her two-year-old son Isaiah in his room at bedtime and locked the door for the night. Isaiah's father heard Isaiah whimpering the next morning and found him with his legs pinned between a dresser and a crossbar on Isaiah's bed. Isaiah developed a painful condition described as compartment syndrome, which required an aggressive surgery to correct. A jury convicted Defendant of one count of abandonment of a child resulting in great bodily harm, a second-degree felony, contrary to NMSA 1978, Section 30-6-1(B) (2009), after being unable to find that Defendant committed child abuse by failing to act for Isaiah's welfare and safety, contrary to Section 30-6-1(D). The Court of Appeals reversed Defendant's conviction, holding that her conduct did not fall within the meaning of "leaving or abandoning" because she did not leave Isaiah with the intent not to return. *State v. Stephenson*, 2015-NMCA-038, ¶¶ 23, 25, 346 P.3d 409. We granted the State's petition for writ of certiorari to determine whether the Court of Appeals' definition of "leaving or abandoning" was correct and whether the evidence was sufficient as a matter of law to support the conviction. 2015-NMCERT-001.

{2} We conclude that the Legislature intended the crime of abandonment of a child under Section 30-6-1(B) to include the situations (1) where a parent intentionally leaves a child with the intent not to return, whereby the child may or does suffer neglect, which would constitute "abandoning"; and (2) where a parent or other caregiver intentionally departs from a child, leaving the child under circumstances whereby the child may or does suffer neglect, which would constitute "leaving." Thus, we interpret Section 30-6-1(B) differently than the Court of Appeals. The dissent offers a third interpretation of Section 30-6-1(B)—as causing a child to remain in some specified condition—which we interpret to be consistent only with the crime of permitting child abuse by failing to act for the child's safety, a crime that the jury rejected. Perhaps the most important lesson from this case is that the Legislature must clarify its intent with respect to the crime of child abandonment. Nevertheless, we agree with the Court of Appeals that Defendant could not be found guilty of abandoning Isaiah because there is no evidence that Defendant intentionally left Isaiah with the intent not to return. We also conclude that there was not sufficient evidence to support the finding that Defendant intentionally departed from Isaiah, leaving him under circumstances where Isaiah might have or did suffer neglect—where his well-being was at risk of harm. We therefore reverse Defendant's conviction and remand for an entry of a judgment of acquittal.

BACKGROUND

{3} Anthony Apodaca, Isaiah's father, worked the late night shift until 1:30 a.m. the morning of January 28, 2010. Anthony arrived at Defendant's apartment at approximately 2:00 a.m., and because the door was locked, he knocked to awaken Defendant to let him into the apartment. Anthony was hungry, so he asked Defendant to go to McDonald's to get him some food. Meanwhile Anthony went into his daughter Neveah's room and found her awake on the floor outside her crib, so he picked her up to feed her a bottle of milk. He did not check on Isaiah, his son, because he assumed that Isaiah was asleep and Anthony did not want to disturb him. Isaiah had been locked in his room for the night.

{4} After Defendant returned with food from McDonald's, Anthony shared his food with Neveah before putting her back to sleep in her crib. Anthony asked Defendant to check on Isaiah. Defendant told Anthony that Isaiah was fine, but it is not clear whether she actually checked on him, although in her statement to the police, Defendant said that Isaiah was asleep when she checked on him at 2:30 a.m. Anthony did not check on Isaiah that night. Both parents went to sleep and did not leave the apartment after Defendant returned from McDonald's. There is no evidence that the parents heard Isaiah crying or screaming when they went to bed or in the middle of the night. Anthony testified that he woke up in the middle of the night and did not hear Isaiah crying or screaming.

{5} Anthony woke up the next morning around 7:00 a.m. and heard Isaiah whimpering, so he unlocked Isaiah's bedroom door and saw Isaiah pinned between a dresser and a crossbar from his toddler bed. Anthony could tell that Isaiah's legs were swollen and reddish purple and that he was in pain. Defendant took Isaiah to the hospital after picking up her father, Calvin Stephenson, on the way to the hospital. Calvin testified that Isaiah whimpered but did not cry on the way to the hospital.

{6} Dr. Meher Best was the first doctor to see Isaiah at the hospital and he could immediately tell that Isaiah was in pain. Isaiah's lower extremities were unusually hard with strange marks and lesions that later proved to be pressure lesions from being pinned for a prolonged time. Isaiah did not have bruises or broken bones which Dr. Best would have expected to see if a toddler suffered a crush injury from a dresser. By the time Isaiah was in the emergency room, he was "inconsolable."

{7} Isaiah was diagnosed with compartment syndrome of both legs as a result of being pinned between the dresser and the crossbar on his toddler bed. There is no evidence as to how the dresser actually fell on Isaiah, although Anthony testified that Isaiah liked to climb on furniture.

{8} Compartment syndrome usually results from a crush injury that can be limb- or even life-threatening. Several medical doctors testified that compartment syndrome takes hours to develop. The orthopedic surgeon who treated Isaiah testified that he thought Isaiah would have had to have been trapped for at least "eight to twelve hours and, more likely, twenty-four hours." The pediatric intensive care doctor testified that she thought Isaiah would have been trapped for "a minimum of six to twelve hours." The doctors agreed that it was extremely rare to see compartment syndrome in a child.

{9} Isaiah underwent a fasciotomy, which is a surgery performed by slicing open the legs, removing the dead muscle tissue, and leaving the swollen muscles exposed outside of the skin until the muscles recede back into their respective compartments. Once the muscles recede, skin grafts are required to replace the skin that was removed during the fasciotomy. Isaiah needed a walker to help him walk for some time and his lower legs will be disfigured for the rest of his life.

{10} Dr. Best reported Defendant to the authorities for potential child abuse because although Defendant was polite, Dr. Best thought Defendant's reaction to her child being in such serious condition was too casual. Defendant was indicted for negligently causing, or in the alternative, negligently permitting Isaiah to be placed in a situation which endangered his life or health, when Defendant knew or should have known of the danger involved and acted with reckless disregard for Isaiah's safety, in violation of Section 30-6-1(D).

{11} At trial the State abandoned the count for negligently *causing* child abuse and pursued the count for negligently *permitting* child abuse. The district court instructed the jury that if it had a reasonable doubt as to whether Defendant committed the crime of negligently permitting child abuse resulting in great bodily harm, then the jury should consider the crime of abandonment resulting in great bodily harm. The jury returned a verdict finding Defendant guilty of abandonment.

DISCUSSION

{12} The question we must address is whether the evidence was sufficient to convict Defendant of abandonment resulting in great bodily harm. The answer to this question depends on the scope intended by the Legislature for the crime of abandonment. *State v. Rowell*, 1995-NMSC-079, ¶ 8, 121 N.M. 111, 908 P.2d 1379 ("The main goal of statutory construction is to give effect to the intent of the legislature."). "Questions of statutory interpretation are reviewed de novo . . . ." *State v. Tafoya*, 2012-NMSC-030, ¶ 11, 285 P.3d 604. A criminal statute must be strictly construed and "may not be applied beyond its intended scope [for] it is a fundamental rule of constitutional law that crimes must be defined with appropriate definiteness." *State v. Chavez*, 2009-NMSC-035, ¶ 10, 146 N.M. 434, 211 P.3d 891 (internal quotation marks and citation omitted). Therefore, we will not read a criminal statute to apply to particular conduct "unless the legislative proscription is plain." *State v. Bybee*, 1989-NMCA-071, ¶ 12, 109 N.M. 44, 781 P.2d 316 (citing *United States v. Scharton*, 285 U.S. 518 (1932)). "We are generally unwilling to construe one provision of a statute in a manner that would make other provisions null or superfluous." *State v. Rivera*, 2004-NMSC-001, ¶ 18, 134 N.M. 768, 82 P.3d 939.

{13} Section 30-6-1(B) defines "abandonment" as a "parent, guardian or custodian of a child intentionally leaving or abandoning the child under circumstances whereby the child may or does suffer neglect." Neglect means that a child is without proper parental care and control necessary for the child's well-being, including the child's health, education, or subsistence. Section 30-6-1(A)(2). The statute does not define "leaving or abandoning." *See* § 30-6-1. Thus, to determine whether Defendant's conviction was supported by sufficient evidence, we must first examine the scope of Section 30-6-1(B), and in particular, must for the first time ascertain the definitions of "leaving" and "abandoning" as they are used in Section 30-6-1(B).

{14} The Court of Appeals referred to *Black's Law Dictionary* for the definitions of "leave" and "abandonment" because what constitutes leaving or abandoning under Section 30-6-1 is a matter of first impression in New Mexico. *Stephenson*, 2015-NMCA-038, ¶ 15. *Black's Law Dictionary* (9th ed. 2009) defines "leave" as "[t]o depart; voluntarily go away" or "[t]o depart willfully with *the intent not to return*," *id.* at 973 (emphasis added), and "abandonment" as "[t]he relinquishing of a right or interest with *the intention of never reclaiming it*," or "[t]he act of leaving a spouse or child willfully and *without an intent to return*," *id.* at 2 (emphasis added). *See Stephenson*, 2015-NMCA-038, ¶ 15. The Court of Appeals also compared the dictionary definitions of "abandonment" with definitions provided by legal encyclopedias and concluded that all definitions of "abandonment" require deserting the child with the intent to never return. *See Stephenson*, 2015-NMCA-038, ¶ 16. The Court of Appeals did not discuss the definition of "leaving" at length, nor did it address the disjunctive nature of "leaving or abandoning" in Section 30-6-1(B). *See Stephenson*, 2015-NMCA-038, ¶¶ 15-16. We conclude that a principled distinction exists between "leaving" and "abandoning," and therefore, to avoid rendering either word superfluous, each word must be construed consistent with the Legislature's intent, which was to create independent theories of criminal culpability for both "leaving" and "abandoning."

The Legislature intended "leaving" in Section 30-6-1(B) to create an independent theory of criminal culpability distinct from "abandoning"

{15} We must interpret criminal statutes consistent with the purpose of the legislation and the evils sought to be addressed by giving legislative language a reasonable and common-sense construction. *State v. Morales*, 2010-NMSC-026, ¶ 13, 148 N.M. 305, 236 P.3d 24. The purpose of Section 30-6-1 is to protect children from harm. *See State v. Lujan*, 1985-NMCA-111, ¶ 16, 103 N.M. 667, 712 P.2d 13.

{16} To ascertain the common-sense meaning of the terms "leave" and "abandon" in Section 30-6-1, we turn to the dictionary for guidance. *See State v. Segotta*, 1983-NMSC-092, ¶ 8, 100 N.M. 498, 672 P.2d 1129 ("We, as other courts, often make reference to dictionaries and to the case law to determine the probable legislative intent in using a particular word." (internal quotation marks and citation omitted)).

The definitions of "leave" that are consistent with the intent of the legislation are "to take leave of or withdraw oneself from *whether temporarily or permanently*: go away or depart from" and "to cause to be or remain in some specified condition." *Webster's Third New International Dictionary of the English Language Unabridged* 1287 (1971) (emphasis added). The definition of "abandon" that is consistent with the intent of the legislation is "to forsake or desert [especially] in spite of an allegiance, duty, or responsibility: withdraw one's protection, support, or help from." *Webster's Third New International Dictionary of the English Language Unabridged* 2 (1971). A juror relying on the ordinary meaning of the word "abandon" could reasonably conclude that for a parent to abandon a child, he or she must have left the child with the intent of never returning. The State argues that adding an intent never to return even to the word "abandon" does not make sense because the statute also applies to someone who is temporarily responsible for the care and protection of the child. We agree that if the purpose of the statute is the protection of children, *Lujan*, 1985-NMCA-111, ¶ 16, it should not matter whether the defendant was permanently or temporarily responsible for the custody and control of the child. However, the Legislature addressed this concern by eliminating any ambiguity with respect to the purpose of its legislation and the evil it sought to address—exposing the well-being of a child to harm—by making it a crime for a person who has custody and control of the child to either temporarily or permanently leave the child without the control and protection necessary to prevent harm to the child. Section 30-6-1(B) criminalizes either intentionally "*leaving*"—even temporarily—or intentionally "*abandoning*" a child, but only under circumstances where doing so exposes the child to a risk of harm, whether to the child's health, education, or subsistence. *See id.* (emphasis added). We hold that a parent, guardian, or custodian who simply departs from the child does not violate the statute unless at the time the parent, guardian, or custodian departs from the child, the circumstances are such that the child's well-being is at risk of harm.

The evidence was not sufficient to find Defendant guilty of leaving or abandoning her child

{17} The Court of Appeals concluded that the evidence did not support the guilty verdict of abandonment because although Defendant locked Isaiah in his bedroom, she remained in the apartment, and therefore the State did not prove that Defendant left Isaiah without an intent to return. *Stephenson*, 2015-NMCA-038, ¶ 23. We have already held that the State does not have to prove that Defendant left Isaiah with the intent not to return. The question is whether there was sufficient evidence for a reasonable juror to find that Defendant intentionally left Isaiah at a time and under circumstances when Isaiah's well-being was at risk of harm. We must view the evidence in the light most favorable to the verdict, indulging all permissible inferences in favor of the verdict and disregarding all evidence and inferences opposed to the verdict. *State v. Treadway*, 2006-NMSC-008, ¶ 7, 139 N.M. 167, 130 P.3d 746. We will not "weigh the evidence or substitute [our] judgment for that of the fact finder as long as there is sufficient evidence to support the verdict." *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789, *abrogated on other grounds by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683.

{18} We preface our discussion of the sufficiency of the evidence by revisiting the relevant procedural history of this case. Defendant was indicted for negligently causing, or in the alternative, negligently permitting Isaiah to be placed in a situation which endangered his life or health, when Defendant knew or should have known of the danger involved and acted with reckless disregard for Isaiah's safety, both in violation of Section 30-6-1(D). Causing and permitting child abuse are two distinct legal concepts. *State v. Leal*, 1986-NMCA-075, ¶ 14, 104 N.M. 506, 723 P.2d 977. " '[P]ermit' refers to the proscribed act, the passive act of allowing the abuse to occur." *Id.* ¶ 19. "[C]*ausing* child abuse is synonymous with inflicting the abuse." *State v. Nichols*, 2016-NMSC-001, ¶ 33, 363 P.3d 1187. When the endangerment is allegedly based on medical neglect, the appropriate theory is *causing* the child's life or health to be endangered by medical neglect. *Id.* ¶ 35.

{19} During trial the State abandoned the count for negligently *causing* child abuse and pursued the count for negligently *permitting* child abuse. The district court also instructed the jury on abandonment. The district court gave this instruction, despite the fact that neither party believed that abandonment is a true lesser-included offense of permitting child abuse. The district court considered the instruction because Defendant argued that pursuant to *State v. Darkis*, she was entitled to a step-down instruction on the lesser offense of abandonment because the evidence and the State's theory fit that crime. *See* 2000-NMCA-085, ¶¶ 14-20, 129 N.M. 547, 10 P.3d 871 (recognizing that *State v. Meadors*, 1995-NMSC-073, ¶ 12, 121 N.M. 38, 908 P.2d 731 provides the test for determining when a court should grant the State's request for an instruction on a lesser-included offense, and concluding that "a defendant's right to a lesser-included offense instruction is effectively greater than the State's"). The district court agreed with Defendant and granted her request to give the jury a step-down instruction from permitting child abuse to child abandonment. Because neither party challenges the district court's ruling that Defendant was entitled to the abandonment instruction, we do not decide that issue here.

{20} The district court instructed the jury that to find Defendant guilty of negligently permitting child abuse resulting in great bodily harm, the State had to prove beyond a reasonable doubt that:

> 1. The Defendant permitted Isaiah Apodaca to be placed in a situation which endangered the life or health of Isaiah Apodaca;
> 2. The Defendant acted with reckless disregard. To find that the Defendant acted with reckless disregard, you must find that the Defendant knew or should have known that her failure to act created a substantial and foreseeable risk, that she disregarded that risk and that she was wholly indifferent to the consequences of her failure to act, and to the welfare and safety of Isaiah Apodaca;
> 3. The Defendant was a parent, guardian or custodian of the child, or the Defendant had accepted responsibility for the child's welfare;
> 4. The Defendant's failure to act resulted in great bodily harm to Isaiah Apodaca;
> 5. Isaiah Apodaca was under the age of 18; and
> 6. This happened in New Mexico on or between the 27th day of January 2010 and the 28th day of January 2010.

{21} The State's ultimate theory of the case was that although the dresser falling on Isaiah was an accident, Defendant's failure to respond to the cries and screams the doctors would have expected from

Isaiah is what permitted Isaiah to be placed in a situation that endangered his life or health. According to the State, Defendant's failure to act was with reckless disregard because she knew or should have known that her failure to act created a substantial and foreseeable risk to Isaiah. We note that this instruction tracked UJI 14-603 NMRA (2010, withdrawn effective April 3, 2015). In *State v. Consaul* we recently called into question the legal accuracy of the uniform jury instructions for crimes under Section 30-6-1, *see* 2014-NMSC-030, ¶ 35, 332 P.3d 850, and the instruction has since been modified by UJI 14-615 NMRA. However, we need not address this concern because the jury did not find Defendant guilty under the State's theory that she negligently permitted child abuse.

{22} The district court instructed the jury that if it had a reasonable doubt as to whether Defendant committed the crime of negligently permitting child abuse resulting in great bodily harm, then the jury should consider the crime of abandonment resulting in great bodily harm. We presume that the jury followed this instruction, *see Britton v. Bouldon*, 1975-NMSC-029, ¶ 6, 87 N.M. 474, 535 P.2d 1325, and because the jury proceeded to find Defendant guilty of abandonment, the jury had a reasonable doubt as to whether Defendant negligently permitted child abuse.[1]

{23} The district court instructed the jury that to find Defendant guilty of abandonment of a child resulting in great bodily harm, the State had to prove beyond a reasonable doubt that:

> 1. Jennifer Stephenson was a parent of Isaiah Apodaca;
> 2. Jennifer Stephenson intentionally *left or abandoned* Isaiah Apodaca;
> 3. As a result of Jennifer Stephenson's *leaving or abandoning* Isaiah Apodaca, Isaiah Apodaca was without proper parental care and control necessary for Isaiah Apodaca's well-being;
> 4. Jennifer Stephenson had the ability to provide proper parental care and control necessary for Isaiah Apodaca's well-being;
> 5. Jennifer Stephenson's failure to provide proper parental car[e] and control necessary for Isaiah Apodaca's well-being resulted in great bodily harm to Isaiah Apodaca;
> 6. Isaiah Apodaca was under the age of 18;
> 7. This happened in New Mexico on or between the 27th and 28th days of January 2010.

(Emphasis added.)

{24} The State contends that the "most reasonable inference from the evidence is that Defendant left the apartment, leaving Isaiah alone, for the first part of the evening and night, including the time period when the dresser fell on Isaiah's legs." The State asserts that Defendant did not testify, and therefore her whereabouts are not accounted for until Anthony arrived at 2:00 a.m. The State further explains that the reasonable inference that Defendant left Isaiah alone in the apartment is supported by the testimony of multiple doctors who would have expected Isaiah to scream, and therefore Isaiah must have screamed, only quieting through exhaustion and despair once he realized that his screams were futile. Because Defendant did not hear screams, the State argues that the reasonable inference is that she was not in the apartment. The State also contends that even if Defendant did not leave the apartment, she still left Isaiah unattended while he was screaming.

{25} Defendant cites *State v. Vigil*, 1975-NMSC-013, ¶ 12, 87 N.M. 345, 533 P.2d 578 for the proposition that mere speculation cannot support a guilty verdict, and contends that it is pure speculation that she left Isaiah alone in the apartment. Defendant also notes that the jury was instructed not to draw any inferences from the fact that she did not testify, and the jury is presumed to follow jury instructions. Defendant emphasizes that Anthony did not hear Isaiah scream, and argues that Isaiah likely did not scream during the night because compartment syndrome takes a considerable amount of time to become painful.

{26} We conclude that there was not sufficient evidence for a reasonable juror to find that at the time Defendant put Isaiah in his bedroom, intentionally departing from him, the circumstances were such that Isaiah's well-being was at risk of harm. The State's contention that the evidence supports a reasonable inference that Defendant left the apartment is not tied to the facts in the case, and is therefore speculative. " '[E]vidence from which a proposition can be derived only by speculation among equally plausible alternatives is not substantial evidence of the proposition.' " *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (quoting *Baca v. Bueno Foods*, 1988-NMCA-112, ¶ 15, 108 N.M. 98, 766 P.2d 1332), *cert. granted*, 2014-NMCERT-008, *cert. quashed*, 2015-NMCERT-001. The evidence before the jury was that Defendant put Isaiah to bed for the night and locked his bedroom door. According to Anthony, he and Defendant exchanged numerous text messages throughout the night, and Defendant eventually invited him to spend the night with her once he got off work. In Defendant's statement to the police, she stated that she did not hear any screaming or crying from Isaiah that night. Anthony also testified that he did not hear any screaming or crying.

{27} Defendant departed from Isaiah the moment she put him in his room. There is no evidence that the dresser that had been in Isaiah's room for months was wobbly or unsteady, or that he had climbed on the dresser in the past. There is no evidence that Isaiah's well-being was in jeopardy if he was left alone in his room to go to sleep. During closing arguments, the State emphasized that Isaiah had to have been screaming and Defendant ignored him. However, this evidence is relevant only to the question of whether Defendant permitted Isaiah to be in a situation that endangered his health or life, which the jury determined she did not. It is not relevant to Defendant placing Isaiah in his room for the night.

{28} Our review of the sufficiency of the evidence takes into account "both the jury's fundamental role as factfinder" and our independent responsibility to ensure that a jury's conviction of a defendant is supported "by evidence in the record, rather than mere guess or conjecture." *State v. Flores*, 2010-NMSC-002, ¶ 2, 147 N.M. 542, 226 P.3d 641. In this case, we conclude that there was not sufficient evidence to support the conviction for child abandonment. Because the crime

[1]If child abandonment is a lesser-included offense of negligently permitting child abuse, an issue we do not decide, the jury's verdict is an implicit acquittal of negligently permitting child abuse. *See State v. Medina*, 1975-NMCA-033, ¶ 8, 87 N.M. 394, 534 P.2d 486 (citing *State v. Goodson*, 1950-NMSC-023, ¶ 9, 54 N.M. 184, 217 P.2d 262 (stating that it is well settled in New Mexico that a conviction of a lesser-included offense is an implicit acquittal of a greater offense)).

of leaving or abandoning a child is at a minimum a misdemeanor, and possibly a felony if the child suffers great bodily harm or death, and we have noted that by creating criminal liability under Section 30-6-1, "the Legislature did not intend to criminalize conduct creating 'a mere possibility, however remote, that harm may result' to a child," *State v. Graham*, 2005-NMSC-004, ¶ 9, 137 N.M. 197, 109 P.3d 285 (citation omitted), we cannot affirm Defendant's conviction. Indeed, to uphold Defendant's conviction could potentially criminalize parents' actions every single time they tuck their children into bed and harm befalls their children at night through some unfortunate accident, which we refuse to do.

CONCLUSION

{29} We affirm the result reached by the Court of Appeals and remand to the district court for entry of a judgment of acquittal.

{30} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
BARBARA J. VIGIL, Justice
JUDITH K. NAKAMURA, Justice, concurring in part and dissenting in part
PETRA JIMENEZ MAES, Justice, joining in special concurrence and dissent

Nakamura, Justice (concurring in part and dissenting in part).

{31} An appellate court's review of whether sufficient evidence supports a jury's verdict is settled: We draw every reasonable inference in favor of the verdict and then evaluate whether the evidence, so viewed, supports the verdict beyond a reasonable doubt. *E.g.*, *State v. Cantrell*, 2008-NMSC-016, ¶ 26, 143 N.M. 606, 179 P.3d 1214. Under this standard of review, a rational jury could have found beyond a reasonable doubt that Stephenson violated NMSA 1978, Section 30-6-1(B) (2009) by intentionally leaving Isaiah under circumstances whereby Isaiah suffered neglect. Accordingly, I respectfully dissent.

{32} The Legislature intended "leaving" and "abandoning" to create independent theories of criminal culpability under Section 30-6-1(B). The majority concludes that, when enacting Section 30-6-1(B), the Legislature intended "leaving" to reflect its ordinary, dictionary definitions—i.e., first, " 'to take leave of or withdraw oneself from whether temporarily or permanently: go away or depart from' " and, second, " 'to cause to be or remain in some specified condition.' " Maj. Op., ¶ 16 (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 1287 (1971) (emphasis omitted)). I agree that the Legislature intended "leaving" to denote these dictionary definitions. I also agree that there was insufficient evidence for the jury to convict under the first definition of "leaving": *At the time* Stephenson put Isaiah to bed and locked the door, there was not sufficient evidence for a reasonable jury to conclude that she left Isaiah under circumstances in which he may have suffered or did in fact suffer neglect.

{33} Yet, I disagree with the majority's ultimate conclusion that there was insufficient evidence to support the jury's finding that Stephenson intentionally left Isaiah under circumstances whereby he suffered neglect. At some point during the night, the dresser fell upon Isaiah and pinned his legs to the crossbar of his toddler bed. Sufficient evidence was presented at trial for a reasonable jury to find that Stephenson both apprehended that Isaiah was injured and intentionally left him in that condition. In other words, Stephenson "caused" Isaiah "to remain in some specified condition"—i.e., pinned underneath the dresser, expressing his pain, for many, many hours. *Leave*, *Webster's Third New International Dictionary of the English Language Unabridged* 1287 (1971)). In light of this second dictionary definition of "leave," the Legislature could not have intended the statute to focus exclusively on the moment a parent or guardian initially departs from a child. The statute is also implicated where a parent or guardian knows that a child is in peril (even if in the next room) and intentionally *leaves* that child in peril.

{34} Under the second dictionary definition of "leaving" that the Legislature intended in Section 30-6-1(B), sufficient evidence supports the jury's verdict. The jury heard testimony regarding the grave and abnormal extent of Isaiah's injuries. As a result of being trapped underneath the dresser, Isaiah suffered compartment syndrome. The jury heard testimony from Dr. Dale Hoekstra, M.D., an orthopedic surgeon with University of New Mexico's Children's Hospital (UNMH) and medical director of Carrie Tingley Hospital in Albuquerque. Dr. Hoekstra testified that compartment syndrome "is a condition that arises as a result of an injury to an extremity, almost invariably between the knee and the ankle, in which the pressures in the leg build up to the point that the blood can no longer supply the muscles in the leg, and they start to die or necrose." Elevated creatine kinase ["CK"] levels in Isaiah's blood indicated that Isaiah suffered from compartment syndrome. Dr. Hoekstra testified that the normal range for CK is between 72 to 367 units, and at 9:57 a.m., shortly after his arrival, Isaiah's CK level was 36,605 units, which indicated extensive trauma that threatened the loss of Isaiah's legs and the failure of Isaiah's kidneys. Because Isaiah urgently needed the care of a pediatric nephrologist, pediatric surgeons, and pediatric intensive care doctors, Isaiah was airlifted from Christus St. Vincent Hospital in Santa Fe to UNMH in Albuquerque. Once Isaiah arrived at UNMH, his CK peaked at 123,000 units. At UNMH, Dr. Hoekstra performed an emergency fasciotomy on both of Isaiah's legs and found extensive damage, including some tissue death, in Isaiah's leg muscles.

{35} The jury was also presented with evidence establishing that, in order for Isaiah to have developed such an extraordinarily high CK level, Isaiah had to have been trapped under the dresser for eight to twelve hours. Dr. Hoekstra opined that the extent of Isaiah's injuries indicated that Isaiah had been pinned under the dresser for "at least twelve hours." Dr. Denise Coleman, M.D., a pediatric critical care physician at UNMH, who observed Isaiah immediately before his surgery, conservatively estimated that Isaiah was pinned under the dresser for "a minimum of six to twelve hours."

{36} The jury also heard testimony from *Stephenson's* expert witness, Dr. Steven Gabaeff, M.D., who is board certified in emergency medicine and operates a clinical forensic medical practice. Even Dr. Gabaeff testified that Isaiah's CK levels were the highest he had ever seen and estimated that Isaiah's "muscles had no oxygen for a very long time to get that condition." Dr. Gabaeff estimated that Isaiah had been pinned under the dresser for four-and-a-half to eight hours, that "[i]t could have been a little longer even," and that "[b]ased on the [CK levels] going so high, [he] tended to really believe that it was on the longer side." Dr. Gabaeff further opined that "if something happen[ed], say, at 10:30 or 11:00 or 11:30, you know, we're talking about eight hours, and that seems to me to be about what I'd expect . . . we already have numbers that, you know, lead us in a direction." Therefore, from the expert testimony presented by the

State and by Stephenson, the jury was permitted to find that Isaiah was underneath the dresser for eight to twelve hours. Consequently, the jury was permitted to infer that the dresser fell on Isaiah between 10:30 p.m. and 11:00 p.m. and remained on top of him until 7:00 a.m. the next morning.

{37} Critically, the jury was presented with additional evidence from which it was permitted to infer the following two findings: First, Isaiah would have expressed audible and sustained indications of pain. Second, Stephenson was both home and awake throughout the night and into the morning, during the time that Isaiah was pinned and expressing pain. Dr. Coleman testified that Isaiah would have been able to scream and that "he would have been in pain for a very long time." Dr. Coleman further testified that the impairment of blood flow in Isaiah's legs would have caused him extreme pain and compared Isaiah's pain to the pain of having an arterial blood clot. Dr. Coleman referenced her training in critical care in Seattle, where she cared for children who had been pinned under fallen trees during the course of lumbering accidents, and testified, "[I]t's painful. Oftentimes, the pain never goes away. . . . I can tell you it hurt until they could get I.V. pain meds."

{38} Apodaca, Isaiah's father, testified that he worked that night from 6:00 p.m. until 1:25 a.m. or 1:30 a.m. and that he received text messages from Stephenson during the "whole time [he] was working" in which Stephenson invited Apodaca to come spend the night with her at her apartment. Apodaca went to Stephenson's apartment after he left work and arrived at approximately 2:00 a.m. She was home. Upon Apodaca's request, Stephenson went to McDonald's to buy some food. Stephenson returned home at approximately 2:45 a.m. Apodaca asked Stephenson to check on Isaiah at about 3:00 a.m. Stephenson and Apodaca then ate, had sex, and went to sleep at approximately 4:00 a.m. or 4:15 a.m.

{39} From this evidence, the jury was permitted to draw reasonable inferences to reach its verdict. The jury was permitted to rely on the medical expert testimony—and on its common sense and experience—to infer from the severity of Isaiah's injuries, coupled with the shock and pain that a falling dresser would cause to a toddler, that Isaiah cried and screamed loudly, for a prolonged duration. The jury was permitted to infer—based on the estimations of Doctors Hoekstra, Coleman, and Gabaeff—that during the entire time from Apodaca's arrival to the time of their going to sleep, Isaiah was pinned underneath a dresser, enduring and expressing his pain. Based on those same estimations, the jury was entirely free to reject Stephenson's affidavit testimony that she checked on Isaiah at 2:00 a.m., and that he was fine. The jury was rather permitted to infer that, given the severity of Isaiah's injuries and the copious medical expert testimony as to the cause of those injuries, at 2:00 a.m. Isaiah was pinned under the dresser. The jury was also permitted to rely on its common sense to infer that the type of crying and screaming that Isaiah expressed as the dresser fell upon him and as his muscle tissue was dying was abnormal—different in both kind and duration from the type of crying that a follower of Dr. Ferber's method of parenting may recognize as normal. And the jury was permitted to find that if Isaiah had expressed his pain, Stephenson would have heard it. Detective Van Etten testified that Stephenson's apartment was small, such that "anybody would be able to hear anybody from one end of the apartment to the other." In sum, the jury was permitted to find that Stephenson intentionally left Isaiah under circumstances whereby he suffered neglect.

{40} The majority worries that a decision which upholds the jury's verdict "could potentially criminalize parents' actions every single time they tuck their children into bed and harm befalls their children at night through some unfortunate accident." Maj. Op., ¶ 28. While I understand this concern, I do not share it. Two bulwarks prevent a decision upholding the jury's verdict from threatening well-meaning parents with criminal liability. First, to establish a violation of Section 30-6-1(B), the State must prove that the child is exposed to *neglect*, which is specifically defined by Section 30-6-1(A)(2), and which clearly excludes criminal liability for accidental injuries that befall children unbeknownst to well-meaning parents. Second, and more fundamentally, it is the hard and jagged facts of cases which prevent legal conclusions from tumbling down the slippery slope. For example, in this case, the jury had much more to consider than just the scenario of a parent putting a child down to sleep for the night, only to wake up in the morning to discover that the child had experienced some injury as a result of an accident unbeknownst to the parent. Here, the jury was permitted to infer that Stephenson knew Isaiah was suffering an abnormal degree of pain but, nevertheless, intentionally *left* him in that condition. Drawing every reasonable inference in favor of the verdict, as we are required to do, the jury had sufficient evidence to make that finding.

{41} Accordingly, I respectfully dissent.

JUDITH K. NAKAMURA, Justice

I CONCUR:
PETRA JIMENEZ MAES, Justice

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-003

No. S-1-SC-35681 (filed October 13, 2016)

RACHEL VASQUEZ, individually and as
Personal Representative of the Estate of ANDREW VASQUEZ, deceased,
and JUVENAL ESCOBEDO,
Plaintiffs,
v.
AMERICAN CASUALTY CO. OF READING, PENNSYLVANIA,
Defendant.

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
M. CHRISTINA ARMIJO, Chief U.S. District Court Judge

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for Defendant

Opinion

Barbara J. Vigil, Justice

{1} This case comes before the Court by certification from the United States District Court for the District of New Mexico requesting an answer to the following question:

> Is a worker injured in the course of employment by a co-worker operating an employer owned motor vehicle a person "legally entitled to recover damages" under his employer's uninsured/underinsured motorist coverage?

The question arises from an alleged discontinuity among the plain language of New Mexico's Workers' Compensation Act (WCA), the Uninsured Motorist statute, and this Court's case law. Because the WCA provides the exclusive remedy for an employee injured in a workplace accident by an employer or its representative, the employee is not legally entitled to recover damages from the uninsured employer tortfeasor under the Uninsured Motorist statute. We answer the certified question in the negative.

I. BACKGROUND

{2} Andrew Vasquez was killed at the workplace after being struck by a steel beam that fell off of a forklift during the course of his employment at Coronado Wrecking and Salvage (Coronado). A co-worker operating the forklift had jumped off to check whether the steel beam being lifted was secure, leaving the forklift unattended as the steel beam slid off of the forks, striking and killing Vasquez. Plaintiff, Vasquez's estate, subsequently collected workers' compensation benefits from Coronado's workers' compensation carrier. Related to the forklift accident, Plaintiff also collected uninsured motorist benefits under Vasquez's own automobile insurance policy.

{3} Seeking to collect uninsured motorist benefits under an automobile insurance policy issued to Coronado by Defendant, American Casualty Company of Reading, Pennsylvania (American Casualty), Plaintiff was denied coverage because Vasquez was not legally entitled to recover damages under Subsection (A) of the Uninsured Motorist statute, NMSA 1978, § 66-5-301 (1983), due to the exclusivity provisions of the WCA, NMSA 1978, § 52-1-6(E) (1990) and NMSA 1978, § 52-1-9 (1973).

{4} Plaintiff sued American Casualty in the Second Judicial District Court. American Casualty removed the case to federal district court and filed a motion to dismiss relying upon this Court's decision in *State Farm Auto. Ins. Co. v. Ovitz*, 1994-NMSC-047, ¶¶ 7, 9-11, 117 N.M. 547, 873 P.2d 979 (concluding that injured motorists "were not 'legally entitled to collect' noneconomic damages" pursuant to an uninsured motorist insurance policy because the accident took place in a no-fault insurance state where the law forbade suit for such damages).

{5} The federal district court initially denied the motion to dismiss because of this Court's decision in *Draper v. Mountain States Mut. Cas. Co.*, 1994-NMSC-002, ¶ 10, 116 N.M. 775, 867 P.2d 1157. The *Draper* Court held that the WCA's exclusivity provision does not preclude an employee injured by a third-party motorist from retaining the difference between uninsured motorist benefits and workers' compensation, notwithstanding that an employer paid the premiums on both policies. 1994-NMSC-002, ¶¶ 2, 10; *see also Continental Ins. Co. v. Fahey*, 1987-NMSC-122, ¶ 12, 106 N.M. 603, 747 P.2d 249 ("[T]he [L]egislature . . . never intended that the worker's compensation award would preclude . . . any . . . injured worker from seeking and receiving full or additional compensation from whatever other sources might be available." (citation omitted)), *superseded by statute*, NMSA 1978, Section 52-5-17(C) (1990), *as recognized in Chavez v. S.E.D. Labs.*, 2000-NMSC-034, ¶ 13, 129 N.M. 794, 14 P.3d 532 ("creat[ing] a right of reimbursement in employers for workers' compensation benefits paid when the injured worker has received uninsured motorist benefits from a policy paid for by the employer").

{6} The federal district court reconsidered its decision denying the motion to dismiss and vacated its initial order on the basis that Vasquez was killed in an accident caused by his coworker and not a third party. The federal district court then certified the present inquiry to this Court.

II. STANDARD OF REVIEW

{7} In this case we are called upon to interpret and reconcile the language and policy contained in the WCA, §§ 52-1-6(E) and 52-1-9, and the Uninsured Motorist statute, § 66-5-301(A). In so doing we first turn to the plain language of the relevant statutes to guide our interpretation. *See*

NMSA 1978, § 12-2A-19 (1997) ("The text of a statute or rule is the primary, essential source of its meaning."); *see, e.g.*, *State v. Tufts*, 2016-NMSC-020, ¶ 4, ___ P.3d ___ ("We attribute the usual and ordinary meaning to words used in a statute." (citation omitted)). "Our principal goal in interpreting statutes is to give effect to the Legislature's intent." *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865; *see also* § 12-2A-18(A)(1) (stating that if possible, we will construe a statute or rule to "give effect to its objective and purpose"). "Appellate courts review [such] matters of law *de novo*." *Hasse Contracting Co. v. KBK Fin., Inc.*, 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641.

III. DISCUSSION

{8} In addressing the question presented we start by setting forth the specific language in the WCA and the Uninsured Motorist statute, and proceed to interpret and reconcile the specific statutory provisions in accordance with existing case law.

A. The New Mexico Workers' Compensation Act

{9} The WCA immunizes employers who have complied with its provisions and their representatives from suit by employees arising from most workplace injuries. *See* § 52-1-9 (providing "[t]he right to the compensation provided for in [the WCA], *in lieu of any other liability whatsoever*, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where . . . the injury or death is proximately caused by accident arising out of and in the course of his employment" (emphasis added)); *see also* § 52-1-6(E) ("The [WCA] provides *exclusive remedies*. No cause of action outside the [WCA] shall be brought by an employee or dependent against the employer or his representative, including the insurer, guarantor or surety of any employer, for any matter relating to the occurrence of or payment for any injury or death covered by the [WCA]." (emphasis added)). By such exclusivity with respect to actions against employers and their representatives, the Legislature struck a balance meant to benefit both employees and their employers through the workers' compensation program by providing employees with a quick and efficient remedy for any workplace injury, even one resulting in death, while also providing employers with immunity from tort liability and predictability in the aftermath of injury. *See Salazar v. Torres*, 2007-NMSC-019, ¶¶ 10-11, 141 N.M. 559, 158 P.3d 449.

{10} While immunizing employers and their representatives from tort liability for workplace injuries, the Legislature also provided for recovery by a worker for injuries caused by a third-party tortfeasor under the WCA's subrogation provision:

> The right of any worker or, in case of his death, of those entitled to receive payment or damages for injuries or disablement occasioned to him by the negligence or *wrong of any person other than the employer* or any other employee of the employer, including a management or supervisory employee, shall not be affected by the [WCA] . . . but the *claimant shall not be allowed to receive payment or recover damages for those injuries or disablement and also claim compensation from the employer*, except as provided in Subsection C of this section.

Section 52-5-17(A) (emphases added). Subsection (C) of the subrogation provision regards uninsured motorist insurance policies, stating that a

> worker or his legal representative *may retain any compensation due under the uninsured motorist coverage provided in Section 66-5-301 NMSA 1978 if the worker paid the premium for that coverage*. If the employer paid the premium, the worker or his legal representative may not retain any compensation due under [New Mexico's compulsory Uninsured Motorist statute], and that amount shall be due to the employer.

Section 52-5-17(C) (emphasis added). While the explicit language in the WCA provides for an exclusive remedy to an injured employee for harm sustained in workplace accidents, we must further examine whether such limitation in remedy is consistent with the provision in the Uninsured Motorist statute.

B. New Mexico's Uninsured Motorist Statute

{11} Under the Uninsured Motorist statute:

> [n]o motor vehicle or automobile liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person . . . shall be delivered or issued for delivery in New Mexico . . . unless coverage is provided . . . in minimum limits for bodily injury or death . . . up to the limits of liability specified in . . . the insured's policy, for the protection of persons insured thereunder who are *legally entitled to recover damages from owners or operators of uninsured motor vehicles* . . . .

Section 66-5-301(A) (emphasis added) (citation omitted). That is, the Uninsured Motorist statute only benefits persons "legally entitled to recover damages from owners or operators of uninsured motor vehicles." Section 66-5-301(A). We consider this phrase to be key to our analysis. We have explained "that the purpose of [the Uninsured Motorist statute] is to protect individual members of the public against the hazard of culpable uninsured motorists. However . . . [w]hile it is important to protect the public from irresponsible or impecunious drivers, uninsured motorist coverage is not intended to provide coverage in every uncompensated situation." *Ovitz*, 1994-NMSC-047, ¶ 12 (internal quotation marks and citations omitted).

{12} *Ovitz* involved a two-vehicle car accident in Hawaii that was covered by insurance contracted in New Mexico. 1994-NMSC-047, ¶¶ 2, 8. At issue was the application of Hawaii's no-fault insurance statute, which foreclosed the plaintiff from bringing a negligence action for noneconomic damages against the tortfeasor, who was self-insured in accordance with Hawaii law. *Id.* ¶ 3. In an attempt to recover noneconomic damages outside of court, the plaintiff made a claim for uninsured motorist benefits under his insurance policy, which the insurer denied. *Id.* ¶¶ 3-4. We held in favor of the insurer, concluding that under the New Mexico Uninsured Motorist statute the plaintiff was "not 'legally entitled to collect' noneconomic damages" from the allegedly uninsured tortfeasor and thereby was not entitled to receive uninsured motorist insurance benefits. *Id.* ¶ 7.

{13} The issue in the instant case, in light of the explicit language of the WCA, is whether Plaintiff is legally entitled to recover damages under Coronado's insurance policy pursuant to the Uninsured Motorist statute, Section 66-5-301(A).

C. Plaintiff Is Not Legally Entitled to Recover Damages Because He Was Injured by a Coworker, Limiting His Remedy to That Permitted Under the WCA

{14} Plaintiff argues that the purpose and intent underlying the Uninsured

Motorist statute—"to aggressively expand [uninsured motorist] coverage to protect innocent victims"—should outweigh the purpose of the WCA, which is to strike a balance between tort liability and workers' compensation by affording exclusive remedies. *See* § 66-5-301(A); *Torres*, 2007-NMSC-019, ¶¶ 10-11. To that point, Plaintiff in part relies on an opinion of this Court rejecting limitations on the availability of uninsured motorist benefits to accident victims who were legally entitled to recover damages. *See Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 2007-NMSC-015, ¶¶ 2, 15, 141 N.M. 387, 156 P.3d 25.

{15} Plaintiff misapplies our opinion in *Boradiansky*, which held that a claimant is legally entitled to recover damages pursuant to the Uninsured Motorist statute in the context of an express policy exclusion and a limitation on damages in the Tort Claims Act. *Id.* ¶ 1. *Boradiansky* is distinguishable from the present case. The present case involves a statutory bar to a negligence suit by employees against employers or their representatives, as opposed to the policy exclusion and damages limitation that were at issue in *Boradiansky*. *See id.* Unlike in *Boradiansky*, where this Court had to decipher the purpose of the Uninsured Motorist statute, *see id.* ¶¶ 8-10, 15-17, we are persuaded that the legislature engaged in a sufficient balance of competing interests by its express provision of workers' compensation as the exclusive remedy for workplace accidents.

{16} Plaintiff also relies on this Court's holding that the subrogation clause of the WCA "does not preclude an employee from retaining the difference between uninsured motorist benefits and workers' compensation benefits, notwithstanding that the employer has paid the premiums for each coverage," with respect to a scenario involving an employee injured by a third-party tortfeasor. *Draper*, 1994-NMSC-002, ¶¶ 2, 10. Plaintiff argues that *Draper* should control the instant case. Yet, Plaintiff ignores the critical distinguishing and dispositive fact that the instant case involves the actions and conduct of a coworker rather than that of a third-party uninsured tortfeasor. *See* § 52-1-6 (E) ("Nothing in the [WCA], however, shall affect . . . the existence of or the mode of trial of any claim or cause of action that the worker has against any person other than his employer or another employee of his employer . . . ."); *see also Draper*, 1994-NMSC-002, ¶ 10 ("find[ing] no merit in [the insurer's] argument that [the employee] was indirectly suing his employer in contravention of the [WCA]").

{17} Plaintiff primarily relies on *Draper*, where a plaintiff-employee was injured driving his employer's car in a collision with a third-party, uninsured driver. 1994-NMSC-002, ¶ 2. *Draper* turned on whether a plaintiff-employee would be legally entitled to recover damages for injuries from an accident caused by an uninsured third party, and the Court was focused on the availability of reimbursement to both the employer and employee under the subrogation clause in that unique context. *Id.* ¶¶ 7, 9. In the case before us, the alleged tortfeasor was Vasquez's coworker—a critical distinction from the facts in *Draper*. Unlike the plaintiff-employee in *Draper*, Vasquez was prohibited from pursuing a tort action against, or seeking reimbursement from, the ultimate tortfeasor, his employer Coronado. *See* § 52-1-6 (E). Thus, *Draper* does not control this case, and because the WCA provided the exclusive remedy to Plaintiff for the workplace injury to Vasquez, Plaintiff was not similarly legally entitled to recover damages under the Uninsured Motorist statute.

{18} We hold that an employee injured in a workplace accident caused by an employer or its representative may only seek a remedy authorized under the WCA, and under the WCA such an employee is not legally entitled to recover damages for the purposes of the Uninsured Motorist statute. Given the facts of this case, Plaintiff is not legally entitled to recover damages from Coronado, the tortfeasor and holder of the uninsured motorist policy.

IV. CONCLUSION

{19} We answer the certified question in the negative. Plaintiff is not legally entitled to recover damages from the uninsured tortfeasor, Coronado, because Plaintiff's exclusive remedy was in the workers' compensation forum.

{20} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
JUDITH K. NAKAMURA, Justice

Certiorari Denied, November 14, 2016, No. S-1-SC-36150

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-006

No. 34,017 (filed September 19, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
OMAR ORTIZ,
Defendant-Appellant.

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

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
CHARLES J. GUTIERREZ
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR
Chief Public Defender
MARY BARKET
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Roderick T. Kennedy, Judge

I. INTRODUCTION

{1} Defendant was charged with concealing his identity and attempting to disarm a peace officer. The district court convicted him of both charges in a bench trial. Defendant appeals, arguing that the evidence produced at trial was insufficient to support a guilty verdict beyond a reasonable doubt with respect to each element of each charge. We conclude that the evidence was sufficient to support Defendant's convictions, and we affirm.

II. BACKGROUND

{2} Officer Standridge was dispatched to the Grand Motor Inn in Deming, New Mexico at approximately 6:00 a.m. When she arrived on the scene, she observed Defendant "jumping back and forth over the fence" of a nearby auto center. She testified that such behavior was "pretty suspicious in the area for that hour of the day." She approached Defendant and informed him that she was investigating reports of a male subject acting suspiciously. She then asked for Defendant's name and identification, which Defendant declined to give. Officer Standridge conducted a pat-down of Defendant, during which she discovered a temporary paper ID card issued by the state of New Mexico in his pocket.[1] Throughout Officer Standridge's encounter with Defendant, his behavior was "bizarre," and he kept trying to pull away from her. Officer Standridge then placed Defendant in the back of her patrol car and took him to the Deming Police Department.

{3} Officer Robert Chavez came into contact with Defendant at the Deming Police Department when Defendant began hitting his head against the wall and door of the holding cell. Defendant did not heed orders to stop this behavior, and he eventually developed a large, bleeding lump on his head. When several officers entered the holding cell to prevent him from causing any more injury to himself, Defendant became aggressive toward the officers, and he was subdued only after he was tasered and restrained by multiple officers.

{4} Officer Chavez, accompanied by an officer trainee, then took Defendant to the hospital to address Defendant's injuries. Defendant was transported in the back seat of Officer Chavez's patrol car with his hands handcuffed behind his back. The clear partition separating the front seat from the back seat was open to allow air to flow from the front seat to the back seat. Officer Chavez's shotgun lock had been removed after causing an electrical fire in his patrol car. Officer Chavez had his shotgun, which was not locked in place, propped up against the seat so that the barrel of the shotgun was visible and accessible to Defendant in the back seat through the partition.

{5} When they arrived at the hospital, the officer in training exited the patrol car and went to remove Defendant from the back seat. The officer in training yelled out to Officer Chavez stating, "he has your gun!" At that point, Officer Chavez exited the car. He observed Defendant grasping the barrel of Officer Chavez's shotgun through the open partition with both hands—while both hands were still handcuffed behind Defendant's back—and attempting to pull it through the partition. The officers struggled with Defendant, ultimately removing the gun from his hands, extracting him from the car, and taking him into the hospital.

{6} Defendant was charged with concealing identity contrary to NMSA 1978, Section 30-22-3 (1963),[2] as well as attempting to commit the felony of disarming a peace officer contrary to NMSA 1978, Section 30-22-27(A)(1) (1997) and NMSA 1978, Section 30-28-1 (1963). The district court held a bench trial on August 2, 2013. At the close of the State's case, Defendant moved for a directed verdict on the grounds that the State did not proffer evidence sufficient to sustain a conviction for attempting to disarm a peace officer. In response, the State acknowledged that Section 30-22-27(A)(1) was inapplicable, but maintained that the evidence was sufficient to sustain a conviction under Section 30-22-27(A)(2). Later in this opinion we discuss the difference between these two sections.

{7} Noting that it was clear that Officer Chavez was acting in the scope of his duties and that the shotgun was intended

[1]Defendant does not contest the validity of this pat-down.

[2]Defendant was also charged with receiving or transferring stolen motor vehicles contrary to NMSA 1978, Section 30-16D-4(A) (2009) and failure to give immediate notice of accident contrary to NMSA 1978, Section 66-7-206 (1991). Those charges, however, were resolved through Defendant's guilty plea, arise from completely separate facts than those listed above, and are not at issue in this appeal.

for Officer Chavez's use, the district court found that Defendant was "going after" the shotgun through the open partition. Accordingly, the district court denied Defendant's motion for directed verdict. Defendant then testified on his own behalf. During his testimony, Defendant admitted that he was under the influence of alcohol and methamphetamine when he encountered Officers Standridge and Chavez. Defendant nonetheless claimed that he remembered giving Officer Standridge his name and informing Officer Standridge that he had only a temporary paper copy of his identification. Defendant also claimed that he never requested to be taken to the hospital and that he never wanted to be transported to the hospital. Because of this reluctance to go to the hospital, Defendant claimed that he grabbed on to anything that he could reach in order to try and prevent the officers from removing him from the patrol car. Defendant insisted that he was not trying to use the shotgun against anyone and insinuated that at the time of the incident, he was not actually aware that what he was grabbing on to was a shotgun.

{8} During closing arguments, both parties argued the merits of the concealing identity charge as well as whether the evidence proffered was sufficient to sustain a conviction under Section 30-22-27(A)(2). The parties argued for two opposing sets of facts. The State argued that Defendant gave no identification and intended to grab the shotgun thereby depriving Officer Chavez of its use. Defendant insisted that he gave his identification when asked and that he did not have the requisite intent to deprive Officer Chavez of the use of the shotgun when he grabbed it. The district court acknowledged the conflicting evidence. It discounted Defendant's testimony due to his intoxication and found Defendant guilty of concealing his identity. With regard to the attempt to disarm a police officer charge, the district court noted that it was appalled by the fact that Defendant was transported in a unit in which the partition was open and the shotgun was unsecured and acknowledged that once Defendant laid hands on the shotgun, "that changed the picture entirely." The district court held that, whether Defendant availed himself of the opportunity to grab the gun in order to prevent removal from the car or for other reasons, the State proved beyond a reasonable doubt that Defendant attempted to remove the shotgun from its place in the front seat, thereby depriving Officer Chavez of its use. Thus, the district court found Defendant guilty of attempting to disarm a police officer under Section 30-22-27(A)(2). Defendant appealed.

III. DISCUSSION

A. Standard of Review

{9} On appeal, Defendant challenges the sufficiency of evidence in support of his convictions. Whether evidence is sufficient to support a verdict requires an inquiry into whether direct or circumstantial evidence 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. "In reviewing whether there was sufficient evidence to support a conviction, we resolve all disputed facts in favor of the State, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *State v. Smith*, 2016-NMSC-007, ¶ 19, 367 P.3d 420 (internal quotation marks and citation omitted).

B. Concealing Identity

{10} Defendant was convicted of concealing his identity contrary to Section 30-22-3. Section 30-22-3 requires proof of three elements: (1) the defendant concealed his name or identity, (2) with intent to obstruct, hinder, interrupt, or intimidate, (3) any public officer or person acting in legal performance of his duty.

1. Officer Standridge's Legal Performance of Duty

{11} Defendant argues on appeal that we must look to whether Officer Standridge had reasonable suspicion that Defendant had committed or was about to commit a crime in order to determine whether sufficient evidence establishes that Officer Standridge was engaged in "a legal performance of [her] duty." Section 30-22-3. The State suggests that Defendant's argument in this regard actually raises an unpreserved Fourth Amendment issue that we should not address on appeal.

{12} An officer detaining a suspect for the purpose of requiring him to identify himself, has conducted a seizure subject to the requirements of the Fourth Amendment. *Brown v. Texas*, 443 U.S. 47, 50-52 (1979) ("In the absence of any basis for suspecting [the defendant] of misconduct, the balance between the public interest and [the defendant]'s right to personal security and privacy tilts in favor of freedom from police interference."). Without reasonable suspicion, the officer would have no legal authority to detain the defendant for questioning. *See State v. Gutierrez*, 2007-NMSC-033, ¶ 29, 142 N.M. 1, 162 P.3d 156 (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion)); *see also State v. Dawson*, 1999-NMCA-072, ¶ 21, 127 N.M. 472, 983 P.2d 421 (concluding that unless there is reasonable suspicion to believe the defendant was involved in criminal activity, it violates the Fourth Amendment to require the defendant to produce identification). We therefore agree with Defendant that if the State failed to produce evidence that Officer Standridge had reasonable suspicion to detain Defendant, her seizure of Defendant was unlawful and the State failed to prove that Officer Standridge was a public officer in a legal performance of her duty.[3]

{13} We review questions of reasonable suspicion de novo. *State v. Neal*, 2007-NMSC-043, ¶ 19, 142 N.M. 176, 164 P.3d 57. "Reasonable suspicion must exist at the inception of the stop and cannot be based on facts that arise as a result of the encounter." *State v. Akers*, 2010-NMCA-103, ¶ 38, 149 N.M. 53, 243 P.3d 757. Reasonable suspicion exists where an officer can point to specific articulable facts, together with rational inferences from those facts "that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *State v. Ochoa*, 2008-NMSC-023, ¶ 15, 143 N.M. 749, 182 P.3d 130 (internal quotation marks and citation omitted). While reasonable suspicion can arise from "wholly lawful conduct[,]" it may not be based on "unsupported intuition and inarticulate hunches." *State v. Harbison*, 2007-NMSC-016, ¶ 15, 141 N.M. 392, 156 P.3d 30 (alteration,

[3]This is different from the analysis commonly used when applying the statutes prohibiting battery of a police officer and resisting arrest. *See, e.g.*, *State v. Doe*, 1978-NMSC-072, ¶ 14, 92 N.M. 100, 583 P.2d 464 ("An arrest undertaken without probable cause does not vitiate all the authority of the arresting officer."). Those statutes, however, differ from the statute at issue in this case because they further different purposes. The statute at issue in this case does not necessarily involve the possible risk of physical harm to an officer, while the battery of a police officer and resisting arrest statutes are specifically aimed at discouraging physical harm to officers during physical encounters with suspects.

internal quotation marks, and citation omitted). Thus, we look not to "whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* (internal quotation marks and citation omitted).

{14} For purposes of our reasonable suspicion analysis, we take into consideration only the facts in evidence leading up to the moment that Officer Standridge asked Defendant for identification. *See Akers*, 2010-NMCA-103, ¶ 38. Thus, our reasonable suspicion analysis is premised solely on Officer Standridge's information regarding the area, the time of day, and Defendant's behavior. Officer Standridge was dispatched to investigate a report of an adult male acting suspiciously. Once in the area, she observed Defendant "jumping back and forth" over the fence of a business establishment in the early hours of the morning. Defendant's behavior was odd in light of the time of day and location.

{15} Defendant calls attention to the lack of evidence that Defendant matched the description of the individual who was acting suspiciously and asserts that a report of suspicious activity alone is not enough to amount to a suspicion that a crime has occurred. Irrespective of the description in the dispatch, upon arrival Officer Standridge observed an adult male acting suspiciously. It was reasonable for Officer Standridge to have stopped the only person that she saw acting suspiciously by repeatedly jumping the fence of a private property in the vicinity of a recent report of suspicious activity. This occurred at an hour when it is objectively reasonable to infer there were no other individuals present and that the business was not open. We agree with the State that Defendant's conduct could reasonably give rise to the belief that Defendant was engaged in criminal activity, such as trespass or breaking and entering. The content of the dispatch is a red herring given Officer Standridge's observations at the scene. We conclude that Officer Standridge had a reasonable suspicion to conduct a brief investigatory stop of Defendant. We also conclude that the State presented sufficient evidence that Officer Standridge was acting in the legal performance of her duty as a police officer in stopping Defendant.

2. Defendant Concealed his Identity

{16} Defendant suggests that any failure to give Officer Standridge his identification information was merely a hesitation that is permitted by *Dawson*, 1999-NMCA-072, ¶ 12. *Dawson* looked at the plain language of the statute and determined that rather than require concealment through the giving of a false name, Section 30-22-3 also prohibits withholding one's identity "by refraining from stating any identity at all." *Dawson*, 1999-NMCA-072, ¶ 9. Looking to case law applying time limits to the withholding of information under the Implied Consent Act, this Court crafted a rule that allows "a few moments to consider the consequences of refusal to identify oneself." *Id.* ¶ 12. We held that Section 30-22-3 "requires a person to furnish identifying information immediately upon request or, if the person has *reasonable* concerns about the validity of the request, so soon thereafter as not to cause any 'substantial inconvenience or expense to the police.' " *Dawson*, 1999-NMCA-072, ¶ 12 (emphasis added) (quoting *In re Suazo*, 1994-NMSC-070, ¶ 20, 117 N.M. 785, 877 P.2d 1088). In *Dawson,* evidence of the defendant's repeated refusal to provide identification was sufficient to amount to concealment under Section 30-22-3 because additional officers were called to the scene, resulting in substantial inconvenience. *Dawson*, 1999-NMCA-072, ¶ 14.

{17} There is no evidence in the record to support Defendant's "hesitation" argument. Defendant characterizes Officer Standridge's request for identification as "dubious," "vague," and "open-ended," suggesting that Defendant's hesitation was therefore reasonable under the circumstances; assertions also unsupported in the record. Defendant testified that he gave the officer his identification immediately upon request. He never suggested that he hesitated, nor did he suggest that he was confused, apprehensive, or suspicious. Officer Standridge never suggested in her testimony that Defendant's actions were a hesitation or delay, but instead characterized them as an outright refusal. Defendant never affirmatively or voluntarily supplied his identification; rather, Officer Standridge discovered it during a pat-down of Defendant's person. Because we are not faced with a situation analogous to *Dawson*, that analysis of whether the police faced "substantial inconvenience or expense" is inapplicable. *Id.* ¶ 12 (internal quotation marks and citation omitted).

{18} Defendant points to his own testimony at trial, during which he claimed to have given Officer Standridge his name and temporary paper ID, as evidence that he did not conceal his identity. It is within the district court's purview, when acting as fact-finder, to weigh the credibility of witnesses and, in doing so, discard Defendant's version of events. *See, e.g.*, *Sutphin*, 1988-NMSC-031, ¶ 21 ("The fact[-]finder may reject [the] defendant's version of the incident."); *State v. Gonzales*, 1997-NMSC-050, ¶ 18, 124 N.M. 171, 947 P.2d 128 ("Determining credibility and weighing evidence are tasks entrusted to the trial court sitting as fact-finder."). Defendant did not apparently have any "reasonable concerns about the validity" of Officer Standridge's request for identification at the time of his detention. *Dawson*, 1999-NMCA-072, ¶ 12. In light of the evidence, we also conclude that the conviction for concealing identity under Section 30-22-3 is based on sufficient evidence regarding the element of concealment. *See Dawson*, 1999-NMCA-072, ¶ 9 ("[B]y refraining from stating any identity at all, one conceals one's identity."). In reviewing the evidence presented at trial for sufficiency, we disregard all evidence contrary to the verdict. *Smith*, 2016-NMSC-007, ¶ 19. Defendant's argument on this issue is therefore without merit.

3. Defendant's Intent

{19} We disagree with Defendant's contention that the evidence did not establish that he had the requisite intent to hinder or delay the officer's investigation. In this case, a fact-finder could reasonably infer from testimony that Defendant refused to produce identification or give the officer his name, that Defendant intended to hinder Officer Standridge in the discharge of her duties. *See State v. Andrews*, 1997-NMCA-017, ¶ 9, 123 N.M. 95, 934 P.2d 289 (using reasonable inference regarding intent to affirm conviction under sufficiency analysis). This is not a case in which Defendant's silence gave rise to the concealing identity charge. The evidence instead suggests that Defendant affirmatively misrepresented to Officer Standridge that he had no identification, despite having a state-issued identification card in his pocket. Because we indulge all reasonable inferences in support of the verdict, *Smith*, 2016-NMSC-007, ¶ 19, it is reasonable to infer from Defendant's misrepresentation that he intended to interrupt, obstruct, or hinder Officer Standridge's investigation.

C. Attempt to Disarm

{20} Section 30-22-27 in pertinent part states:

> A. Disarming a peace officer consists of knowingly:
>
> (1) removing a firearm or weapon from the person of a

> peace officer when the officer is acting within the scope of his duties; or
>
> (2) depriving a peace officer of the use of a firearm or weapon when the officer is acting within the scope of his duties.
>
> . . . .
>
> C. Whoever commits disarming a peace officer is guilty of a third degree felony.

A criminal attempt is "an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." Section 30-28-1.

{21} The criminal information charged Defendant with attempt to disarm a peace officer under Section 30-22-27(A)(1). The written judgment convicted Defendant of Subsection (A)(1) of the statute. Defendant made a motion for directed verdict at the close of the State's evidence, during which he suggested that Subsection (A)(1) was inapplicable. In response, the State acknowledged that Subsection (A)(2), rather than Subsection (A)(1) applied to the facts of this case. The district court specifically cited to Subsection (A)(2) in ruling on Defendant's motion for directed verdict. During closing argument, the State again argued in support of a conviction under Subsection (A)(2). On appeal, both parties proffer arguments related to Subsection (A)(2). It appears that the parties as well as the district court impliedly made a constructive amendment to the indictment by charging Subsection (A) in its entirety, rather than specifying either Subsection (A)(1) or (A)(2). *See* Rule 5-204 NMRA (allowing information to be amended where the defendant's rights are not prejudiced by doing so, and disallowing acquittal absent such prejudice). Because Defendant neither objected to this alteration at trial, nor does he assert prejudice on appeal, we proceed to an analysis of whether a conviction under Subsection (A)(2) was supported by sufficient evidence.

1. Defendant Acted Knowingly

{22} Defendant insists that the evidence produced at trial was insufficient to establish that he had the knowledge required by the statute. More specifically, Defendant suggests that to prove he acted "knowingly," the State was required to produce evidence that he grabbed the shotgun intending to keep the gun away from Officer Chavez or preventing Officer Chavez from using it.

{23} Direct evidence of knowledge and intent are rarely available. *State v. Glascock*, 2008-NMCA-006, ¶ 29, 143 N.M. 328, 176 P.3d 317. As such, intent and knowledge may be proved by circumstantial evidence. *See, e.g.*, *State v. Montoya*, 1966-NMSC-224, ¶ 10, 77 N.M. 129, 419 P.2d 970 ("Knowledge, like intent, is personal in its nature and may not be susceptible of proof by direct evidence. It may, however, be inferred from occurrences and circumstances. The act itself may be such as will warrant an inference of knowledge."). At trial, the State produced evidence that upon arriving at the hospital, Defendant grabbed the shotgun with both hands, despite his hands being cuffed behind his back, and tried to pull it through the opening in the partition separating the front and back seat of the patrol car. Given that the court, acting as fact-finder, can properly resolve conflicts in the evidence, the evidence produced at trial was sufficient for the district court to conclude that Defendant intentionally grabbed the shotgun intending to pull it through the partition. It is reasonable, then, for the district court to infer that by intentionally grabbing the shotgun, Defendant knew that doing so would deprive Officer Chavez of its use. *State v. Dowling*, 2011-NMSC-016, ¶ 23, 150 N.M. 110, 257 P.3d 930 (noting that a defendant's actions can act as an indicia of the defendant's subjective knowledge, and acknowledging that circumstantial evidence alone can sustain a finding of subjective knowledge); *Cf. State v. Herrera*, 1991-NMCA-005, ¶ 10, 111 N.M. 560, 807 P.2d 744 (pointing out that the State is not required "to produce direct evidence of the defendant's subjective mental state" where the defendant was convicted for driving under a revoked license).

{24} Defendant also suggests that his voluntary intoxication diminished his ability to form the intent required under the statute. "[W]here a defendant claims that he was so intoxicated as to be unable to form the necessary intent, . . . the question of intent is a matter for the jury." *State v. Rayos*, 1967-NMSC-008, ¶ 6, 77 N.M. 204, 420 P.2d 314. Thus, whether Defendant was able to *knowingly* deprive Officer Chavez of the use of the shotgun, despite his voluntary intoxication, was a factual issue for the district court to decide. The district court heard Defendant's testimony that he grabbed the shotgun to prevent the officers from removing him from the car and heard Defendant admit to being highly intoxicated on the night in question. Again, as the fact-finder, the district court weighed Defendant's testimony against the officer's, and apparently concluded that Defendant acted knowingly when he grabbed the shotgun. We will not second guess the fact-finder's decision concerning the credibility of witnesses or substitute our judgment for that of the fact-finder. *E.g.*, *State v. Lucero*, 1994-NMCA-129, ¶ 10, 118 N.M. 696, 884 P.2d 1175. As such, Defendant's contention that his own voluntary intoxication prevented him from forming the requisite intent could properly be disregarded by the fact-finder.

2. "Use of a Firearm" Under Section 30-22-27(A)

{25} Defendant also suggests that in order to deprive a peace officer of "the use of a firearm" under the statute, the State needed to show that Defendant interfered with the officer's actual or probable use of the shotgun. We review this argument de novo because it presents an issue of statutory interpretation. *See, e.g.*, *State v. Erwin*, 2016-NMCA-032, ¶ 5, 367 P.3d 905 (conducting de novo statutory interpretation of a statute's term in order to evaluate the defendant's argument regarding sufficiency of the evidence), *cert. denied*, 2016-NMCERT-___, ___P.3d ___ (No. 35,753, Mar. 8, 2016). When interpreting a statute, we seek to fulfill the intent of the Legislature, and use the language of the statute as the primary indicator of that intent. *See, e.g.*, *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. When the language in a statute is plain and unambiguous, "we give effect to that language and refrain from further statutory interpretation." *State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50.

{26} Defendant interprets Section 30-22-27(A)(2)'s "use of a firearm" language as requiring the State to show that Officer Chavez was intending to use the weapon, or had need of it for some valid police purpose, at the time when Defendant had the weapon otherwise engaged. Defendant cites to federal case law to support this position. That case law, however, is distinguishable based on the context in which the word "use" is used. In New Mexico's statute, "use" is not an active verb; it is a function of the firearm's mere presence, not much different than the words "access to." Both cases that Defendant cites refer to statutes that penalize a defendant who is demonstrated to have used *or carried* a firearm during the commission of a crime. *See Bailey v. United States*, 516 U.S. 137, 138, 142-43 (1995) (analyzing the meaning of "use" where the statute penalizes the

defendant if he "uses or carries a firearm" during or in relation to a crime of violence or drug trafficking crime), *superceded by statute as stated in Welch v. United States*, 136 S. Ct. 1257 (2016); *United States v. Santiago*, 207 F. Supp. 2d 129, 146 (S.D.N.Y. 2002) (same). Defendant's reliance on these federal cases ignores that the plain language of the federal statute being applied dealt with the *actions* of using and carrying a firearm. *See* 18 U.S.C. § 924(C) (2006). Our statute's employing the word in the context of depriving an officer of the use of a firearm makes the word "use" a noun, rather than a verb.

{27} Defendant's interpretation of "use of a firearm" does not effectuate the plain language used by the Legislature. In the present case, the prevention of a hypothetical future use is an element of the crime. That hypothetical need not come to fruition in order for a defendant to deprive the officer of its use. The plain language of the statute penalizes a defendant for depriving an officer of the use of a firearm *at any point* during the officer's acting within the scope of his duties, rather than limiting its applicability to a deprivation that occurs only when the officer is attempting or intends an immediate use of the firearm.

{28} Having interpreted Section 30-22-27(A)(2) in such a way that interference with an officer's actual or probable use of a weapon is not required, we next turn to the issue of whether sufficient evidence exists to support the element that Defendant deprived Officer Chavez of the use of the shotgun. As discussed above, the State proffered testimony that Defendant grabbed the shotgun with both hands and was attempting to pull it through the partition when he was subdued by the officers. That is sufficient evidence to support a conclusion that Defendant committed an overt act in order to disarm Officer Chavez.

{29} We also agree with the district court that it is beyond dispute that Officer Chavez was acting within the scope of his duties. Thus, we conclude that the State met its burden of providing sufficient evidence that Defendant attempted to disarm a peace officer, contrary to Section 30-22-27(A)(2) and 30-28-1, and affirm Defendant's conviction.

IV. CONCLUSION

{30} We affirm both Defendant's conviction for concealing identity, contrary to Section 30-22-3, and his conviction for attempting to disarm a police officer, contrary to Section 30-22-27(A)(2) and Section 30-28-1. We remand, however, for the district court to revise the final judgment and sentence to reflect Defendant's second conviction was pursuant to Section 30-22-27(A)(2).

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

TIMOTHY L. GARCIA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-007

No. 34,269 (filed September 15, 2016)

PETER WIRTH, ESQ.,
as Personal Representative of the ESTATE OF INEZ MARTINEZ,
Plaintiff-Appellee,
v.
SUN HEALTHCARE GROUP, INC., SUNBRIDGE HEALTHCARE, LLC,
PEAK MEDICAL, LLC, and PEAK MEDICAL ASSISTED LIVING, LLC d/b/a
THE VILLAGE AT NORTHRISE,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
FRANCIS J. MATHEW, District Judge

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Opinion

Linda M. Vanzi, Judge

{1} The decedent in this wrongful death lawsuit was Inez Martinez, a resident at the Village at Northrise (VNR), which is a skilled nursing facility. The only remaining Defendants are Peak Medical Assisted Living, LLC (PMAL)—doing business as VNR—and three upstream entities in its ownership chain, which Plaintiff (as personal representative for Martinez) has alleged are joint venturers and co-employers of the staff at VNR. At the close of a six-day jury trial, the district court directed verdicts for Plaintiff on theories of negligent operation of a facility and negligence per se. The jury then found that at least one of those theories of negligence caused Martinez's death.

{2} Since the jury also found that Defendants were joint venturers and co-employers, the court entered judgment against all four entities, jointly and severally. The court then awarded interest under NMSA 1978, Section 56-8-4(B) (2004), which allows a discretionary award of prejudgment interest of up to 10 percent from the date the complaint is served when a defendant fails to make a reasonable and timely settlement offer. This appeal challenges the underlying directed verdicts, the submission of the joint venture and co-employment issues to the jury, and the assessment of prejudgment interest. We affirm with respect to PMAL, which is liable for the negligent acts or omissions of its employees. But we set aside the judgment against the other defendants and remand for a corresponding reassessment of prejudgment interest.

BACKGROUND

{3} On April 15, 2010, Inez Martinez, age 82, was admitted to VNR where she was to recuperate from pacemaker implantation surgery for an anticipated stay of twenty days. She was discharged on May 5, 2010, by order of her attending physician, Dr. Guadencio Pavia, who was credentialed to see patients at the facility. Martinez died shortly thereafter as a result of sepsis caused by a wound infection (staph) at her incision.

{4} Dr. Pavia never examined Martinez's incision during her stay at VNR, and it was later revealed at trial that attending physicians were not required to come to the facility to see their patients. To be sure, Martinez did see physicians on two occasions: first on April 23, when her cardiologist found that her incision was healing well, and again on May 3, when she met with Dr. Pavia at his office and was cleared for discharge. But by all accounts, Dr. Pavia ordered Martinez's discharge without even removing her bandage, making that off-site meeting effectively useless for diagnosing a wound infection, even if early symptoms would have been manifest on May 3.

{5} On May 4, after the off-site meeting but prior to discharge, a nurse at VNR noted "scabbed pus" around Martinez's incision. The nursing staff applied antibiotic ointment, covered the incision with sterile gauze, and notified Dr. Pavia by fax of what had been observed and what had been done. Dr. Pavia signed the fax, presumably indicating that he read it; but he did not modify his discharge order, he left no instruction for the nursing staff, and—in accordance with his normal practice—he did not come to the facility to see his patient.

{6} The next day, Martinez complained of a "[m]oderate, severe pain" that was progressing from the site of her pacemaker to her left shoulder. This time without notifying Dr. Pavia, staff administered two doses of narcotic pain medication and discharged Martinez from the facility pursuant to Dr. Pavia's May 3 order.

{7} Once home, Martinez's condition rapidly deteriorated. She was hospitalized with a wound infection that had become septic. She received aggressive treatment, but her symptoms worsened: she developed stress ulcers, hypoxemia, liver damage, and kidney failure. Martinez died at the hospital—thirty-one days after her admission to VNR.

{8} The administrator at VNR, who was employed by PMAL, should have required attending physicians, including Dr. Pavia, to come to the facility to see their patients. Experts for both sides agreed that the failure to do so fell below the standard of care applicable to a skilled nursing facility. But the evidence conflicted as to whether signs of a wound infection were apparent on May 4 and 5, raising a question whether the result would have been any different

had Martinez been examined by her physician before discharge.

{9} Thus, based on the experts' opinions, Plaintiff moved for directed verdict on a theory of negligent operation of the facility with the understanding that the jury would still have to determine whether the failure to require Dr. Pavia to visit Martinez at the facility caused her death. Plaintiff also moved for directed verdict on a closely related theory of negligence per se, arguing that the facility had violated both a federal and a state regulation.

{10} The federal regulation, 42 C.F.R. § 483.75(h) (2014), is part of a complex scheme of conditions that nursing homes must meet to participate in medicare and medicaid programs. *See* 42 C.F.R. § 483.1(b) (2015). Its somewhat cryptic language requires a nursing home to either employ a qualified professional to furnish a specific service to residents or to

> have that service furnished . . . by a person or agency outside the facility under an arrangement . . . [that] must specify in writing that the facility assumes responsibility for . . . [o]btaining services that meet professional standards and principles that apply to professionals providing services in such a facility[.]

42 C.F.R. § 483.75(h)(1), (2)(i).

{11} The state regulation, 7.9.2.37(A), (C)(1) NMAC, requires that a physical examination be conducted within forty-eight hours on persons admitted to nursing homes, except those admitted for short-term care. Although it was undisputed at trial that Martinez was expected to stay at VNR for twenty days, and that no physician examined her within forty-eight hours of her admission, there was no testimony about the meaning of the short-term care exception. "Short-term care" is not defined in the regulations, and the parties have not cited any authority defining the term, nor pointed to any case interpreting it.

{12} The district court ultimately granted the directed verdict motions. Because causation was still at issue, the directed verdicts did not determine liability. They only resulted in a jury instruction that Defendants had been held negligent as a matter of law in all three respects, and that the jury could return a verdict for Plaintiff if it found that any such negligence was a cause of Martinez's death. Accompanying that instruction was a verdict form that accordingly asked, "Do you believe that any of these acts of negligence by . . . Defendants were a cause of injury and damage [to] Martinez?" Without any further specification, the jury marked "[y]es."

{13} Defendants twice moved for a directed verdict on Plaintiff's theories of joint venture and co-employment. The district court denied Defendants' motions, and the jury found that all Defendants were joint venturers and co-employers of the staff at VNR. Upon finding causation, the jury returned a verdict for Plaintiff awarding compensatory damages of $2.5 million. The court then agreed with Plaintiff that Defendants' only settlement offer of $250,000 was unreasonable. It awarded prejudgment interest at 8 percent per annum in the total amount of $334,246.57.

{14} Defendants now make several arguments, some of which were not made below. To the extent their arguments were not preserved, they invoke the doctrine of fundamental error, which they recognize applies in civil cases in only "the most extraordinary and limited circumstances." *See Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C.*, 2012-NMSC-004, ¶ 33, 274 P.3d 97. They assert, first, that directing a verdict on the negligent operation theory was error because expert opinions—even when unanimous—are not binding on the jury. That is, since our case law allows juries to reject expert testimony, *see, e.g.*, *State v. Moore*, 1938-NMSC-007, ¶ 73, 42 N.M. 135, 76 P.2d 19, the directed verdict on the negligent operation claim must have been improperly based on the district court's decision to accept the testimony, and not the jury's.

{15} Defendants also argue that it was error to direct verdicts based on the federal and state regulations because the federal regulation does not set forth a specific standard of conduct distinct from the medical negligence standard of care, *see Heath v. La Mariana Apartments*, 2008-NMSC-017, ¶ 9, 143 N.M. 657, 180 P.3d 664, and the state regulation, by its terms, does not apply to short-term care. Since the verdict form does not reveal which theory the jury found to be causative, Defendants argue that a new trial is required if any directed verdict was improperly granted. *See Bachicha v. Lewis*, 1987-NMCA-053, ¶ 16, 105 N.M. 726, 737 P.2d 85 ("[W]here we cannot tell whether the jury based its verdict upon an improperly submitted issue, the proper procedure is to reverse and remand for a new trial on all issues.").

{16} With respect to joint and several liability, Defendants contend that the evidence showed nothing more than the degree of control normally incident to a chain of ownership in a legitimate corporate structure. In a parent-subsidiary relationship, "[t]he parent has control over the subsidiary . . . by its ownership of a majority or all of the stock therein[,]" and it can generally be held vicariously liable for the subsidiary's acts only by piercing the corporate veil. *Scott v. AZL Res., Inc.*, 1988-NMSC-028, ¶ 6, 107 N.M. 118, 753 P.2d 897. Defendants argue that it was improper to circumvent veil-piercing by submitting questions of joint venture and co-employment to the jury. In the event their other arguments are unsuccessful, Defendants argue that the district court should not have awarded prejudgment interest at a "highly punitive" rate of 8 percent.

{17} We review de novo the grant or denial of a motion for directed verdict. *McNeill v. Burlington Res. Oil & Gas Co.*, 2008-NMSC-022, ¶ 36, 143 N.M. 740, 182 P.3d 121. We review an award of prejudgment interest for an abuse of discretion. *Behrens v. Gateway Court, LLC*, 2013-NMCA-097, ¶ 25, 311 P.3d 822, *cert. quashed*, 2014-NMCERT-010, 339 P.3d 426.

DISCUSSION

The Negligent Operation Claim

{18} A directed verdict is proper when "the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result [and] . . . when there are no true issues of fact to be presented to a jury[.]" *Rist v. Design Ctr. at Floor Concepts*, 2013-NMCA-109, ¶ 7, 314 P.3d 681 (internal quotation marks and citations omitted). That standard applies notwithstanding the rule—cited by Defendants for the first time on appeal—that "[t]he judgments of experts . . . , even when unanimous and uncontroverted, are not necessarily conclusive on the jury, but may be disregarded by it." *State v. Alberico*, 1993-NMSC-047, ¶ 36, 116 N.M. 156, 861 P.2d 192 (internal quotation marks and citation omitted); *see Moore*, 1938-NMSC-007, ¶ 73 ("We cannot supplant the conclusions of experts, though unanimous . . . , for the conclusion of the jury's verdict.").

{19} These principles are not at odds. That the jury can reject unanimous expert testimony does not mean that it would be

reasonable in every case to do so. Where there is some basis for disregarding the testimony—for instance, where eyewitness (lay) testimony conflicts with the opinions of psychiatrists and psychologists that a criminal defendant was insane when he committed an offense—it is plainly improper for a court to weigh the evidence and direct a verdict favoring the experts' opinions. *See State v. Dorsey*, 1979-NMSC-097, ¶¶ 10-12, 93 N.M. 607, 603 P.2d 717; *see also Moore*, 1938-NMSC-007, ¶ 55 ("Against the opinion of the doctors, we have testimony showing that the defendant knew what he was doing and why he was doing it.").

{20} But absent any true issues of fact, "[u]ncontradicted evidence, which is not subject to reasonable doubts, may not be arbitrarily disregarded." *Samora v. Bradford*, 1970-NMCA-004, ¶ 16, 81 N.M. 205, 465 P.2d 88. That is the rule even when the movant bears the burden of persuasion at trial. *See* 1 Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence* § 3:43 (7th ed. 2016) ("Although the presumption that uncontradicted [expert] testimony is to be credited can, of course, be trumped by any negative impression that the trier of fact may have on a witness' demeanor, [the trier of fact] cannot act arbitrarily." (omission, internal quotation marks, and citation omitted)).

{21} It is undisputed that Defendants did not require Dr. Pavia, or any physician, to visit Martinez at VNR within forty-eight hours of her admission, after nurses noted "scabbed pus" at her pacemaker site on May 4, or after she was treated with two doses of narcotic medication for pain at her incision immediately prior to discharge. Indeed, in accordance with the facility's general policy, Dr. Pavia was never required to visit Martinez at VNR. Experts for both sides agreed that this conduct fell below the standard of care. Their testimony was not incredible (the adverse witnesses corroborated one another on the issue); it was not shaken by cross-examination; and it could not have been contradicted by any lay testimony. *Sewell v. Wilson*, 1982-NMCA-017, ¶ 23, 97 N.M. 523, 641 P.2d 1070 ("Expert testimony . . . is required if the alleged negligence is in an area peculiarly within the knowledge of physicians.").

{22} The district court properly granted a directed verdict with respect to the negligent operation claim, not because there is an inflexible rule that expert testimony can never be disregarded by the jury, but because under these facts, it would have been patently unreasonable for the jury to concoct from nothing its own competing professional standard of care. "The basis for a directed verdict, therefore, [was] the absence of an issue for the jury to resolve." *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶ 11, 106 N.M. 726, 749 P.2d 1105.

The Negligence Per Se Claims

{23} Negligence per se requires, among other things, "a statute which prescribes certain actions or defines a standard of conduct, either explicitly or implicitly[.]" *Heath*, 2008-NMSC-017, ¶ 7 (internal quotation marks and citation omitted). The duty must be defined "with specificity," *id.* ¶ 9, and it must be "distinguishable from the ordinary standard of care." *Thompson v. Potter*, 2012-NMCA-014, ¶ 32, 268 P.3d 57.

{24} It would be redundant, for example, to instruct the jury on negligence per se based on a regulation imposing an obligation on owners to update or retrofit their property when an existing condition is "dangerous to life." *Heath*, 2008-NMSC-017, ¶¶ 18-19. "[T]he statutory term ['dangerous to life'] adds little if anything to the common law standard of ordinary care because, if property owners have to exercise ordinary care, then obviously they would have to respond to a life-threatening condition." *Id.* ¶ 19. For the same reason, negligence per se is inappropriate for violation of laws that prohibit drivers from following "more closely than is reasonable and prudent" or that make it a crime to "negligently" graze livestock on a fenced highway. *Id.* ¶¶ 20-21 (emphasis, internal quotation marks, and citation omitted) (overruling cases that held the opposite). In all of these examples, the quoted terms effectively restate the ordinary standard of care.

{25} Similarly, the federal regulation at issue requires only that nursing homes furnishing outside services must enter written agreements with their service providers assuming responsibility for ensuring that the providers meet applicable "professional standards." 42 C.F.R. § 483.75(h)(1), (2)(i). In the words of Plaintiff's expert—a doctor of internal medicine and geriatrics:

> [T]hat's basically a way of saying that the facility has to make sure that if you're, for instance, a physical therapist from the outside, you maintain the standards that physical therapists are supposed to maintain. And, therefore, in this case, the administrator, the director of nursing, the other members of the governing body, including the corporate representative, are to make certain that the facility, meaning, in this case, the administrator, assures that people providing care are meeting their own standards. In other words, a doctor is meeting the doctor standard of care.

Along these lines, Plaintiff argued to the district court that the federal regulation created a mechanism to hold the facility responsible in tort for Dr. Pavia's breach of professional standards by failing to visit Martinez at VNR. That is a dubious interpretation of a regulation that only sets forth conditions for participation in medicare and medicaid programs. *See* 42 C.F.R. § 483.1(b). But the district court, apparently persuaded, directed a verdict in favor of Plaintiff, which ultimately resulted in the following jury instruction:

> The Court has determined as a matter of law that Defendants violated 42 C.F.R. [§ 483.75(h)] that requires the facility itself to assume responsibility for obtaining services that meet professional standards and principles that apply to professionals providing services in such a facility.
>
> You are instructed that such conduct . . . constituted negligence as a matter of law.
>
> You need now determine whether [this or any other admitted liability] contributed to cause damage to . . . Martinez.

This instruction should never have been given because it derived liability from the undefined standard of care applicable in any medical negligence case. *See Heath*, 2008-NMSC-017, ¶¶ 8-9. Worse still, by directing to the jury that Defendants failed to ensure that Dr. Pavia met "professional standards," the court actually determined the medical negligence standard of care as a matter of law, which is a matter normally left to the jury. *See* UJI 13-1101 NMRA.

{26} "But an unnecessary instruction does not necessarily create reversible error." *Abeita v. N. Rio Arriba Elec. Coop.*, 1997-NMCA-097, ¶ 23, 124 N.M. 97, 946 P.2d 1108. In this case, the standard of care was never in doubt. We have already held that the district court properly granted judgment as a matter of law on the negligent operation claim. The result of the district court's error of instructing the jury

a second time that Defendant's failure to ensure Dr. Pavia met professional regulatory standards constituted negligence as a matter of law, and then asking the jury to determine whether that conduct caused Martinez's death, was nothing more than a redundant jury instruction that could not have impacted the verdict. That is not a basis for a new trial. *See id.*

{27} As mentioned earlier, Defendants have cited the following language from one of our cases in support of their argument that a new trial is required: "[W]here we cannot tell whether the jury based its verdict upon an improperly submitted issue, the proper procedure is to reverse and remand for a new trial on all issues." *Bachicha*, 1987-NMCA-053, ¶ 16. That language, however, does not remove technically erroneous jury instructions from the ambit of harmless error. *See Kennedy v. Dexter Consol. Sch.*, 2000-NMSC-025, ¶¶ 29-30, 129 N.M. 436, 10 P.3d 115; *see also* Rule 1-061 NMRA ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). There is no presumption of prejudice where a single claim is severed by the jury instructions into two separate theories of liability—one erroneous and the other not. *See Kennedy*, 2000-NMSC-025, ¶ 30 ("[T]he erroneous [jury] instruction was merely another way to complain of the same act that formed the basis of the claimed illegal search."); *First Nat'l Bank in Albuquerque v. Sanchez*, 1991-NMSC-065, ¶ 14, 112 N.M. 317, 815 P.2d 613 ("[A]lthough stated as a separate theory of liability, the claim of duress seems merely to have been another way to complain of the same act that formed the basis for the claimed breach of contract.").

{28} That is all that happened here. It would be a mistake of this Court to nullify the result of a six-day jury trial because a negligence per se instruction erroneously restated the uncontroverted medical negligence standard of care, which was not met by any account.

{29} Nor was it reversible error to direct a verdict on the state regulation. There is a dispute on appeal whether Defendants have preserved their argument that Martinez's expected stay of twenty days at VNR constituted "short-term care," which is expressly excepted from the forty-eight-hour examination requirement of 7.9.2.37(C)(1) NMAC. Although Defendants did argue that "New Mexico requirements say[forty-eight] hours but not if it's a short-term stay[,]" the district court asked Defendants to develop that argument by directing it to any testimony about the definition of a "short-term" stay because it did not "recall any testimony about . . . what the definition of short-term was." Defendants did not direct the court to any such testimony, and there is none in the record.

{30} Regardless of whether Defendants' argument was preserved, we are as puzzled as the district court because the regulations shed no light on the exception, and the parties have not cited a single authority to assist us in interpreting it. We have the same basic question that the court asked below: What is a short-term stay? It is Defendants' burden as appellants to "clearly demonstrat[e] that the trial court committed error." *Allen v. Amoco Prod. Co.*, 1992-NMCA-054, ¶ 17, 114 N.M. 18, 833 P.2d 1199. They have not done so.

{31} But even accepting that the state regulation did not apply, there is still no prejudice to Defendants. A potentially erroneous finding of causation based on violation of the forty-eight-hour requirement would mean that the jury also (appropriately) found causation based on the broader allegation that the facility was negligently operated. Together, the federal and state regulation were part of a single claim that the facility failed to adhere to the normal practice of requiring attending physicians to visit their patients on-site, within forty-eight hours *or ever*. Subsumed within that theory, the negligence per se instructions and the directed verdicts that led to them were superfluous. *See Kennedy*, 2000-NMSC-025, ¶¶ 29-30; *Sanchez*, 1991-NMSC-065, ¶ 14.

Joint and Several Liability

{32} We next turn to Defendants' argument that Plaintiff needed to pierce the corporate veil to hold them jointly and severally liable. Plaintiff—who has made no attempt to pierce the veil—responds that veil-piercing was not required because (1) there was sufficient evidence of a joint venture between all Defendants, and (2) all Defendants also exercised enough control over PMAL's employees to establish a "co-employment" relationship with the negligent staff at VNR. Plaintiff also says that the jury expressly determined that each Defendant was *directly liable* for Martinez's wrongful death, but we must reject that contention outright because it is impossible to tell from the special verdict form which Defendants the jury found to be negligent[1] and also because multiple wrongdoers cannot be held jointly and severally liable in New Mexico. NMSA 1978, § 41-3A-1(A) (1987); *see Valdez v. R-Way, LLC*, 2010-NMCA-068, ¶¶ 6-7, 148 N.M. 477, 237 P.3d 1289 (distinguishing vicarious liability, which is faultless). That leaves either joint venture or co-employment as the only potential bases for upholding the verdict.

{33} "A joint venture is formed when the parties agree to combine their money, property or time for conducting a particular business venture and agree to share jointly in profits and losses, with the right of mutual control over the business enterprise or over the property." *Quirico v. Lopez*, 1987-NMSC-070, ¶ 9, 106 N.M. 169, 740 P.2d 1153. Perhaps the most workable rule is that joint venturers can never conduct their enterprise through the instrumentality of a corporation as the two forms of business are mutually exclusive and governed by different bodies of law. *Weisman v. Awnair Corp. of Am.*, 144 N.E.2d 415, 418 (N.Y. 1957). But that is not the rule everywhere, *see, e.g.*, *Kissun v. Humana, Inc.*, 479 S.E.2d 751, 753 (Ga. 1997), and it is at least conceivable that a parent may share a business venture with its subsidiary. This Court has said as much in a memorandum opinion. *Wrongful Death Estate of Archuleta v. THI of N.M., LLC*, No. 31,950, 2014 WL 890613, mem. op. ¶ 48 (N.M. Ct. App. Jan. 9, 2014) (nonprecedential).

{34} Defendants formed a chain of ownership: PMAL, which was the licensed operator of VNR (and the undisputed employer of the facility's staff), was a wholly owned subsidiary of Peak Medical, LLC (Peak Medical), which was wholly owned by SunBridge Healthcare, LLC (SunBridge), which was itself wholly owned by Sun Healthcare Group, Inc. (Sun). There was some apparent overlap in corporate officials within the group, and entities up the chain promulgated general policies and provided assistance at VNR for employee conduct, patient care, and regulatory compliance. The most extensive meddling seemed to result from administrative and advisory assistance agreements that PMAL entered into with

[1]"Question No. 1: Do you believe that any of these acts of negligence by *any* . . . *Defendants* were a cause of injury and damage to . . . Martinez?" (Emphasis added.)

Sun and SunBridge, pursuant to which the parent entities charged fees from the facility's operating income to draft policies and procedures for VNR, pay its vendors, and manage its account.

{35} There is nothing particularly unusual about that, at least in the abstract. *See* Phillip I. Blumberg, *Limited Liability & Corporate Groups*, 11 J. Corp. L. 573, 623 (1986) ("Within the corporate group, the parent as sole shareholder is almost invariably engaged in the managerial functions of establishing policy, determining budget, providing administrative support, and participating in the decision[]making of the subsidiary corporation."). Stock ownership, as a matter of course, allows a parent to choose its subsidiary's board of directors, make bylaws, and vote on general matters of corporate governance put forth by the board. *See United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). "Thus it is hornbook law that the exercise of the control which stock ownership gives to the stockholders will not create liability beyond the assets of the subsidiary." *Id.* (omission, internal quotation marks, and citation omitted); *see* Restatement (Second) of Agency § 14M (1958) ("A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other."). Likewise in New Mexico, limited liability is the rule and not the exception, *see Scott*, 1988-NMSC-028, ¶ 6, and evidence sufficient to satisfy the elements of joint venture or co-employment within a parent-subsidiary relationship had better be eccentric to the norms of corporate behavior, lest we risk unwittingly eliminating the doctrine of limited liability via the mundane application of ordinary agency principles.

{36} One of the elements of a joint venture is an agreement to share profits and losses. *Quirico*, 1987-NMSC-070, ¶ 9. It is not clear what evidence supports the existence of such an agreement in this case. Plaintiff's brief seems to point to the capture of profits on each Defendant's income statement upstream. That is, of course, entirely ordinary. *Hanback v. GGNSC Southaven, LLC*, No. 3:13-CV-00288-MPM-SAA, 2014 WL 3530613 at *5 (N.D. Miss. July 15, 2014) ("[I]f the capture of upstream profits constitutes a joint venture, then nearly all formally organized . . . parent/holding companies would be considered part of a joint venture[.]"). And Sun and SunBridge profited from activities at the facility by charging PMAL a fee for administrative assistance. But the administrative assistance agreements could not have established a joint venture; they expressly disclaimed any right of mutual control.[2]

{37} Even if we were to somehow infer a profit-sharing agreement from other evidence, such as VNR's policy manuals and codes of conduct, which are printed with Sun's and Sunbridge's logos, there is certainly no evidence of any agreement to share losses. It is said that the "absence of an express agreement to share losses is not fatal to a determination that the transaction was a joint venture" and that "mutual liability for losses will be implied from an agreement to share profits." *Quirico*, 1987-NMSC-070, ¶ 9. While that is fine as a general matter, it is a poor fit for this case where the upstream Defendants have plainly manifested their intention to avoid loss-sharing by structuring their businesses to limit losses to the extent of their investments downstream. *See Rosenfeld v. Brooks*, 895 S.W.2d 132, 135 (Mo. Ct. App. 1995) ("[I]t is inappropriate for a court to imply a joint venture where . . . it is evident that there is a different business form involved.").

{38} Plaintiff's brief says that the "critical evidence" of a joint venture is that "each entity owned 100 [percent] of the operations" at VNR. That is the same thing Plaintiff told the jury in closing argument:

> Now, the joint venture section of this verdict form is very important. . . . Now, when you look at [the joint venture question], I would tell you to think the easy way, and that is the licensure application. And that is 100 percent of 100 percent is 100 percent. And that is that all four corporations own, manage, control, share 100 percent. And so a check mark for every one of those tells us that you believe those four are in [a] joint venture together.

This was derived from PMAL's application to operate the facility that disclosed its chain of ownership—as required—to the Department of Health. As a matter of law, that document cannot establish a joint venture, or else we would expose to liability every corporate parent of every entity that correctly attaches its ownership information when it fills out a nursing facility licensure application. In fact, only PMAL was authorized by the Department of Health to operate the facility.

{39} The chain of ownership itself is almost certainly what the jury relied upon when it found that all four Defendants were joint venturers. How else can we explain the determination of Peak Medical's liability, for which there was no evidence whatsoever of any right to exercise control over the facility? In the absence of any real evidence of a joint venture, the jury did exactly what Plaintiff asked it to do: It inferred a right of mutual control and a profit/loss-sharing agreement from evidence tending to show a series of ordinary corporate relationships; Peak Medical was swept up with the others.

{40} Ultimately, the sine qua non of a joint venture is an agreement. *Sheppard v. Carey*, 254 A.2d 260, 263 (Del. Ch. 1969). Because there was not sufficient evidence to prove one—even by inference—Defendants' motion for directed verdict should have been granted.

{41} With respect to co-employment, we cannot locate any case anywhere (and Plaintiff has not cited one) that has held that, absent veil-piercing, a parent corporation can be vicariously liable in tort as a simultaneous co-employer of its subsidiary's employees. *See Atwood v. Chicago, R.I. & P. Ry. Co.*, 72 F. 447, 455 (C.C.W.D. Mo. 1896) ("It is a doctrine as old as the Bible itself, and the common law of the land follows it, that a man cannot serve two masters at the same time[.]"). The novelty of the issue was evident in a lengthy argument below about the wording of our respondeat superior uniform jury instructions, which are naturally directed at the relationship between an employee and a single employer. *See* UJI 13-403 NMRA; UJI 13-407 NMRA.

{42} Joint employment theories (with specially formulated multifactor tests) have sometimes arisen from the particular definitions in federal employment and labor statutes, *see, e.g.*, 42 U.S.C. § 2000e-2 (2014); 29 U.S.C. § 206(d)(1) (2016),

[2]See, for example, the agreement between PMAL and Sun:

The Subsidiaries shall remain solely responsible for, and the Administrative Assistance shall not include, the management and operation of the Subsidiaries, including clinical matters, supervision of staff, and the adoption of policies and procedures. Nothing herein shall delegate the control of or ultimate responsibilities of the Subsidiaries to Sun.

but even those cases take heed of limited liability and apply "a strong presumption that a parent company is not the employer of its subsidiary's employees[.]" *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993). *Frank*, for example, held that the "extraordinary circumstances" that would establish a joint employment relationship between parent and subsidiary did not exist, though the parent owned all of its subsidiary's stock, shared a manager in common with its subsidiary, supervised employees of its subsidiary, provided services to its subsidiary, and established general policies governing the overall enterprise. *Id.* at 1362-64.

{43} In this case, co-employment liability was based only on an instruction that asked the jury to apply the "right of control" test that we use to distinguish employees from independent contractors. *See* UJI 13-403 ("An employer is one who has another perform certain work and who has the right to control the manner in which the details of the work are to be done, even though the right of control may not be exercised."). That effectively eschewed any finding of domination or instrumentality that is normally required to hold a shareholder vicariously liable for the torts of corporate employees. *See Morrissey v. Krystopowicz*, 2016-NMCA-011, ¶ 13, 365 P.3d 20. We conclude that there is no viable claim of co-employment liability, at least not in this context, and that judgment as a matter of law should have been granted on that issue as well. To the extent the evidence revealed questionable corporate practices on the part of Sun or SunBridge, Plaintiff was free to seek the equitable relief of veil-piercing, which is a firmly established exception to the general rule that "[s]hareholders can . . . commit limited capital to the corporation with the assurance that they will have no personal liability for the corporation's debt." *Scott*, 1988-NMSC-028, ¶ 6.

{44} Our conclusion does not reach PMAL. "A corporation can act only through its officers and employees, and any act or omission of an officer or employee of a corporation, within the scope or course of his or her employment, is an act or omission of the corporation." *Bourgeous v. Horizon Healthcare Corp.*, 1994-NMSC-038, ¶ 11, 117 N.M. 434, 872 P.2d 852. There is no dispute that PMAL employed the negligent staff at VNR.

CONCLUSION

{45} We affirm the entry of judgment against PMAL and reverse with respect to all other Defendants. Since we have reversed aspects of the judgment and since the district court relied, in part, on its view of the complexity of the issues in the case, we think it prudent to remand for the district court to reassess its award of prejudgment interest.

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

LINDA M. VANZI, Judge

WE CONCUR:
M. MONICA ZAMORA, Judge
J. MILES HANISEE, Judge

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New Mexico Legal Aid's Domestic Violence, Sexual Assault and Stalking Helpline in cooperation with the Volunteer Attorney Program is hosting a CLE entitled **"Representing Victims of Violence at Order of Protection Hearings"** on **March 31, 2017** from **9:00 am – 12:30 pm** at **New Mexico Legal Aid**, 301 Gold Ave. SW, Albuquerque, NM 87102

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FREE for attorneys who agree to represent a victim pro bono at an order for protection hearing within the next 12 months, or who agree to help staff the DV Helpline for 12 hours within the next 12 months (training provided).

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Senior Trial Attorney/Deputy District Attorney Union County

The Eighth Judicial District Attorney's Office is accepting applications for a Senior Trial Attorney or Deputy District Attorney in the Clayton Office. The position will be responsible for a felony caseload and must have at least two (2) to four (4) years as a practicing attorney in criminal law. This is a mid-level to an advanced level position. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send interest letter/resume to Suzanne Valerio, District Office Manager, 105 Albright Street, Suite L, Taos, New Mexico 87571 or svalerio@da.state.nm.us. Deadline for the submission of resumes: Open until position is filled.

Bilingual Domestic Violence Family Law Attorney and Legal Director

Enlace Comunitario (EC), a social justice non-profit organization in Albuquerque, N.M. works to eliminate domestic violence in the immigrant community and is seeking applications for a Legal Director and a staff attorney. Attorneys in the legal department represent EC clients in domestic relations matters including orders of protection. The legal director must be an experienced and effective attorney, mentor and trainer. The Legal Director is part of the lead¬ership team and will work collaboratively to fur¬ther EC's mission. More information about the positions can be found on EC's web site. http://www.enlacenm.org/. Required: State of New Mexico Bar License or eligible for NM limited license pursuant to NM Rule 15-301.2. Spanish/English bilingual proficiency and committed to social justice. LEGAL DIRECTOR: At least three years of family law practice experience for legal director position. STAFF ATTORNEY: At least one year as a licensed attorney preferably with family law practice experience. Preference will be given to individuals with experience working with domestic violence, immigrant rights and/or social justice issues. Competitive salary and benefits depending on experience. If interested, please send your resume, letter of interest and a recent writing sample to info@enlacenm.org. Closing date: Open until filled.

Attorney
Nonprofit children's legal services agency seeks full-time attorney to represent care givers in kinship guardianship cases, manage network of contract attorneys, conduct trainings and perform other duties. Five years' legal experience and some experience in civil/family law required. English/Spanish speakers preferred. Demonstrated interest in working on behalf of children and youth required. Excellent interpersonal skills, writing skills, attention to detail, and ability to multi-task are required. No telephone calls please. Submit resume with cover letter to info@pegasuslaw.org.

Legal Assistant
East Mountain Attorney seeks experienced, highly organized legal assistant on a part-time basis. If interested, please e-mail your resume to fwilson@moplaw.com.

Paralegal
Busy estate planning and transactional firm seeks paralegal with experience in wills, trusts, probate and administration. Ideal candidate must be proactive, organized, and able to effectively multi-task. Salary DOE. Excellent benefits. Email resume, cover letter, writing sample and references to nmwillsandtrusts@gmail.com. Drug-free workplace. Incomplete applications will not be considered.

Office Manager/Paralegal
Poulos and Coates, an established Las Cruces law firm, is seeking to hire a full time office manager/paralegal. Duties will include: Office management, management of advertising, bookkeeping, accounts receivable, accounts payable, payroll administration and line of credit administration. Excellent hours and salary. Submit resume and cover letter to: victor@pouloscoates.com

Paralegal
Busy personal injury firm seeks paralegal with experience in personal injury litigation. Ideal candidate must possess excellent communication, grammar and organizational skills. Must be professional, self-motivated and a team player who can multi-task. Salary depends on experience. Firm offers benefits. Fax resumes to (505) 242-3322 or email to: nichole@whitenerlawfirm.com

Paralegal
Litigation Paralegal with minimum of 3- 5 years' experience, including current working knowledge of State and Federal District Court rules, online research, trial preparation, document control management, and familiar with use of electronic databases and related legal-use software technology. Seeking skilled, organized, and detail-oriented professional for established commercial civil litigation firm. Email resumes to e_info@abrfirm.com or Fax to 505-764-8374.

Services

Research and Writing
For the past 20 years I have provided research and writing for NM attorneys, including some who are recognized as Super Lawyers, Best Lawyers in America, and AV-rated, as well as other hard-working lawyers who also may deserve such recognition. I have litigation and appellate experience. I have a talent for finding authority that others may have difficulty finding. I am a published author and a former professor of Canon Law. Terence Grant, J.D., magna cum laude. legalresearch@comcast.net. 505-508-1755.

Office Space

Two Offices For Rent
Two offices for rent, one block from courthouses, all amenities: copier, fax, printer, telephone system, conference room, high speed internet, and receptionist, office rent $400 and $700, call Ramona @ 243-7170.

Office For Lease Or Sublease
1,877 sq. ft. corner office opens to atrium at One Executive Center, 8500 Menaul NE, A-400, three atty offices, conf. room, large secretary station, reception area, kitchen, telephone system, high speed internet, office rent $2,660; call Jim or Marcy @ 275-1222; 235-7697. Available March 31, 2017. Quality furniture for sale.

For Lease
1817 sq.ft. of bright office space in the Calle Medico area in Santa Fe; includes 6 offices with windows, a common area, utilities and janitorial service and ample parking. For information, please contact Eva or Diana at 505-988-4476.

For Sale

Closing Law Office
Top quality exec. desks, chairs, credenzas, conf. table/chairs, bookcases, storage cabinets, and more. Call: 275-1222, 235-7697 or text 235-7693.

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Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

BAR BULLETIN
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All advertising must be submitted via e-mail by 4 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Wednesday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.**

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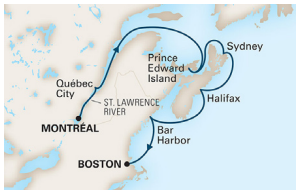

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CLE course information and registration is forthcoming. Volunteer to teach and get free CLE registration ($350). Send proposals to Christine Morganti, cmorganti@nmbar.org.

*Space may still be available on the ms Veendam after March 31. However, attendees who register for the cruise after the March 31 deadline will not be eligible for the State Bar discounted rate or planned group activities. **The March 31 deadline does not apply to CLE registration.**

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