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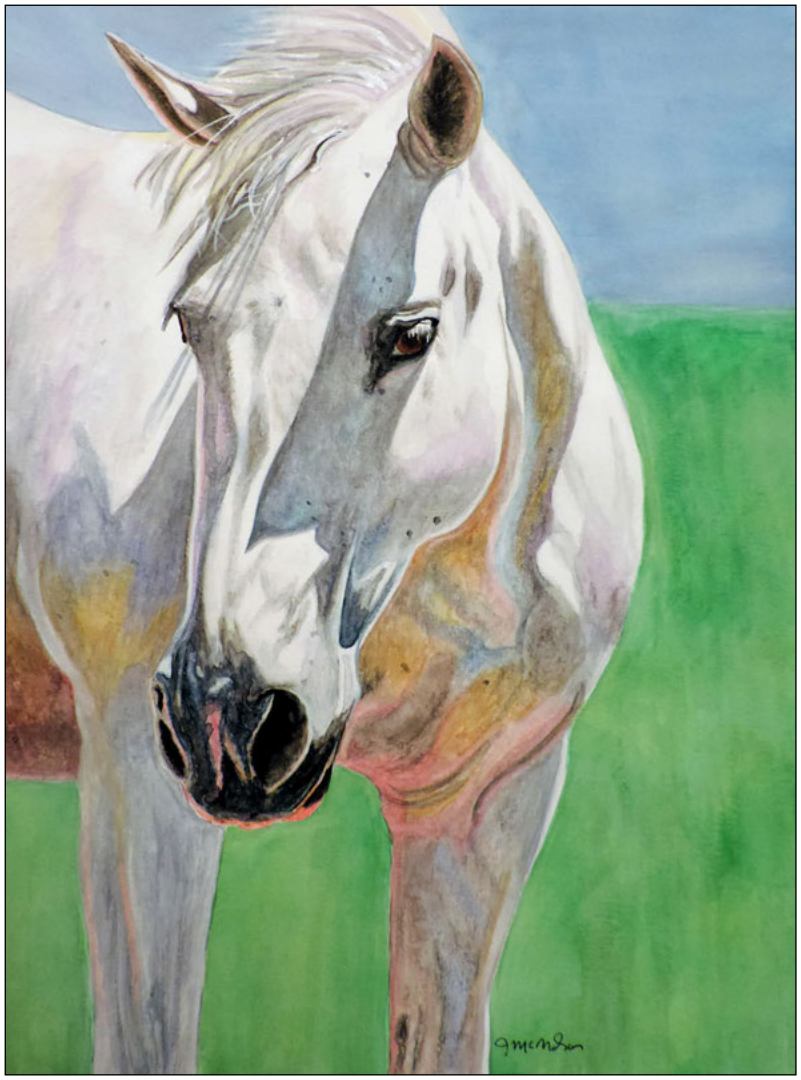

Sunny Day Gray, by Joan McMahon (see page 3) Lea County Museum Art Gallery

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New Mexico Lawyer

Real Property, Trust and Estate Law

STATE BAR of NEW MEXICO

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9
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6
Common Legal Issues for Senior Citizens
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7
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

7
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

7
Common Legal Issues for Senior Citizens
Presentation 9:30–10:45 a.m., Neighborhood Senior Center, Gallup, 1-800-876-6657

9
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

About Cover Image and Artist: Joan McMahon seeks to capture the joy she experiences in sharing her life with an extended family of animal members. Her watercolors radiate the inner light of her subject animals. Joan decided that her artwork should "pay it forward" for the animals that inspire it. With the sales of her art Joan donates to animal rescue and welfare organizations. More of her work can be viewed at www.joansart.com.

Notices

Court News

Seventh Judicial District Court

Judicial Applicants Recommended to Governor

The Seventh Judicial District Court Nominating Commission convened on May 18 in Socorro and completed its evaluation of the six applicants for the vacancy on the Seventh Judicial District Court. The Commission recommends the following five applicants (in alphabetical order) to Gov. Susana Martinez: **Gordon Bennett**, **Ricardo A. Berry**, **Shannon Murdock**, **Matthew "Mateo" S. Page** and **Roscoe A. Woods**.

Bernalillo County Metropolitan Court

Investiture of Hon. Renée Torres

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. Renée Torres, Division III at 5:15 p.m., June 1, in the Bernalillo County Metropolitan Court Rotunda. Judges who want to participate in the ceremony, including Tribal Court judges, should bring their robes and report to the First Floor Viewing Room by 5 p.m. Following the ceremony, a reception will be held on the first floor of the Metro Court.

State Bar News

Attorney Support Groups

- June 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- June 12, 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#.
- July 19, 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: Protecting Pollinators: Laws, Policies, Action

Join Julie McIntyre, pollinator coordinator for the Southwest Region 2 of U.S. Fish and Wildlife, for an Animal Law Section Animal Talk. McIntyre will discuss the importance of pollinators, along with federal, state and tribal protections for pollinators from noon-1 p.m., June 22, at the State Bar Center and by teleconference. Snacks and refreshments will be provided. Contact Breanna Henley at bhenley@nmbar.org to indicate your attendance or to obtain teleconference information.

Professionalism Tip

With respect to opposing parties and their counsel:

I will not serve motions and pleadings that will unfairly limit the other party's opportunity to respond.

Annual Meeting—Bench and Bar Conference

Resolutions and Motions

Resolutions and motions will be heard at 2:30 p.m., July 27, at the opening of the State Bar of New Mexico 2017 Annual Meeting at the Inn of the Mountain Gods Resort in Mescalero. To be presented for consideration, resolutions or motions must be submitted in writing by June 27 to Acting Executive Director Richard Spinello, PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or e-mail rspinello@nmbar.org.

Appellate Practice Section

Luncheon with Judge Vargas

Join the Appellate Practice Section and YLD for a brown bag lunch at noon, June 2, at the State Bar Center with guest Judge Julie J. Vargas of the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate judges and practitioners who appear before them to exchange ideas and get to know each other better. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. with Zach Ives at zach@ginlawfirm.com. Space is limited.

Board of Bar Commissioners

Appointment of Young Lawyer Delegate to ABA House of Delegates

The Board of Bar Commissioners will make one appointment of a young lawyer delegate to the American Bar Association (ABA) House of Delegates (HOD) for a two-year term, which will begin at the conclusion of the 2017 ABA Annual Meeting in August 2017 and expire at the conclusion of the 2019 ABA Annual Meeting. The delegate must be willing to attend ABA mid-year and annual meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar. However, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members who want to serve as the young lawyer delegate to the HOD must have been admitted to his or her first bar within the last five years or be less than 36 years old at the beginning of the term; be an ABA member in good standing throughout the tenure as a delegate; and report to the N.M. YLD Board during the YLD Board's scheduled board meetings throughout the tenure as a delegate. Qualified candidates should send a letter of interest and brief resume by June 16 to Kris Becker at kbecker@nmbar.org or by fax to 505-828-3765.

Criminal Law Section

Telling Your New Mexico Legal Story and Getting it Published

Do you have a story that needs telling? The real questions are, "How do you tell your story? How do you get it published and produced and follow the rules of ethical procedure? How do you avoid being sued?" Jonathan Miller has practiced law in New Mexico since 1988 and has appeared in court (as a lawyer) in every judicial district. He is the author of 12 books, including the upcoming *Luna Law: A Rattlesnake Lawyer novel*. Miller will discuss how to get published in today's changing environment and how to protect oneself from the pitfalls. At the end, Miller will discuss attendees' potential ideas if time permits. Join him from 1:30-2:30 p.m., June 24, at the State Bar Center and by teleconference. Contact Breanna Henley at bhenley@nmbar.org to obtain teleconference information and to R.S.V.P. To submit a question for Miller in advance, visit www.nmbar.org/CriminalLaw. Information given during this event is solely the opinion of the presenter. Information given is not deemed

to be an endorsement by the State Bar of New Mexico or the Board of Bar Commissioners of the views expressed therein.

Taxation Section

Tax Practitioner Liaison Lunch

Join the Taxation Section for a Tax Practitioner Liaison Lunch from noon-1 p.m., June 12, at the State Bar Center. Speakers include Lelah Lucero, the senior stakeholder liaison for the Internal Revenue Service, and Samuel Peat, the tax practitioner liaison for the N.M. Taxation & Revenue Department. Lucero and Peat will give a presentation on resources for practitioners with their respective taxing agencies, will provide relevant updates for up and coming issues within their agencies and be available to answer questions you may have as a tax practitioner. The cost for the lunch and presentation is $15 for Taxation Section members, $20 for non-members and $12.50 for law students. Visit www.nmbar.org/tax to register.

Young Lawyers Division

Volunteers Needed for Wills for Heroes in Rio Rancho

The Young Lawyers Division seeks volunteer attorneys for its Wills for Heroes event for Rio Rancho Police officers from 9 a.m.-2 p.m., June 10, at the Loma Colorado Main Library, located at 755 Loma Colorado Blvd NE in Rio Rancho. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Paralegal and law student volunteers are also needed to serve at witnesses and notaries. Volunteers should bring a windows laptop if they are able. Contact YLD Vice Chair Sonia Russo at soniarusso09@gmail.com to volunteer and indicate if you have a laptop to bring or if you will need one.

Volunteers Needed for Veterans Legal Clinic

The Veterans Legal Clinic seeks volunteer attorneys to provide brief legal advice (15-20 minutes) to veterans in the areas of family law, consumer rights, bankruptcy, landlord/tenant and employment. The remaining clinic dates and times for 2017 are June 13 and Sept. 12 from 8:30-11 a.m. For more information or to volunteer contact Keith Mier at KCM@sutinfirm.com.

UNM

Law Library Hours

Through Aug. 20

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.

Holiday Closures

May 29: Memorial Day
July 4: Independence Day

Other Bars

Albuquerque Bar Association

June Luncheon with Bill Slease

The Albuquerque Bar Association's next membership luncheon will be June 6 at the Hyatt Regency in Albuquerque. Bill Slease will present "Disciplinary Board Update" from noon–1 p.m. (arrive at 11:30 a.m. for networking). Afterwards, there will be a malpractice panel (2.0 G) with Jack Brandt, Briggs Cheney and Jerry Dixon at 1:15 p.m. Register online at www.abqbar.org.

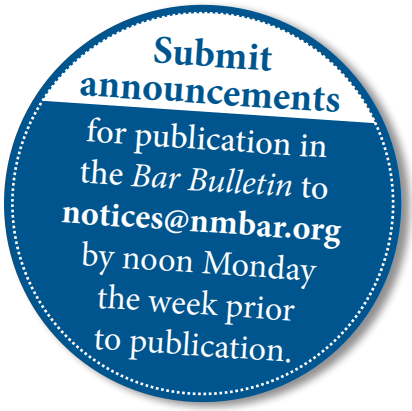
Request for Feedback Regarding Law Day Luncheon

The Albuquerque Bar Association welcomed more than 300 participants to its annual Law Day luncheon on May 2. The program, "The 14th Amendment: Transforming American Democracy," was presented by the Hon. Christina Armijo, chief judge of the U.S. District Court for the District of New Mexico. Chief Judge Armijo analyzed six cases that had a defining impact on Due Process jurisprudence. The Albuquerque Bar was also honored to host Chief Justice Charles W. Daniels who delivered the annual memorial list. The program also recognized the bright young minds who won the 2017 Gene Franchini High School Mock Trial Competition, the State Bar Student Essay Contest and the Breaking Good Video Contest. Thanks to all who participated. Feedback on this and future events is encouraged. Send emails to Executive Director Terah Beckmann at TBeckmann@abqbar.org.

New Mexico Criminal Defense Lawyers Association

Fighting Forensics CLE

Join the New Mexico Criminal Defense Lawyers Association on June 9 in Albuquerque for the Fighting Forensics CLE (6.0 G), the annual membership meeting and the Driscoll Award Ceremony. Topics include DNA, pathology, computer, cell phone and body camera forensics. Afterwards, NMCDLA members and their families and friends are invited to the annual membership party and silent auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar today.



Other News

Southwest Women's Law Center

Understanding Proposed Changes in Healthcare

The Southwest Women's Law Center invites members of the legal community to its Healthcare CLE (1.0 G) to learn how to navigate the complexities of the healthcare law and understand proposed changes to the law. SWLC will discuss new terminology in healthcare and proposed changes to deliverables under the American Health Care Act. The CLE only costs $25. The CLE will be 4–5 p.m., June 6, in the SWLC Conference Room, 1410 Coal Avenue SW, Albuquerque, NM 87104. For more information, call 505-244-0502, or visit www.swwomenslaw.org.

Legal Education

May

31 **Ethics and Artificial Intelligence in Law Practice Software and Tools**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

1–3 **2017 Jackrabbit Bar Conference**
7.8 G
Live Seminar, Santa Fe
State Bar of New Mexico
www.nmbar.org/nmstatebar/JBC.aspx

2 **Drafting Employee Handbooks**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Ethics in Civil Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Understanding Proposed Changes in Healthcare**
1.0 G
Live Seminar, Albuquerque
Southwest Women's Law Center
505-244-0502

7 **2017 Ethics in Civil Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **Annual Judicial Conclave**
9.4 G, 4.0 EP
Live Seminar, Albuquerque
University of New Mexico JEC and IPL
jec.unm.edu

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

9 **The Disciplinary Process (2016 Ethicspalooza)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **SAFeR Approach**
4.0 G
Live Seminar, Albuquerque
New Mexico Coalation Against Domestic Violence
www.nmcadv.org

9 **Tax Lightning: How to Avoid Being Struck**
2.0 G
Live Seminar, Albuquerque
New Mexico Hispanic Bar Association
www.nmhba.net

9 **Evidence Issues for Bankruptcy Lawyers**
2.0 G
Live Seminar, Albuquerque
U.S. Bankruptcy Court, District of New Mexico
505-348-2545

9 **Ethical Issues in Pro Bono**
2.0 EP
Live Seminar, Albuquerque
Volunteer Attorney Program
505-545-8542

16 **Reforming the Criminal Justice System (2017)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Avoiding Discrimination in the Form I-9 or E-Verify (2017)**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Ethical Issues of Social Media and Technology in the Law (2016)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **The Ethics of Supervising Other Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Representing Victims of Domestic and Sexual Violence in Family Law Cases**
2.0 G
Live Seminar, Albuquerque
Volunteer Attorney Program
505-814-5038

16 **Representing Victims of Domestic and Sexual Violence in Family Law Cases**
2.0 G
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-5038

16 **Long Term Care**
1.0 EP
Live Seminar, Albuquerque
UNM School of Medicine
som.unm.edu/ethics

19 **Fourth Amendment: Comprehensive Search and Seizure Training for Trial Judges**
25.0 G
Live Seminar, Santa Fe
National Judicial College
775-784-6747

22 **Lawyer Ethics and Credit Cards**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

22 **Decanting and Otherwise Fixing Broken Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Copy That! Copyright Topics Across Diverse Fields (2016)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2016 Real Property Institute**
4.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **DTSA: Protecting Employer Secrets After the New Defend Trade Secrets Act**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

30 **The Rise of 3-D Technology - What Happened to IP? (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

July

12 **Technical Assistance Seminar**
6.0 G
Live Seminar, Albuquerque
U.S. Equal Employment Opportunity Commission
602-640-4995

18 **Techniques to Restrict Shareholders/LLC Members: The Organizational Opportunity Doctrine, Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Default and Eviction of Commercial Real Estate Tenants**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Annual Rocky Mountain Mineral Law Institute**
13.0 G, 2.0 EP
Live Seminar, Santa Fe
Rocky Mountain Mineral Law Foundation
www.rmmlf.org

21 **Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Commercial Paper: Drafting Short-Term Notes to Finance Company Operations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Evidence and Discovery Issues in Employment Law**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27-29 **24th Annual Advanced Course: Current Developments in Employment Law**
17.5 G, 1.0 EP
Live Webcast/Live Seminar, Santa Fe
American Law Institute
www.ali-cle.org/CZ002

27–29 **2017 Annual Meeting—Bench & Bar Conference**
8.0 G, 7.0 EP (total possible)
Live Seminar, Mescalero
Center for Legal Education of NMSBF
www.nmbar.org

August

8 **Lawyers Ethics in Employment Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Tricks and Traps of Tenant Improvement Money**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

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

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

Effective May 19, 2017

UNPUBLISHED OPINIONS

No. 36049	5th Jud Dist Lea CR-16-173, STATE v K SCHELLER (reverse)	5/16/2017
No. 35865	1st Jud Dist Santa Fe LR-16-18, STATE v R VAUGHN (affirm)	5/16/2017
No. 35776	2nd Jud Dist Bernalillo CR-14-1945, STATE v S HARPER (reverse)	5/17/2017
No. 35891	11th Jud Dist San Juan JQ-14-40, CYFD v DONNA W (affirm)	5/17/2017
No. 36058	6th Jud Dist Grant JQ-15-9, CYFD v DEREK T (affirm)	5/17/2017
No. 36145	3rd Jud Dist Dona Ana CR-16-151, STATE v C MALDONADO (affirm)	5/18/2017

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

STATE BAR of NEW MEXICO

2017 Annual Meeting– Bench & Bar Conference

Congratulations!

The State Bar of New Mexico is proud
to announce the recipients of the

2017 Annual Awards!

The Annual Awards will be presented July 28 during the 2017 Annual Meeting—Bench & Bar Conference at the Inn of the Mountain Gods in Mescalero, N.M. We hope you will join us to celebrate these individuals and programs who have made exemplary contributions to the State Bar and legal profession.

Distinguished Bar Service Award
Scott M. Curtis

Distinguished Bar Service Non-lawyer Award
Cathy Ansheles

Justice Pamela B. Minzner Professionalism Award
Hon. Elizabeth E. Whitefield

Outstanding Legal Program Award
YLD Wills for Heroes Program

Outstanding Young Lawyer of the Year Award
Spencer L. Edelman

Robert H. LaFollette Pro Bono Award
Stephen C. M. Long

Seth D. Montgomery Distinguished Judicial Service Award
Hon. Michael D. Bustamante

Visit **www.nmbar.org** for more information and to register for the Annual Meeting.

New Commissioners Sworn In

On April 21, eight new members of the Board of Bar Commissioners were sworn in. Chief Justice of the New Mexico Supreme Court Charles W. Daniels administered the Oath for each new commissioner and made remarks.

Pictured above are **Raynard Struck** (First Bar Commissioner District), **David P. Lutz** (Seventh BCD), **Erinna M. "Erin" Atkins** (Sixth BCD), **Carla C. Martinez** (First BCD), **Elizabeth J. Travis** (Third BCD), Chief Justice Daniels, **Tomas J. Garcia** (YLD Chair), **Barbara C. Lucero** (Paralegal Division Liaison) and **Mick I.R. Gutierrez** (Seveth BCD).

After swearing in the new commissioners, the Chief Justice affirmed the Court's appreciation for the State Bar. "Thank you for all the work you do," he said to the Board, "and for letting me be a part of this celebration."

President Scotty A. Holloman, President-Elect Wesley O. Pool, Secretary-Treasurer Gerald G. Dixon and Immediate Past President J. Brent Moore make up this year's officers. Officers were sworn in at the Supreme Court in Santa Fe on Dec. 14, 2016.

To learn more about the Board of Bar Commissioners and to find your representative, visit www.nmbar.org/BBC. More photos of the swearing-in can be found at www.nmbar.org/photos.

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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Dated May 17, 2017

Clerk's Certificate of Address and/or Telephone Changes

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective May 24, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 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		
12-307.2	Electronic service and filing of papers	07/01/2017*
12-314	Public inspection and sealing of court records	03/31/2017

* Voluntary electronic filing and service in any new or pending case in the Supreme Court may commence on May 1, 2017.

Disciplinary Rules		
17-202	Registration of attorneys	07/01/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017
Rules Governing Review of Judicial Standards Commission Proceedings		
27-104	Filing and service	07/01/2017

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.

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-009

No. S-1-SC-35751 (filed January 23, 2017)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
TREVOR BEGAY,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
JOHN A. DEAN, JR., District Judge

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Opinion

Judith K. Nakamura, Justice

{1} The question before this Court is whether a magistrate court had jurisdiction to revoke probation when a defendant violated the terms of probation and was in bench-warrant status when the defendant's original probationary period expired. We hold that NMSA 1978, Section 31-20-8 (1977), does not deprive a magistrate court of jurisdiction to revoke a defendant's probation under these circumstances. Accordingly, we reverse the judgment of the Court of Appeals and remand for the execution of the sentence imposed by the magistrate court.

I. BACKGROUND

{2} Trevor Begay pleaded no contest to a petty misdemeanor count of battery. The San Juan County Magistrate Court in Farmington imposed a 182-day sentence, suspended 171 days, credited Begay with 11 days of pre-sentence confinement, and imposed supervised probation. Begay failed to comply with the terms of his probation; he neither completed a life skills class nor performed community service. The magistrate court consequently ordered Begay to appear for a hearing. When Begay failed to appear at the September 25, 2012, hearing, the magistrate judge issued a bench warrant for his arrest. Had Begay complied with the terms of his probation, his original probationary sentence would have concluded on December 27, 2012. Instead, on that day, Begay was subject to an outstanding warrant.

{3} Begay was arrested on February 11, 2013. He subsequently admitted to violating the terms of his probation. On March 14, 2013, the magistrate court revoked his probation and imposed a jail sentence of 171 days. The court suspended 96 days of the sentence and awarded 31 days of pre-sentence confinement credit, which left 44 days to be served in jail. Begay appealed the judgment and sentence to the Eleventh Judicial District Court.

{4} Once in district court, Begay moved to dismiss the probation-violation proceedings. Begay asserted that the magistrate court had lacked jurisdiction to revoke his probation and to impose penalties after the original probationary term had concluded. Begay argued that the magistrate court's bench warrant did not toll the running of his probationary term because NMSA 1978, Section 31-21-15(C) (1989), which authorized such tolling, applied only to the district courts. According to Begay, when his original probationary term expired on December 27, 2012, he was relieved of all obligations imposed by the magistrate court, satisfied all criminal liability for violation of NMSA 1978, Section 30-3-4 (1963), and was entitled to a certificate of satisfactory completion. The district court denied the motion.

{5} The district court then conducted a de novo probation-revocation hearing and issued a final order. The district court concluded that for the 137 days from the date of the bench warrant to the date of Begay's arrest, Begay was a fugitive and, hence, his probationary term did not expire on December 27, 2012, but rather on May 13, 2013. Thus, on March 14, 2013, the magistrate court had jurisdiction to revoke Begay's probation. Because the district court concluded that Begay had violated the conditions of probation, the court remanded to the magistrate court for execution of the magistrate court's March 14, 2013, amended judgment and sentence. Begay again appealed.

{6} The Court of Appeals reversed the district court's order. *State v. Begay*, 2016-NMCA-039, ¶ 1, 368 P.3d 1246. The Court acknowledged that Section 31-21-15(C) (1989) authorized tolling a probationer's suspended sentence where the probationer had violated the terms of his or her probation and could not be found to answer for the violation. *See Begay*, 2016-NMCA-039, ¶ 4. The Court held, however, that Section 31-21-15(C) (1989) was limited to cases where the defendant's underlying conviction occurred in the district court. *Begay*, 2016-NMCA-039, ¶ 6. Therefore, the Court held that the statute did not authorize the magistrate court to toll Begay's suspended sentence from the date the magistrate court had issued the bench warrant until the date of Begay's arrest. *See id.* ¶¶ 1, 6. As a result, the Court of Appeals determined that Begay's probationary sentence expired on December 27, 2012, even though as of that date Begay had absconded and was in bench-warrant status. *See id.* ¶¶ 2, 8. The Court of Appeals accordingly required the entry of an order certifying that Begay was relieved of any obligations imposed by the magistrate court and had satisfied his criminal liability. *Id.* ¶ 8. This Court granted the State's petition for certiorari review, exercising our jurisdiction under Article VI, Section 3 of the New Mexico Constitution and NMSA 1978, Section 34-5-14(B)(4) (1972).

II. DISCUSSION

A. This case presents an issue of substantial public interest

{7} The Court of Appeals issued its *Begay* opinion on January 13, 2016. On March

2, 2016, the Legislature amended Section 31-21-15(C) to provide:

> If it is found that a warrant for the return of a probationer cannot be served, the probationer is a fugitive from justice. After hearing upon return, if it appears that the probationer has violated the provisions of the probationer's release, the court shall determine whether the time from the date of violation to the date of the probationer's arrest, or any part of it, shall be counted as time served on probation. *For the purposes of this subsection, "probationer" means a person convicted of a crime by a district, metropolitan, magistrate or municipal court.*

2016 N.M. Laws, ch. 27, § 1; NMSA 1978, § 31-21-15(C) (2016) (emphasis added). In light of this amendment, Begay requests this Court to quash our grant of certiorari review. Begay argues that after the 2016 statutory amendment, this matter does not present an issue of public importance but rather of simple error correction.

{8} We disagree. Notwithstanding the Legislature's recent amendment, there remains an issue of "substantial public interest." Section 34-5-14(B)(4). The Court of Appeals's opinion calls into question the validity of a significant number of orders issued by magistrate courts across New Mexico (as well as the metropolitan and municipal courts), including orders that imposed or reinstated probationary conditions such as restitution payments, warrant fees, and probation fees. The question of the validity of those orders arises because New Mexico case law has interpreted Section 31-20-8 and NMSA 1978, Section 31-20-9 (1977), "as depriving courts of jurisdiction to revoke probation or to impose any sanctions for violation of probation conditions once the probationary period has expired . . . ." *State v. Ordunez*, 2012-NMSC-024, ¶¶ 8- 9, 283 P.3d 282 (citing *State v. Lara*, 2000-NMCA-073, ¶ 11, 129 N.M. 391, 9 P.3d 74; *State v. Travarez*, 1983-NMCA-003, ¶ 6, 99 N.M. 309, 657 P.2d 636). If, as the Court of Appeals concluded, a magistrate court lacked the power to toll a probationary sentence where a defendant had violated the terms of probation, failed to appear, and could not be located, then it might appear that the magistrate court lost jurisdiction when the original probationary period expired. Absent jurisdiction, any orders imposed by the magistrate courts in probation-revocation proceedings after absconded probationers were arrested and compelled to appear would be invalid. The validity of these orders clearly constitutes a question of substantial and statewide public interest. Accordingly, our grant of certiorari review was proper, and we will not quash it as improvidently granted.

B. Standard of review

{9} This Court reviews issues of statutory interpretation de novo. *State v. Tufts*, 2016-NMSC-020, ¶ 3, __P.3d__. Rules of statutory construction are provided by the Uniform Statute and Rule Construction Act, NMSA 1978, §§ 12-2A-1 to -20 (1997), and by New Mexico case law, *Tufts*, 2016-NMSC-020, ¶ 3. This Court must construe statutes, if possible, to give effect to their objective and purpose and to avoid absurd results. Section 12-2A-18(A)(3); *see also State v. Maestas*, 2007-NMSC-001, ¶ 16, 140 N.M. 836, 149 P.3d 933 ("If adherence to the plain meaning of a statute would lead to absurdity, we must reject that meaning and construe the statute according to the obvious intent of the legislature.").

C. The magistrate court had jurisdiction to enter its March 14, 2013, order revoking Begay's probationary sentence and imposing a jail sentence

{10} This case implicates the interpretation of two statutes. First, Section 31-20-8 addresses the "[e]ffect of termination of [a] period of suspension without revocation of order." The statute provides:

> Whenever the period of suspension expires without revocation of the order, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime. He shall thereupon be entitled to a certificate from the court so reciting such facts . . . .

Id. Second, Section 31-21-15(C) (1989) concerned the power to toll a probationary sentence. It provided:

> If it is found that a warrant for the return of a probationer cannot be served, the probationer is a fugitive from justice. After hearing upon return, if it appears that [he] has violated the provisions of [his] release, the court shall determine whether the time from the date of violation to the date of [his] arrest, or any part of it, shall be counted as time served on probation.

Id.

{11} Begay relies on both statutes to argue that the magistrate court lacked the power to enter an order revoking his probationary sentence and imposing a new sentence. Begay points out that, under Section 31-20-8, when a probationary period expires without an order revoking probation, the expiration of the probationary period relieves the defendant of any obligations imposed by the court. Begay maintains that Section 31-20-8 requires this result *even if* the probationary period expires when the defendant has failed to comply with his or her terms of probation and a bench warrant has been issued. Next, Begay argues that Section 31-21-15(C) (1989) did not empower the magistrate courts to toll the running of a probationary period where the defendant allegedly had violated probation and absconded. Begay therefore asserts that once his original probationary period expired, the magistrate court was without jurisdiction to enter a probation-revocation order.

{12} In its analysis, the Court of Appeals focused on the interpretation of Section 31-21-15(C) (1989). *See Begay*, 2016-NMCA-039, ¶¶ 4-7. In light of NMSA 1978, Section 31-21-5 (1991), which defines the terms as used in the Probation and Parole Act, NMSA 1978, §§ 31-21-3 to -19 (1955, as amended through 2016), we agree that Section 31-21-15(C) (1989) did not empower courts of limited jurisdiction to toll the running of a probationary period. *See Begay*, 2016-NMCA-039, ¶¶ 4-7. Unlike the Court of Appeals, however, we do not believe that this interpretation disposes of this case. Even though Section 31-21-15(C) (1989) did not authorize the magistrate court to toll the running of Begay's probationary period, the magistrate court nevertheless had jurisdiction as of March 14, 2013, to revoke Begay's probation.

{13} Section 31-20-8 does not deprive a trial court of the power to revoke probation when, at the time the defendant's probationary term expired, the defendant had allegedly violated the terms of probation and the court subsequently issued a bench warrant. Otherwise, the application of Section 31-20-8 would entail absurd results. To be sure, the plain language of Section 31-20-8 entitles a defendant to a certificate that he or she is relieved of any obligations imposed on him or her by the court and has satisfied all criminal liability "[w]henever the period of

suspension expires without revocation of the order . . . ." But, if "[w]henever the period of suspension expires" encompasses those instances when a probationer fails to comply with the terms of probation and successfully evades the service of a bench warrant, then a defendant may be relieved of all obligations imposed by the court by violating probationary terms and successfully evading the reach of the court until the probationary term ends. This is an absurdity, and the Legislature plainly did not intend it.

{14} The Legislature intended to vest the power to impose probationary sentences in the magistrate courts. *See* NMSA 1978, §§ 31-19-1(C) (1984), 31-20-5(A) (2003). Begay's interpretation of Section 31-20-8 would frustrate the Legislature's purposes when empowering the magistrate courts to impose probationary sentences. A reading of Section 31-20-8 that permits a defendant to be relieved of all obligations imposed by a court by violating probation and evading the execution of a warrant until an original probationary term expires would encourage defendants to do so. The Legislature, however, indubitably did not intend to enact a statute that incentivizes probationers to ignore the orders that the Legislature authorized New Mexico courts to impose.

{15} Because the Legislature did not intend this absurd result, we depart from the plain meaning of "whenever the period of suspension expires" when applying Section 31-20-8 to this case. "[O]ur case law demonstrates that we diverge from the plain meaning of a statute to avoid an absurd result only when it is clear that the legislature did not intend such a result." *Maestas*, 2007-NMSC-001, ¶ 22. To avoid an absurdity, the phrase "whenever the period of suspension expires" cannot be read to include those instances when a probationary period expires while a defendant has absconded after allegedly violating probation. Nor does this departure from plain meaning constitute any "great leap." *Cf. id.* ¶ 24 (refusing to read NMSA 1978, Section 10-16-3(D) (1993) to apply to judges as a class of defendants where the plain language of a statute did not include them). Accordingly, we hold that Begay's probationary period did not run from the date the magistrate court issued the bench warrant to the date of Begay's arrest.

{16} Further, New Mexico appellate case law does not support Begay's interpretation that Section 31-20-8 deprived the magistrate court of jurisdiction at the expiration of Begay's original probationary period. This Court has interpreted Section 31-20-8 "as depriving courts of jurisdiction to revoke probation or to impose any sanctions for violation of probation conditions once the probationary period has expired, even for violations occurring and revocation motions filed before expiration of probation." *Ordunez*, 2012-NMSC-024, ¶¶ 8-9 (citing *Lara*, 2000-NMCA-073, ¶ 11; *Travarez*, 1983-NMCA-003, ¶ 6). No New Mexico appellate opinion, however, suggests that Section 31-20-8 strips a trial court of jurisdiction when, at the time a defendant's probationary period expires, the defendant has allegedly violated probation and failed to appear to respond to such a charge, causing a bench warrant to issue. Our opinion in *Ordunez*, as well as the *Lara* opinion on which the *Ordunez* Court relied, concerned the meaning of Section 31-20-8 as it applied to the *timing* of probation-revocation motions, hearings, and orders. In *Ordunez*, this Court affirmed a dismissal of probation-revocation proceedings because the probation-revocation hearing was conducted after the defendant's original probationary term had expired. *See* 2012-NMSC-024, ¶¶ 5, 9, 23. In *Lara*, the Court of Appeals held that the trial court lacked jurisdiction to enter an order that the defendant unsatisfactorily completed probation because, even though the state had moved for unsatisfactory discharge and the trial court had set a hearing before the original probationary term had expired, the trial court did not enter its order until after the original probationary term expired. 2000-NMCA-073, ¶¶ 3, 12. *Ordunez* and *Lara* adjudicated fact patterns where the defendant was not responsible for the trial courts' entries of probation-revocation orders after the respective defendants' probationary terms had expired. Those cases did not present the circumstance in which a probation period expired while a noncompliant defendant failed to appear to respond to a charge of probation violation and a bench warrant issued. Hence, *Ordunez* and the opinions upon which it relied simply do not entail that Section 31-20-8 deprives a trial court of jurisdiction if a defendant's original probationary period expires while the defendant is on the run.

{17} Our interpretations of Section 31-20-8 reached in *Ordunez* and in this case strike the balance that the Legislature intended. Section 31-20-8 deprives a trial court of jurisdiction to enter a probation-revocation order when the probationary period expires and the defendant did not cause the revocation order to be entered after the defendant's probationary period expired. *See Ordunez*, 2012-NMSC-024, ¶¶ 5, 9, 23; *Lara*, 2000-NMCA-073, ¶¶ 3, 12. But where, owing to a defendant's furtive or fugitive actions, a trial court does not enter a probation-revocation order until after the defendant's probationary term has expired, Section 31-20-8 does not deprive the court of jurisdiction upon the expiration of the defendant's original probationary period. *See, e.g.*, *State v. Cannon*, 457 So.2d 1177, 1178 (La. 1984) (interpreting a state statute to hold that "the running of the probationary period shall cease when the defendant is deemed a fugitive and a warrant cannot be executed. . . . [I]n order to trigger suspension, the impediment to the execution of the warrant must derive from the *defendant's action* in concealing himself or fleeing from the jurisdiction and not from inactions by the State in its efforts to locate him." (emphasis added)).

{18} Lastly, we observe that our interpretation of Section 31-20-8 is consistent with the rules governing the probationary sentencing power of courts of limited jurisdiction. Rule 6-802(C) NMRA, for example, sets forth the procedure in the return of a probation violator. It provides that once a hearing is held and a probation violation is established, a magistrate court has the power to "require the probationer to serve the *balance* of the sentence imposed . . . ." Rule 6-802(C) (emphasis added). "Balance" in this context means only that time for which a defendant has successfully completed probation and, therefore, excludes the period from issuance of a warrant to arrest of the defendant pursuant to the warrant.

III. CONCLUSION

{19} For the foregoing reasons, the magistrate court had the authority to issue its March 14, 2013, order revoking Begay's original probationary sentence and imposing a new sentence. Accordingly, we reverse the decision of the Court of Appeals and remand for execution of the magistrate court's March 14, 2013, judgment and sentence.

{20} IT IS SO ORDERED.

JUDITH K. NAKAMURA, Justice

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

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-010

No. S-1-SC-35512 (filed January 26, 2017)

PHOENIX FUNDING, LLC,
Plaintiff-Respondent,
v.
AURORA LOAN SERVICES, LLC and
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
FRANCIS J. MATTHEW, District Judge

JOSHUA A. SPENCER
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Albuquerque, New Mexico

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for Respondent

Opinion

Judith K. Nakamura, Justice

{1} We are called to decide whether a 2009 default foreclosure judgment may be collaterally attacked based on assertions that the judgment was void for lack of jurisdiction and procured by fraud. In this case, those assertions were made by Phoenix Funding, LLC, which attempted to overturn a settled foreclosure judgment entered in favor of Aurora Loan Services, LLC. We hold that the 2009 default judgment was not void and that Phoenix's fraud claim is procedurally barred. Accordingly, we reverse the judgment of the Court of Appeals, reinstate the district court's grant of summary judgment to Aurora, and remand to the district court with instructions to dismiss Phoenix's fraud claim.

I. BACKGROUND

{2} On December 13, 2006, Kirsten Hood executed a promissory note payable to GreenPoint Mortgage Funding, Inc., for the purchase of a home in Santa Fe, New Mexico (the Property). This note was secured by a mortgage in favor of Mortgage Electronic Registration Systems, Inc., (MERS), as nominee for GreenPoint.

{3} By way of the following transactions, the Hood note was eventually transferred from GreenPoint to Aurora. First, after origination, the note was pooled into a securitized trust—namely, GreenPoint Mortgage Funding Trust Mortgage Pass-Through Certificates, Series 2007-ARI. An agreement that created this securitized trust indicated that the Hood note was held by Lehman Brothers Holdings Inc., which transferred it to Structured Asset Securities Corporation, who then transferred the note to U.S. Bank National Association. In January 2009, the note was transferred to Aurora.

{4} On March 3, 2009, Aurora filed a foreclosure complaint in district court, alleging that Hood had defaulted on the note. Aurora alleged that it was, by assignment, the current holder of the note and mortgage. Aurora attached to its complaint an unindorsed copy of both the Hood note and a document entitled "Corporate Assignment of Mortgage" indicating that MERS had assigned to Aurora the mortgage "together with the Note . . . ."

{5} Because Hood did not respond to Aurora's complaint, the district court entered default judgment on October 8, 2009, finding that the note and mortgage had been properly assigned to Aurora. The district court also found that Hood had defaulted on the note, ordered the mortgage foreclosed, and appointed a special master to conduct a foreclosure sale. Hood neither redeemed the Property nor appealed the district court's order.

{6} Aurora purchased the Property at the foreclosure sale and recorded a Special Master's Deed. On August 23, 2010, the district court entered an order that confirmed the sale of the Property to Aurora and approved the Special Master's Deed.

{7} Enter Gregory Hutchins, a speculator in foreclosed properties. Seeking to procure the Property, on November 3, 2011—fourteen months after the district court approved the Special Master's Deed—Hutchins obtained a quitclaim deed to the Property from Hood for "valuable consideration." Hood executed the quitclaim deed on November 3, 2011, despite the 2009 default judgment against her. The deed was recorded on the same day.

{8} Hutchins then attempted to transfer the Property to Phoenix, a New Mexico limited liability company of which Hutchins was the sole member. Hutchins first executed a note, promising to pay $750,000.00 to Phoenix. As security for the note, he executed a mortgage in favor of Phoenix, encumbering his supposed interest in the Property.

{9} On March 1, 2012, Phoenix filed a complaint against Hutchins, GreenPoint, Aurora, and MERS. Against Hutchins, Phoenix asserted actions for judgment on the note, foreclosure on the Property, and quiet title. This Court recognizes that, by directing Phoenix to assert these claims in this case, Hutchins effectively *sued himself* in his attempt to take control of the Property.

{10} Against GreenPoint, Aurora, and MERS, Phoenix asserted claims for declaratory judgment and quiet title. Phoenix argued that because Aurora did not attach a copy of an indorsed note to its 2009 foreclosure complaint against Hood, Aurora lacked standing to commence suit. Phoenix alleged that the district court was consequently without jurisdiction and, thus, the 2009 default judgment against Hood and the resulting foreclosure sale were void. Phoenix sought an order quieting title to itself in fee simple.

{11} Aurora and MERS answered and asserted counterclaims against Phoenix and crossclaims against Hutchins to cancel the quitclaim deed and the Hutchins mortgage. Aurora and MERS also asserted counterclaims and crossclaims against Phoenix and Hutchins, respectively, for declaratory judgment and quiet title. GreenPoint did not answer the complaint, leading to the district court's entry of default judgment. Hutchins responded to Phoenix's complaint by disclaiming all interest in the matter.

{12} Aurora, MERS, and Phoenix cross-moved for summary judgment. Aurora and MERS argued, inter alia, that Aurora had standing to assert the 2009 foreclosure action against Hood, that Phoenix's claims were barred by res judicata, and that Phoenix's complaint was an improper collateral attack on the 2009 default judgment against Hood. Phoenix, by contrast, repeated its argument that the 2009 district court lacked jurisdiction to adjudicate the Hood action because Aurora lacked standing to foreclose.

{13} Phoenix also argued in its summary judgment motion that Aurora committed fraud by attaching the Corporate Assignment of Mortgage to its 2009 foreclosure action against Hood. Phoenix's fraud claim alleged that Aurora was not a successor to GreenPoint and, therefore, lacked the right either to prepare the Corporate Assignment or to direct MERS to do so. According to Phoenix, Aurora's attachment of the Corporate Assignment to Aurora's 2009 complaint constituted a fraud on the district court that warranted setting aside the 2009 foreclosure judgment. In its complaint, Phoenix did not assert a claim to set aside the 2009 default foreclosure judgment for fraud. Rather, Phoenix first raised its fraud theory in its motion for summary judgment.

{14} The district court granted summary judgment to Aurora and MERS. The district court determined that Phoenix's suit was a collateral attack by a party in privity with or a successor-in-interest to Hood. The district court also concluded that the 2009 district court had jurisdiction over Aurora's foreclosure action, that the district court's default foreclosure judgment was therefore not void, and, accordingly, that Phoenix's claims were barred by res judicata. The district court declared that Aurora owned the property in fee and that all adverse claims of Phoenix and Hutchins were barred. The district court consequently held Phoenix's motion for summary judgment to be moot. Phoenix filed a timely notice of appeal.

{15} The Court of Appeals reversed the district court. *Phoenix Funding, LLC v. Aurora Loan Servs., LLC*, 2016-NMCA-010, ¶ 1, 365 P.3d 8, *cert. granted* 2016-NMCERT-001. The Court first determined that judgments may be challenged collaterally "where the challenge is based on an asserted lack of jurisdiction" of the court that rendered the judgment. *Id.* ¶ 11. The Court then considered whether the 2009 district court had subject matter jurisdiction to render the default foreclosure judgment against Hood. *Id.* ¶¶ 14-28. The Court noted that, under *Bank of New York v. Romero*, a plaintiff's failure to establish standing to foreclose is a jurisdictional defect and that a plaintiff must demonstrate that it had the right to enforce a note at the time of filing suit in order to establish standing. *Phoenix Funding*, 2016-NMCA-010, ¶¶ 15, 21 (citing *Bank of N.Y.*, 2014-NMSC-007, ¶ 17, 320 P.3d 1). The Court of Appeals determined that Aurora did not present sufficient evidence to establish that it was the holder of the note at the time it filed suit. *Phoenix Funding*, 2016-NMCA-010, ¶ 20. The Court of Appeals, therefore, concluded that Aurora lacked standing to foreclose, which consequently deprived the 2009 district court of subject matter jurisdiction and voided the 2009 default foreclosure judgment against Hood. *Id.* ¶ 28. Because the Court of Appeals determined that the 2009 default foreclosure judgment was void, it held that Phoenix's claims against Aurora and MERS for declaratory judgment and quiet title were not barred by res judicata. *Id.* ¶ 30. Furthermore, because the Court of Appeals held that the 2009 default foreclosure judgment was void, it declined to rule on Phoenix's fraud argument. *Id.* ¶ 44.

{16} Aurora and MERS petitioned for a writ of certiorari. We granted the petition and issued the writ, exercising our jurisdiction under Article VI, Section 3 of the New Mexico Constitution and NMSA 1978, Section 34-5-14(B) (1972).

II. DISCUSSION

A. Standard of Review

{17} We review the district court's grant of summary judgment to Aurora and MERS de novo. *See Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 6, 310 P.3d 611. In the summary judgment posture, we review the facts and make all reasonable inferences from the record in the light most favorable to the party opponent of the motion. *Id.* "'Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (citation omitted); *see also* Rule 1-056(C) NMRA.

B. The 2009 Foreclosure Judgment Was Not Void for Lack of Jurisdiction

1. Because standing is a jurisdictional prerequisite only for causes of action created by statute, standing is not a jurisdictional prerequisite in actions to enforce a promissory note and foreclose on a mortgage

{18} We recently clarified the relationship between justiciability requirements and subject matter jurisdiction. *See Am. Fed. of State, Cty. & Mun. Emps. v. Bd. of Cty. Comm'rs of Bernalillo Cty.* (*AFSCME*), 2016-NMSC-017, ¶¶ 14-15, 373 P.3d 989; *Deutsche Bank Nat'l Trust Co. v. Johnston*, 2016-NMSC-013, ¶¶ 10-12, 369 P.3d 1046. Unlike in the federal courts, the requirement of a plaintiff's standing to commence suit in New Mexico courts is not derived from a constitutional limitation on the power of the judicial branch. *Compare, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) ("[Anyone] who seek[s] to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy . . . show[ing] that he has sustained or is immediately in danger of sustaining some direct injury . . . ." (internal quotation marks and citations omitted)), *with Am. Civil Liberties Union of N.M. v. City of Albuquerque* (*ACLU of N.M.*), 2008-NMSC-045, ¶ 9, 144 N.M. 471, 188 P.3d 1222 ("[S]tanding in our courts is not derived from the state constitution . . . ."). Because the requirement of a plaintiff's standing is not derived from a constitutional limitation of the judiciary to decide cases or controversies, it is not a jurisdictional prerequisite to every cause of action that a New Mexico court is called to adjudicate. *See ACLU of N.M.*, 2008-NMSC-045, ¶ 9.

{19} In some cases, however, justiciability requirements are jurisdictional prerequisites. For example, standing is a jurisdictional prerequisite where an action is created by statute and the statute specifies that only a limited class of plaintiffs who satisfy certain conditions may sue. *See Deutsche Bank*, 2016-NMSC-013, ¶ 11 ("'[W]hen a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action.'" (citation omitted)); *see also AFSCME*, 2016-NMSC-017, ¶ 31 ("Under New Mexico's Declaratory Judgment Act, standing—like ripeness—is a jurisdictional prerequisite."). Where a cause of action is created by statute, the Legislature empowers the courts to adjudicate a new kind of claim and, thus, the Legislature may condition the exercise of that power on the plaintiff's satisfaction of certain prerequisites. *See AFSCME*, 2016-NMSC-017, ¶ 14 ("If a statute creates a

right and provides that only a specific class of persons may petition for judicial review of an alleged violation, then the courts lack the jurisdiction to adjudicate that alleged violation when the petition is brought by a person outside of that class."). Hence, when a claim is created by statute, the justiciability requirements of standing, ripeness, and mootness can be jurisdictional. *See, e.g.*, *id.* ¶¶ 15-17 (explaining that because the Declaratory Judgment Act requires the demonstration of an "actual controversy," the justiciability requirements of ripeness and standing are necessary to establish a court's jurisdiction over a declaratory judgment action); *see also New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 17, 149 N.M. 42, 243 P.3d 746 (same).

{20} By contrast, when a claim is *not* created by statute but rather was born of common law, the lack of the traditional justiciability prerequisites does not impair a court's jurisdiction. *See Deutsche Bank*, 2016-NMSC-013, ¶ 12 ("[A]n action to enforce a promissory note fell within the district court's general subject matter jurisdiction . . . because it was not created by statute."). New Mexico courts have general subject matter jurisdiction over common-law claims. *See* N.M. Const. art. VI, §§ 1, 13. For these claims, the justiciability doctrines are prudential, imposed not by the Constitution or by statute but by the judicial branch on itself to serve judicial economy and "the proper—and properly limited—role of courts in a democratic society . . . ." *Shoobridge*, 2010-NMSC-049, ¶ 16 (internal quotation marks and citation omitted). Yet, while the justiciability doctrines as applied to nonstatutorily created claims are prudential, they are not toothless: A nonstatutorily created claim is also dismissable for want of the plaintiff's "prudential standing." *See, e.g.*, *Deutsche Bank*, 2016-NMSC-013, ¶¶ 9, 32 (holding that a bank's action to enforce promissory note was dismissable for failure to prove that the bank had standing at the time it filed its foreclosure complaint).

{21} Employing this framework, this Court explained in *Deutsche Bank* that because actions to enforce a promissory note and foreclose on a mortgage originated at common law and were not created by statute, standing in mortgage-foreclosure cases is a prudential concern. *See* 2016-NMSC-013, ¶¶ 12-13. The lack of a plaintiff's standing in an action to enforce a promissory note does not divest a court of subject matter jurisdiction. *See id*. Consequently, when a district court enters a foreclosure judgment against a defendant, that judgment cannot be collaterally attacked in a subsequent action as void for the reason that the plaintiff in the prior matter lacked standing. *See id.* ¶ 34. *Deutsche Bank* explained that this framework was a clear "practical implication[] of our holding that standing is not jurisdictional in mortgage foreclosure cases." *Id.* ¶ 33.

{22} Phoenix cannot successfully argue that the 2009 district court lacked jurisdiction over Aurora's foreclosure action because Aurora lacked standing. The 2009 district court had jurisdiction to adjudicate Aurora's complaint to enforce the Hood note and foreclose on the mortgage, and the 2009 district court had such jurisdiction independent of Aurora's standing. Accordingly, the district court's 2009 default foreclosure judgment was not void for lack of jurisdiction.

2. *Deutsche Bank*'s holding is not limited to nonnegotiable instruments

{23} Phoenix attempts to escape the reach of *Deutsche Bank* by contending that our holding in that opinion is limited to nonnegotiable instruments. Phoenix asserts that, unlike actions to enforce nonnegotiable instruments, actions to enforce negotiable instruments are a creation of the Uniform Commercial Code and did not originate at common law. Phoenix argues that because the Hood note was a *negotiable* instrument, *Deutsche Bank* does not apply, and consequently, the district court lacked subject matter jurisdiction and its default judgment against Hood is void.

{24} We are unconvinced; our holding in *Deutsche Bank* is not limited to nonnegotiable instruments. First, contrary to Phoenix's contention, *Deutsche Bank* involved a negotiable instrument, and, hence, its holding directly applies to this case. *See* 2016-NMSC-013, ¶¶ 2-3, 6, 13. Second and also contrary to Phoenix's contention, actions to enforce negotiable instruments, including promissory notes, originated at common law. "[T]he principles that govern negotiable instruments today, currently embodied in the Uniform Commercial Code, long ago became part of the common law, and it is only because of their assimilation into the common law that they developed any legal significance." 22 Richard A. Lord, *Williston on Contracts*, § 60:1, at 484 (4th ed. 2002). These rules were once known as the *lex mercatoria* or the law merchant and formed a part of the English common law. *Id.* at 484-85 (citing *Gannon v. Bronston*, 55 S.W.2d 358, 362 (Ky. 1932)). Although the law merchant was first codified in the United States by the Uniform Negotiable Instruments Law (NIL), Lord, *supra*, at 486, it formed a part of New Mexico common law prior to New Mexico's adoption of the NIL in 1907. For instance, in *Farmers' State Bank of Texhoma, Okla. v. Clayton National Bank*, we made clear:

> The adoption of the Uniform Negotiable Instruments Act introduced no new system. Generally speaking . . . it is merely declaratory of the existing law merchant or common law. Prior to 1907, when we adopted it, a very few sections embodied all of our statute law of negotiable instruments. Our law was the common law, which we adopted in 1876 as the rule of practice and decision.

1925-NMSC-026, ¶ 17, 31 N.M. 344, 245 P. 543 (citing Section 1345, C.L. 1915). Hence, Phoenix's suggestion that actions to enforce negotiable instruments did not exist at common law is without merit, and accordingly, its attempt to limit *Deutsche Bank*'s holding to nonnegotiable instruments fails.

{25} We are also unpersuaded by Phoenix's assertion that standing is jurisdictional for causes of action that derive from statutory codifications of common law. This argument is foreclosed by *Deutsche Bank*'s holding that, for purposes of an action to enforce a promissory note (which existed at common law and was later codified) standing is *not* a jurisdictional prerequisite. *See* 2016-NMSC-013, ¶¶ 12-14.

3. A plaintiff's failure to establish standing in an action to enforce a promissory note does not divest a district court of the power or authority to decide the particular matter presented

{26} Phoenix also attempts to evade the application of *Deutsche Bank* to this case. Phoenix argues that, despite *Deutsche Bank*, Aurora's failure to establish standing nevertheless deprived the district court of jurisdiction. According to Phoenix, Aurora's lack of standing divested the court of a jurisdictional concept separate from subject matter jurisdiction—namely, the power or authority to decide the particular matter presented. In support of this contention, Phoenix adverts to this Court's statement that "[t]here are three

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Real Property, Trust and Estate

Real Property, Trust and Estate Section

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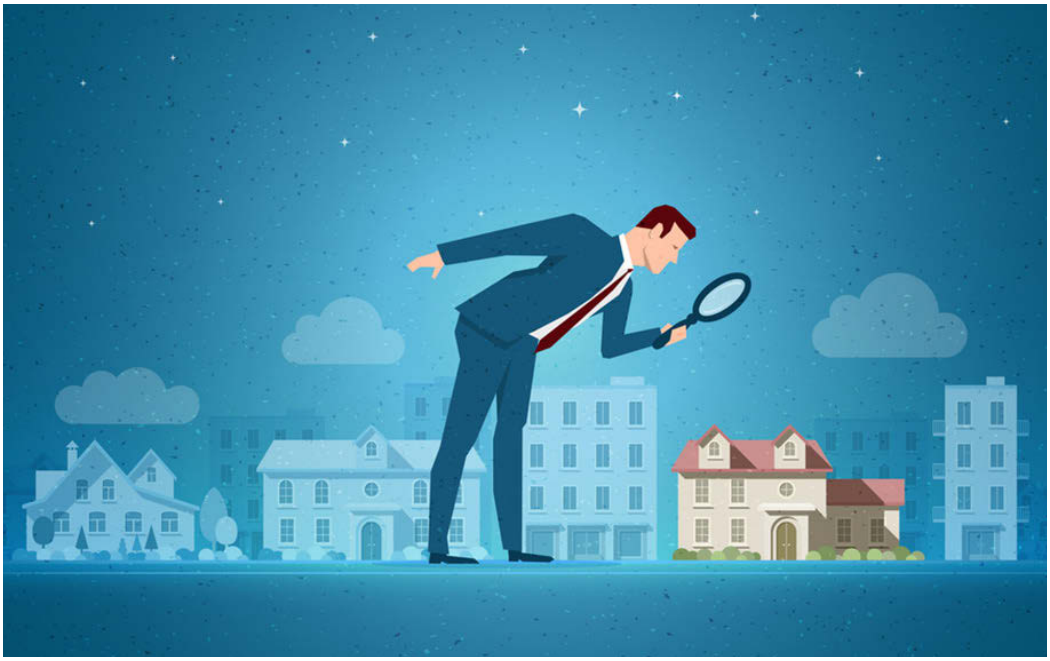
Sincerely,
Sara R. Traub, Chair
Real Property, Trust and Estate Section

2016 and 2017
Changes in Probate, Trust, and Estate Planning Laws

By Fletcher R. Catron



Attorneys working in the probate, trust and estate planning areas should be aware of legislation enacted by the 2016 and 2017 sessions of the New Mexico Legislature that affect their practices. Though this is not a complete listing, it does include some of the most significant substantive changes in the law.

I. 2016 Legislation

A. Notice Requirements and Time Limits

As of July 1, 2016, if notice of a hearing is required to be published to reach unknown persons or persons whose addresses cannot be discovered, the number of weekly publications was increased from two to three. NMSA 1978, § 45-1-401. This includes a hearing on a petition for appointment of a personal representative to open a probate. This three-publication rule conforms to Rule 1-004 NMRA and the Uniform Laws Commission's version of the Uniform Probate Code. *Uniform Probate Code* (1969), Rev. 2010, § 1-401, most easily accessed at www.uniformlaws.org.

NMSA 1978, Section 45-3-801 was amended to make the giving of notice to decedent's creditors, whether known or unknown, optional. If no notice is given, the period in which a creditor may submit a claim remains at one year after death. NMSA 1978, § 45-3-803. If the personal representative wants to shorten that time, notice to creditors is still required, but the number of publications and the time in which to summit claims has changed. In order to bar unknown creditors, the number of required weekly publications is increased from two to three, and the time allowed to present a creditor's claim after the first publication is increased to four months from two. As before, notice to known or reasonably discoverable creditors is effective only if it is sent directly to the creditors, and those creditors are given until the later of 60 days or the last claim date after any publication in which to file claims.

The change in the number of publications in both, Section 45-1-401 and Section 45-3-801 was enacted, in order to bring New Mexico's statute closer to the "uniform" version, to meet the notice objections expressed by the committee comments to Rule 1-004, NMRA, and to ensure that the notice objections found in *Tulsa Professional Collection Services v. Pope*, 485 U.S.478 (1988), are overcome. The official

comments to Uniform Probate Code (1969), Rev. 2010, Section 1-401 and especially Section 1-403, have interesting discussions of the efforts taken to ensure that all notice is constitutionally adequate.

Coincident with lengthening the time for publication and filing of creditors' claims, the legislature extended the earliest date for informal closing of an estate. The earliest date for closing an estate by the sworn statement of the personal representative has been extended from three months after appointment of the personal representative to six months after the appointment. NMSA 1978, § 45-3-1003.

The Supreme Court's Probate Court forms (Rules 4B-001 *et seq*., NMRA) have not yet caught up with these changes in the law. Attorneys using Probate Court forms, or advising *pro se* persons who might do so, should be aware of the need to modify the official forms and instructions. A committee of the Supreme Court is in the process of revising rules and forms for use in the Probate Courts.

For those interested in asset protection trusts, the time allowed for vesting under the rule against perpetuities has now generally been extended to 365 years. NMSA 1978, § 45-2-904.

B. Uniform Acts

Powers of appointment have generally been governed by common law. Effective Jan. 1, 2017, the 2016 Legislature adopted the Uniform Powers of Appointment Act (NMSA 1978, §§ 46-11-101 *et seq.*), which codifies the law relating to creation, interpretation, exercise and termination of powers of appointment. Although the UPAA contains few surprises for the practitioner, it does help answer some nagging common questions, such as the degree of specificity needed to exercise a power that explicitly requires specific reference to the power in order to exercise it. NMSA 1978, § 45-2-704.

As part of the legislation adopting the Uniform Powers of Appointment Act, sections of the Uniform Probate Code and the Uniform Trust Code were amended, including provisions relating to abatement of devises (NMSA 1978, § 45-3-9902), private agreements among successors (NMSA 1978, § 45-3-912), closing estates by sworn statements (conforming to the minimum time for closing an estate as mentioned above), clarifying when a trustee has an insurable interest in the life of an insured (NMSA 1978, § 46A-1-113), and who may represent another in probate matters (NMSA 1978, §§ 45-3-403.1 through 403.5).

Also effective Jan. 1, 2017 is the Uniform Trust Decanting Act. NMSA 1978, §§ 46-12-101 *et seq*. Although the Uniform Trust Code provides a great deal of flexibility in the administration of trusts, the Uniform Trust Decanting Act provides statutory approval and procedures to allow a trustee to "pour over" the assets of an existing trust into a newly-created trust with substantially-different provisions. The decanting is discretionary with the trustee and does not need court approval. Decanting may not be used to reduce a beneficial interest unless the trustee already has that authority.

II. 2017 Legislation

A. Uniform Partition of Heirs Property Act

The 2017 Legislature passed and the governor then signed House Bill 181, 2017 Reg. Sess (N.M. 2017) and Senate Bill 60, 2017 Reg Sess. (N.M. 2017), described below. Both are generally effective Jan. 1, 2018.

House Bill 181 enacts the Uniform Partition of Heirs Property Act. This Act modifies existing partition statutes (NMSA 1978, §§ 42-5-1 *et seq.*) to limit the ability of a co-tenant of family property to force the sale of the lands held in common. The Act provides that other co-tenants may buy out, at a reasonable price, the co-tenant who wants to sell his or her interest, thereby protecting co-tenants who wish to remain owners of family land. The Act expresses a strong preference for actual partition by division over sale, and it expressly provides that the court may order that the land be physically partitioned by value and may not refuse division simply because of the proposition that all real property is unique. If sale is necessary, the Act establishes a commercially reasonable method of sale, as opposed to the auction sale which seems to be generally used under the terms of the current act (NMSA 1978, § 42-5-7). For those who want to understand the background of this legislation, including a discussion of the various state laws under ordinary partition statutes, the official comments to the uniform act are particularly interesting. As noted in the comments, some land grants in New Mexico, lost to the original owners in the late 1800's and early 1900's, might still be in the hands of the descendants of those original owners had this law been in effect at the time. *Uniform Partition of Heirs Property Act* (2010), again most easily accessed at www.uniformlaws.org.

House Bill 181 also amends the form of the self-proving clause for wills and extends from 10 days to 30 days the time for giving notice of the appointment of personal representative, thereby conforming the time to give notice of the appointment of a personal representative (NMSA 1978,§ 45-33-705) to the time to give notice of the probate of a will (NMSA 1978, § 45-3-306B). It provides that a personal representative shall not delay estate distribution because of the potential for a posthumously conceived child unless the personal representative has received written notice or actually knows of an intention to have such a child.

B. Revised Uniform Fiduciary Access to Digital Property Act

Senate Bill 60 enacts the Revised Uniform Fiduciary Access to Digital Property Act. A fiduciary ordinarily is prevented by those hosting remote data servers from obtaining access to the principal's on-line accounts and data. If they are stored "in the cloud," an incapacitated person's bank statements, a Great American Novel written by a now-incapacitated person, the principal's family photos or the texts and emails of a decedent, commonly cannot be retrieved by a fiduciary and may be deleted by the host. This uniform act allows a fiduciary to gain access to certain information that the principal has not explicitly required to be kept private under all circumstances. It is important to note that access to digital assets must be specifically allowed by the governing document in most instances. Because of the requirement for specific reference to digital asset access, most forms of wills, powers of attorney, and revocable trusts should be drafted or amended to include this authority, even though the act will not be effective for several months. ■

About the Author

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Cellular Tower Site Leasing: Avoiding Bear Traps

By Jonathan L. Kramer

Cell tower site leases are often low impact, long-term income sources for landlords, but they fall into a narrow category of complex leases that require careful crafting to protect the landlord from having its smallest tenant turn into its biggest nightmare. This article highlights some of the issues confronting counsel for landlords in the typical boilerplate lease templates used by wireless carriers, which can leave the landlord smarting for decades.

Their Players

The property owner is commonly approached by a land acquisition firm representing a wireless carrier. The representative will insist on using the wireless carrier's rather one-sided lease template. The representatives have little real negotiation authority. Wireless companies have in-house and contract attorneys. Only when you get past the representative to the attorneys are you really able to negotiate.

What's Your Option?

Well-drafted leases begin with an option. The purpose of an option in a cell site lease is to hold the property for a period of time while the cell company goes through the local government permitting process. The option must be supported by consideration to be binding. Many carrier templates attempt to enter into a binding option without paying an actual option fee. Look for and reject non-cash consideration. It's usual for the option fee to be $1,000-$2,000 per year, payable in advance.

In addition to the option fee, the landlord should require a signing bonus in the option to fully recover its legal and other costs in granting the option and the lease terms if the option is exercised. The landlord's cost recovery at this early point is vital because the final terms of the lease will invariably contain a provision allowing the tenant to unilaterally terminate the lease almost at will. Carriers require early termination rights in their leases so they may freely reconfigure their networks and cell site locations. More information on early terminations will be presented later in the article.

Rent Commencement and Lease Term

Assuming that the wireless carrier elects to exercise its option, when should lease payments start? Wireless industry boilerplates allow the carrier to exercise the option and start the lease, but delay the commencement of rent payments until it begins construction, which may be several years off. Landlords should require rent to commence on the earlier of the start of construction or six months after the option is exercised.

How long is the lease term? Customarily, the initial term of the lease will run five years, with four or more 5-year renewal terms triggered solely by the tenant. The landlord will have virtually no right to terminate the lease at the end of any of the 5-year terms. This unilateral provision addresses the wireless carrier's need for long-term location security to protect its network engineering and site construction costs without the threat of landlord disturbance.

Avoiding a Landlord's Horror

Given the decades-long term of wireless site leases, the landlord's attorney should insist upon a one-time relocation provision at the tenant's cost that allows the landlord to trigger a cell site relocation on the landlord's property. The landlord's relocation option should become operative at the beginning of the third five-year term (10 years in to the lease). This is particularly important if the cell site is to be located on a building nearing the end of its economic life, or if the property may be redeveloped. Without such a relocation provision, or a provision that allows the landlord to terminate the lease if the building upon which the cell site is located is demolished, a landlord should expect its wireless tenant to demand anywhere between $300,000 and $1 million to terminate the lease and relocate the cell site to a different property.

Two Big Questions

The first big question is "what's the rent?" The wireless company wants to reach an agreement on rent very early in the process, long before all of the lease terms have been negotiated. Strategically, this makes no sense for the landlord. Setting the rent before negotiating all of the provisions is like walking onto a car dealer's lot and telling the salesperson, 'I want to settle on the price of my new car now before we discuss the accessories.' The wireless company will tell you the rent it wants to pay at the beginning of the negotiations and try to lock the landlord into that rent. Starting rents offered by wireless companies are usually in the range of $800-$1,200 per month. A reasonable

approach to initial rent negotiations is to indicate that the landlord will consider the carrier's rent offer but reserve the right to adjust it based on the number of privileges the wireless tenant seeks in the lease.

The second big question is, "when does the rent escalate and by how much?" Carriers try to hide the ball by offering to escalate lease payments by 10-15 percent at the beginning of each 5-year renewal term. This approach deprives the landlord of the value of compound interest. Savvy landlord attorneys will require the rent to escalate by 2-3 percent per year. Inexperienced landlords may think these are not big differences, but compare two hypothetical cell site leases. Lease 1 has a term of 25 years, a starting rent of $2,000 per month, and a 15 percent increase each renewal term. Lease 2 is identical to Lease 1 except that the rent increases 3 percent each year. At the end of 25 years, Lease 2 will earn the landlord nearly $66,000 more compared to Lease 1. That's not chump change.

SNDA

Does the carrier want the landlord to obtain a subordination and non-disturbance agreement (SNDA) as part of the lease obligations? A common requirement in carrier lease templates is to require the landlord with a mortgage on the property to have its lender issue an SNDA in favor of the carrier. Essentially, an SNDA is a side contract between the lender and the wireless carrier that bars the lender from ejecting the wireless carrier if the landlord defaults on the loan. Some lenders charge their borrowers thousands of dollars to negotiate these deals. While the landlord should agree to cooperate with the carrier to obtain the SNDA, any lender costs should be borne by wireless carrier.

Are there landlord-owned properties nearby or surrounding the parcel on which the cell company wants to lease? Then beware wireless lease clauses that contain the term "surrounding properties" or some similar reference. This is a bold attempt by the wireless carrier to gain economic control over all of those surrounding properties that are owned in common (even in part) by the same landlord. The wireless carrier's goal through the surrounding properties clause is to prevent the landlord from leasing a cell site on a different property to a competitor unless the tenant participates in the income. If found in the lease template, the landlord's attorney should simply strike all references to "surrounding properties."

ROFRs

Template leases frequently contain several right-of-first-refusal (ROFR) provisions that operate against the landlord. ROFRs bar landlords from selling a lease to a third-party without giving the tenant a first right to take that deal. A second type of ROFR enables the wireless tenant to step in during the middle of a potential sale to a third party and buy the entire property from the landlord. Both types of ROFRs harm the landlord's economic interest, and the second type can make the property commercially unmarketable. Strike ROFRs, but include a provision recognizing that the tenant's lease rights are preserved in any sale of the lease or property sale.

Subleasing

Commonly, the template lease will contain a provision allowing the tenant to sublease assign, sublicense, or in any other way retain the right to bring others onto its leasehold without the landlord's permission or providing any financial benefit to the landlord. From the landlord's perspective, subleasing or any other type of assignment should be restricted without the landlord's prior written consent, which may be withheld for any or no reason. In response, wireless carriers will usually agree to share a percentage (10 – 30 percent and sometimes even more) of the subtenant rent with the landlord. This is only fair, given that every additional tenant places a greater burden on the property and some form of landlord compensation for that additional burden should be included in the lease.

Breaking Up Is Hard to Do (for the Landlord)

Wireless lease templates contain escape clauses almost never found in any other commercial leases, allowing the tenant to terminate the lease nearly at will, commonly on 90-day notice and often with no early termination fee. Conversely, the templates sharply limit a landlord's ability to terminate the agreement, even in the event of a tenant's breach. The result is that the landlord is locked in to the lease for decades, but the carrier is not. The landlord should insist that in exchange for the tenant's privilege to terminate early, upon early termination the carrier pay an early termination fee, usually equivalent to several years of rent.

Wait a minute! $500?

Carriers need 24/7 access to their cell sites to perform emergency repairs. Some lease templates will contain a provision that allow the tenant to charge back the landlord $500 for any landlord-caused delay in accessing the cell site. This charge is purely punitive and unrelated to any actual damages. The landlord's attorney should strike this and any other purely punitive lease terms.

Attorneys' Fees and Venue

Over the decades-long life of the lease it is far more likely that the tenant will sue the landlord than vice versa. A strong limitation on attorneys' fees and the addition of a venue selection clause favoring the landlord will help to reduce litigation exposure and expense.

Caveat Imperium

Cell site leasing by local governments merits an entire article of its own. Special rules and lease term considerations apply to local governments acting in their proprietary capacity as a landlord that differ markedly from private landlords. Sophisticated local governments will negotiate from their own lease form rather than work from the wireless carrier's template.

Look Before Your Client Leaps

This short primer can provide only a basic introduction to the labyrinth of terms that comprise a decades-long cell site lease. Remember that the wireless companies negotiate new leases every day whereas the landlord's attorney might engage in these negotiations once every few years. Finally, if you cannot negotiate a reasonably balanced lease on behalf of your client, it may be better to simply advise your client to walk away and let some other less sophisticated landlord make the mistakes that you will have helped your client avoid. ■

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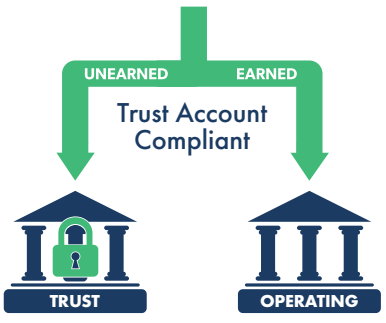

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jurisdictional essentials necessary to the validity of every judgment: jurisdiction of parties, jurisdiction of subject matter and power or authority to decide the particular matter presented." *Heckathorn v. Heckathorn*, 1967-NMSC-017, ¶ 10, 77 N.M. 369, 423 P.2d 410; *see also In re Field's Estate*, 1936-NMSC-060, ¶ 11, 40 N.M. 423, 60 P.2d 945 (same). In *Heckathorn*, this Court concluded that the lack of *power or authority* to decide a particular case renders a judgment void. *See* 1967-NMSC-017, ¶¶ 10-11. In this case, even though the 2009 district court had subject matter jurisdiction, Phoenix suggests that the court's judgment was nevertheless void because Aurora's failure to establish standing divested the court of the power or authority to decide the matter presented. We are unpersuaded.

{27} We have previously doubted but have not decided whether there is a true distinction between, on the one hand, a court's power or authority to decide the matter presented and, on the other, a court's subject matter jurisdiction. *See Sundance Mech. & Util. Corp. v. Atlas*, 1990-NMSC-031, ¶ 13, 109 N.M. 683, 789 P.2d 1250 ("[O]ne may doubt that the distinction serves any useful purpose."). We now clarify that a court's *power or authority to decide the particular matter presented* is not distinct from subject matter jurisdiction.

{28} In the past, this Court has simply used the formulation *power or authority to decide the particular matter presented* to refer to subject matter jurisdiction for a certain set of claims. New Mexico appellate courts have expressly considered a court's *power or authority to decide the particular matter presented* only where a statute created the claim at issue and specifically empowered a court to adjudicate that class of claim. *See Heckathorn*, 1967-NMSC-017, ¶¶ 10-11 (concluding that the trial court lacked the power to grant a divorce because the parties had not satisfied the statutory condition of being New Mexico residents for at least one year); *Field's Estate*, 1936-NMSC-060, ¶¶ 32-34 (concluding that the probate court, under statute, had power or authority to classify certain claims filed against an estate); *Quintana v. State Bd. of Educ.*, 1970-NMCA-074, ¶¶ 7-8, 81 N.M. 671, 472 P.2d 385 (concluding that, under statute, the Court of Appeals lacked authority to review a decision of a state administrative board because that board lacked authority of review where the local administrative board never conducted a hearing). Accordingly, *the power or authority to decide the particular matter presented* is not a separate element of a court's jurisdiction, but rather a formulation we have used to refer to a court's subject matter jurisdiction over claims created by statute when the statute makes a court's power of review dependent upon certain prerequisites. In other words, *the power or authority to decide the particular matter presented* is simply an older way of describing the same legal proposition that this Court recently explained in *AFSCME* and *Deutsche Bank*: where the Legislature *creates* a cause of action and makes a court's power of review dependent upon the satisfaction of certain prerequisites regarding, for example, who may commence suit, those prerequisites are conditions on a court's subject matter jurisdiction. *AFSCME*, 2016-NMSC-017, ¶ 31; *Deutsche Bank*, 2016-NMSC-013, ¶ 11.

{29} We reject the assertion by Phoenix that a court's *power or authority to decide the particular matter presented* is distinct from the court's subject-matter jurisdiction. *See, e.g.*, *Heckathorn*, 1967-NMSC-017, ¶ 10. That formulation, which concerns causes of actions that are created by statute, is unavailing to Phoenix. As we explained, the 2009 district court's jurisdiction over the foreclosure action was not conferred by statute. Accordingly, the cases in which we have referred to a court's *power or authority to decide the particular matter presented* are inapposite.

C. Phoenix Is Barred From Asserting a Claim That the 2009 Foreclosure Judgment Should Be Set Aside for Fraud

{30} We now turn to Phoenix's argument that the 2009 default foreclosure judgment should be set aside for fraud. We granted certiorari to consider whether this Court should uphold current New Mexico law regarding the "procedures and requirements for collaterally attacking judgments" or instead adopt those of the Restatement (Second) of Judgments. In its opinion, the Court of Appeals perceived tensions in New Mexico law concerning attacks on judgments and left "the task of resolving the tension, if any," to this Court. *Phoenix Funding*, 2016-NMCA-010, ¶ 44 (quoting *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 22, 135 N.M. 375, 89 P.3d 47 (inviting the Court of Appeals "'to explain any reservations it might harbor over its application of our precedent'")). We decided to address this question because the Court of Appeals's discussion of Phoenix's fraud claim might leave the inaccurate impression that the Restatement (Second) of Judgments §§ 78-80 (Am. Law Inst. 1982) offers Phoenix some means to press its claim that is unavailable under New Mexico law. *See Phoenix Funding*, 2016-NMCA-010, ¶¶ 32-44.

1. New Mexico law regarding relief from judgments is consistent with the Restatement (Second) of Judgments

{31} Although the Restatement (Second) of Judgments jettisons the terminology of "direct attacks" and "collateral attacks," New Mexico courts have adhered to the use of those terms as shorthand for different ways of seeking relief from judgments. Despite that difference in terminology, we do not perceive New Mexico law concerning relief from final judgments to be inconsistent in substance with the position articulated by the Restatement (Second) of Judgments. Nor do we perceive any tensions in this area of law that are not readily relieved by reference to the course of judicial opinions that have applied it.

{32} To begin, the distinction between direct and collateral attacks in New Mexico case law is well developed:

> A direct attack on a judgment is an attempt to avoid or correct it in some manner provided by law and in a proceeding instituted for that very purpose, in the same action and in the same court . . . . A collateral attack is [either] an attempt to impeach the judgment by matters [outside of] the record, in an action other than that in which it was rendered [or] an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.

Barela v. Lopez, 1966-NMSC-163, ¶ 5, 76 N.M. 632, 417 P.2d 441 (quoting *Lucus v. Ruckman*, 1955-NMSC-014, ¶ 12, 59 N.M. 504, 287 P.2d 68 (1955) (quoting 34 Corpus Juris § 827, at 520-21 (Mack, ed. 1924)), *overruled on other grounds by Kalosha v. Novick*, 1973-NMSC-010, 84 N.M. 502, 505 P.2d 845 (1973)); *see also Hanratty v. Middle Rio Grande Conservancy Dist.*, 1970-NMSC-157, ¶¶ 4-5, 82 N.M. 275, 480 P.2d 165; *Arthur v. Garcia*, 1967-NMSC-205, ¶ 6, 78 N.M. 381, 431 P.2d 759; *Sanders v. Estate of Sanders*, 1996-NMCA-102, ¶ 23, 122 N.M. 468, 927 P.2d 23.

{33} In *Bowers v. Brazell*, an early opinion of this Court, we employed a contrary terminology, wherein we used the term "direct attack" in a way that could be read to describe what we would now call a "collateral attack"—namely, an independent action to challenge the validity of a prior judgment. *See* 1922-NMSC-014, ¶ 3, 27 N.M. 685, 205 P. 715. But this Court later noticed that the development of the law specifically rendered the imprecise *Bowers* formulation anomalous. *See Apodaca v. Town of Tome Land Grant*, 1971-NMSC-084, ¶ 5, 83 N.M. 55, 488 P.2d 105 ("[T]he later cases clearly suggest that under the definitions of direct and collateral attacks adopted therein, the present suit would fall within the definition of a collateral attack . . . ." (citing *Barela*, 1966-NMSC-163; *Lucus*, 1955-NMSC-014)). We are aware that courts around the country have not always been consistent regarding the referents of the terms "direct attack" and "collateral attack." *See generally* Restatement (Second) of Judgments, ch. 5 intro. note at 141-42. We now emphasize that "direct attack" refers to a litigant's attempt to nullify a judgment through a Rule 1-060(B) motion in the same action and with the same court that rendered the judgment. A "collateral attack," by contrast, refers to a litigant's attempt to nullify a judgment and makes that attempt in a separate action and not through a Rule 1-060(B) motion.

{34} A motion under Rule 1-060(B) is the proper procedure to assert a direct attack on a judgment—*i.e.*, a challenge filed in the same court and in the same manner in which the contested judgment was issued. *See, e.g.*, *Barela*, 1966-NMSC-163, ¶¶ 2, 6 (moving under Rule 1-060(B) to vacate a judgment for lack of jurisdiction over the defendant); *Sanders*, 1996-NMCA-102, ¶ 22 ("When proceeding by motion under the specific subdivisions of Rule 60(B), the presumption is that the motion must be filed in the district court and in the action in which the judgment was rendered.").

{35} But Rule1-060(B) does not provide the specific ground on which a litigant may assert a collateral attack. Although Rule 1-060(B)(6) contemplates independent actions for relief from judgment, it neither creates nor provides the authority for such actions. As Rule 1-060(B)(6) states, it "does not limit the power of a court to entertain an *independent action* to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." (Emphasis added). We observe that the federal courts of appeal have emphasized that this "independent action," as noted in the analogous Federal Rule of Civil Procedure 60(d)(1), "was meant to refer to a procedure which has been historically known simply as an independent action in equity to obtain relief from a judgment. This action should under no circumstances be confused with . . . the 60(b) motion [for relief from a final judgment or order]." *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 78 (5th Cir. 1970) (footnote omitted)); *see also Kinder Morgan CO_2 Co. v. State Taxation & Revenue Dep't*, 2009-NMCA-019, ¶ 11, 145 N.M. 579, 203 P.3d 110 ("[T]he federal construction of Rule 60(b) is persuasive authority for the construction of Rule 1-060(B)."). In fact, the Court of Appeals has already also made this point clear. *See Sanders*, 1996-NMCA-102, ¶ 1 ("Rule [1-0]60(B) motions must normally be filed in the original cause of action in the same court in which the challenged judgment was rendered and may not be relied upon to launch a collateral attack in a different cause of action or a different court.").

{36} In contrast to the straightforward procedure for a direct attack under Rule 1-060(B), New Mexico cases have recognized a limited number of ways in which a litigant may seek relief from a prior judgment in a proceeding separate from that in which the judgment was rendered. First, a litigant may file an independent action to set aside a judgment for fraud, accident, or mistake. *Sanders*, 1996-NMCA-102, ¶ 15. New Mexico has long recognized this cause of action as a matter of common law. *See Apodaca*, 1971-NMSC-084, ¶¶ 2, 7 (reversing the dismissal of a complaint in equity attacking the validity of a prior judgment); *Brown v. King*, 1959-NMSC-088, ¶ 9, 66 N.M. 218, 345 P.2d 748 ("[A]n equity action lies to avoid judgment procured by fraud."); *Day v. Trigg*, 1922-NMSC-012, ¶ 7, 27 N.M. 655, 204 P. 62 (deciding on the merits whether a judgment "may be vacated through an independent proceeding . . . solely upon the ground that it was obtained by false testimony"); *Sanders*, 1996-NMCA-102, ¶¶ 10-17 (assuming and describing an independent action for relief from judgment).

{37} Second, a litigant may file an independent action asserting that a previously rendered judgment was void for lack of jurisdiction. *See, e.g.*, *Bonds v. Joplin Heirs*, 1958-NMSC-095, ¶ 13, 64 N.M. 342, 328 P.2d 597 (upholding collateral attack on judgment because the trial court that rendered judgment "failed to obtain jurisdiction of the parties or the subject matter"). Such an action may be properly filed as a claim for declaratory relief. *See Heimann v. Adee*, 1996-NMSC-053, ¶ 36, 122 N.M. 340, 924 P.2d 1352 (recognizing that a claim seeking a declaration that the prior judgment was void for lack of jurisdiction was a collateral attack on the judgment); *see also* Restatement (Second) of Judgments, ch. 5 intro. note at 138-39 ("When relief from a judgment may properly be sought through an independent action, a declaratory proceeding is usually the functional equivalent of the older equitable suit to enjoin enforcement of a judgment."). And an action collaterally attacking a previous judgment as void for lack of jurisdiction may also be filed in "other proceedings long after the judgment has been entered." *Chavez v. Cty. of Valencia*, 1974-NMSC-035, ¶ 15, 86 N.M. 205, 521 P.2d 1154 (citations omitted).

{38} Third, a litigant may argue (either based on fraud, accident, mistake, or lack of jurisdiction) for relief from judgment in a proceeding both separate from that in which the judgment was rendered and in which the judgment is relied on for a claim or defense. This may occur, for example, where a plaintiff attempts to use a prior judgment as a basis to achieve some further relief, and the defendant, through a counterclaim or motion to dismiss, defensively argues that the court should set aside the judgment for one of the aforementioned reasons. *See, e.g.*, *Hanratty*, 1970-NMSC-157, ¶¶ 3, 6-7 (characterizing a counterclaim in a separate proceeding as a collateral attack but dismissing because judgment was not obviously invalid); *Barela*, 1966-NMSC-163, ¶ 5 (noting that "impeaching or overturning of the judgment" may be necessary to the success of an action that has an independent purpose); *St. Paul Fire & Marine Ins. Co. v. Rutledge*, 1961-NMSC-024, ¶¶ 6-10, 68 N.M. 140, 359 P.2d 767 (upholding dismissal of writ of garnishment because the prior judgment was void for want of personal jurisdiction over the defendant); *cf.* Restatement (Second) of Judgments § 80, cmt. b, illus. 1 (providing that a litigant may defend against a contempt proceeding on the ground that the underlying judgment awarding injunction is invalid).

{39} In light of the development of New Mexico case law, we do not perceive any irreconcilable inconsistency between our law and the Restatement position regarding relief from judgments. As described above, in New Mexico, a litigant may seek

relief from judgment through a direct attack by a Rule 1-060(B) motion, a collateral attack by an independent action in a proceeding separate from that in which the judgment was rendered, and, in some circumstances, a collateral attack by way of a counterclaim or motion to dismiss in a proceeding separate from that in which the judgment was rendered. The methods by which a litigant may seek relief from a prior judgment in New Mexico align with those broadly described by Sections 78 through 80 of the Restatement (Second) of Judgments. Phoenix sought to overturn the 2009 default foreclosure judgment in a separate 2012 proceeding, first, by claiming in its complaint that the judgment was void for lack of jurisdiction and, later, in the summary judgment posture, by claiming that the 2009 judgment was procured by fraud. The Restatement does not add anything to how New Mexico law categorizes and disposes of Phoenix's collateral attack.

2. Phoenix's fraud claim is procedurally barred

{40} Phoenix may not pursue its claim that the 2009 default foreclosure judgment should be set aside for fraud. Phoenix points to Section 80 of the Restatement, but it is unavailing. This section allows for relief from judgment "[w]hen a judgment is relied upon as the basis for a claim or defense" where the litigant has made an "appropriate pleading" and establishes that "the convenient administration of justice would be served by determining the question of relief in the course of the subsequent action." Restatement (Second) of Judgments § 80. Phoenix did not make an "appropriate pleading," however, and its fraud claim is procedurally barred.

{41} A litigant may not assert a new claim, long after discovery has commenced, through argument in a brief supporting or opposing summary judgment or in a cross motion for summary judgment. Once a case has arrived at the summary judgment posture, the proper procedure for a plaintiff to assert a new claim is to amend his or her complaint. We recognize that this is the well-settled federal law. *See, e.g.*, *Desparois v. Perrysburg Exempted Vill. Sch. Dist.*, 455 F. Appx. 659, 667 (6th Cir. 2012); *Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jimenez*, 659 F.3d 42, 52-53 (1st Cir. 2011); *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004); *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996); *Fischer v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990). And the "federal construction of the federal rules is persuasive authority for the construction of New Mexico rules." *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶ 9, 142 N.M. 527, 168 P.3d 99. We also note that there are good reasons supporting this procedural bar. To conserve judicial resources and prevent unfair surprise, our liberalized pleading rules "do not permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case." *Green Country Food Mkt., Inc. v. Bottling Grp., LLC*, 371 F.3d 1275, 1279 (10th Cir. 2004); *cf. Dominguez v. Dairyland Ins. Co.*, 1997-NMCA-065, ¶ 17, 123 N.M. 448, 942 P.2d 191 ("Where a motion to amend comes late in the proceedings and seeks to materially change [p]laintiff's theories of recovery, the court may deny such motion.").

{42} Phoenix's 2012 complaint did not assert an independent claim to set aside the judgment for fraud. Rather, Phoenix asserted a claim against Aurora and MERS only for declaratory judgment that the 2009 default foreclosure judgment was void for lack of standing and a claim for quiet title. Phoenix first asserted its claim that the 2009 judgment should be set aside for fraud in its motion for summary judgment. This was improper, and Phoenix's claim for relief from judgment because of fraud is accordingly barred.

{43} Moreover, we note that Phoenix's claim for relief from judgment, founded on its allegation that the Corporate Assignment of Mortgage was fraudulent, likely fails on the merits. It has long been the law "'that [a] court will not set aside a judgment because it was founded on a fraudulent instrument . . . .'" *Day*, 1922-NMSC-012, ¶ 14 (quoting *United States v. Throckmorton*, 98 U.S. 61, 66 (1878)). We make this observation because the mortgage industry in New Mexico requires stability and because we disfavor the uncertainty that Phoenix has attempted to inject through its unmeritorious attempt to overturn a settled foreclosure judgment.

III. CONCLUSION

{44} For the reasons set forth above, we reverse the judgment of the Court of Appeals, reinstate the district court's 2012 grant of summary judgment to Aurora and MERS, and remand to the district court with instructions to dismiss Phoenix's fraud claim as procedurally barred.

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

JUDITH K. NAKAMURA, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
JAMES J. WECHSLER, Judge, sitting by designation

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-011

No. S-1-SC-35508 (filed January 26, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MARCOS SUAZO,
Defendant-Appellant.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Jeff F. McElroy, District Judge

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Opinion

Edward L. Chávez, Justice

{1} Defendant Marcos Suazo became agitated while roughhousing with his friend Matthew Vigil. Suazo retrieved his shotgun and pointed it at Vigil. Vigil grabbed the shotgun and placed the barrel in his mouth. Suazo pulled the trigger, killing Vigil and severely injuring his friend Roger Gage, who was standing behind Vigil. A key contested issue in this case was whether Suazo knew the shotgun was loaded when he pulled the trigger.

{2} Two potentially reversible errors occurred during trial. First, at trial Suazo sought to introduce testimony from two witnesses who saw him approximately one hour after the shooting and heard him claim that he did not know the shotgun was loaded. The district court excluded the testimony as inadmissible hearsay. Second, over Suazo's objection, the prosecution persuaded the court to depart from the uniform jury instruction regarding second-degree murder, which has existed since 1981,[1] by modifying the mens rea element. Instead of requiring the jury to find beyond a reasonable doubt that "[Suazo] knew that his acts created a strong probability of death or great bodily harm," the modified instruction changed the mens rea element to "knew or should have known." *See* UJI 14-210 NMRA.

{3} Among other crimes, Suazo was convicted of second-degree murder and aggravated battery with a deadly weapon. He appealed his second-degree murder conviction to the Court of Appeals, contending that the district court erred by excluding the witness testimony and by modifying the uniform jury instruction for second-degree murder. The Court of Appeals certified his case to this Court pursuant to Rule 12-606 NMRA and NMSA 1978, Section 34-5-14(C) (1996) due to the significant public importance of the jury instruction issue. *State v. Suazo*, order at 3 (N.M. Ct. App. Sept. 4, 2015) (non-precedential). We accepted certification and address both issues.

{4} First, we affirm the district court's exclusion of the hearsay evidence because the district court did not abuse its discretion in finding that Suazo's statements, which were overheard one hour after the shooting, were neither excited utterances nor present sense impressions. Second, we hold that the district court erred by modifying the uniform jury instruction for second-degree murder because in 1980 the Legislature amended the definition of second-degree murder to specifically require proof that the accused knew that his or her acts created a strong probability of death or great bodily harm. 1980 N.M. Laws, ch. 21; *see* NMSA 1978, § 30-2-1(B) (1980). Because the modified instruction misstated an essential element, we reverse Suazo's conviction for second-degree murder and remand for a new trial. *See State v. Dowling*, 2011-NMSC-016, ¶ 17, 150 N.M. 110, 257 P.3d 930 ("When a jury instruction is facially erroneous, as when it directs the jury to find guilt based upon a misstatement of the law, a finding of juror misdirection is unavoidable.").

I. BACKGROUND

{5} Suazo had spent most of the day drinking and visiting with his longtime friends, Vigil and Gage, at the trailer where he lived and in other locations in and around Talpa, New Mexico. Vigil and Suazo were roughhousing throughout most of the day. The two friends often wrestled this way when they were together.

{6} Sometime in the early afternoon, Vigil remarked that Suazo had a nice shotgun, and Gage asked to see it. When Suazo brought out the shotgun, Gage opened it to make sure that it was not loaded. At Gage's request, Suazo disassembled and reassembled the gun. When they finished with the gun, Gage saw Suazo place it against the wall near the back door of the trailer. Gage was certain that the gun was not loaded at that point.

{7} Later that afternoon, Suazo and Vigil were wrestling outside again. Suazo told Vigil not to mess with him because he had just lost his brother. The roughhousing continued. Vigil tried to push Suazo against a car, and then Suazo rushed into the trailer. Suazo's girlfriend, Shania Lujan, heard him cock the shotgun. At trial she testified that she told Suazo to be careful with the gun and that he responded "Don't worry, it's not loaded." However, she had previously given a statement that Suazo had only responded "Leave me alone." She testified that Suazo then held the shotgun with one hand and pointed it at Vigil while standing in the doorway of the trailer. She said that Vigil laughed and then grabbed the barrel of the gun and stuck it into his own mouth. At this point, Gage was standing almost directly behind Vigil. Suazo pulled the trigger and the gun fired. Vigil was killed and Gage was seriously injured. It is not clear when the gun was loaded and who loaded it.

II. DISCUSSION

A. The district court did not abuse its discretion by excluding certain statements by Suazo as hearsay

[1]NMSA 1978, UJI Crim. 2.11 (1981), committee commentary ("Element 2 of UJI 2.10 and of UJI 2.11 were . . . revised in 1981 to be consistent with the 1980 amendment to Section 30-2-1 NMSA 1978."); *see also* UJI 14-211 NMRA (1989).

{8} Suazo sought to elicit testimony from two witnesses at trial regarding statements he made approximately an hour after the shooting, between 4:40 and 5:00 p.m. Elaine Medina and Rosemary Cruz, Suazo's stepmother, testified that Suazo told them he had killed his best friend, he did not know the gun was loaded, and he did not understand what had happened. Medina testified that when Suazo made these statements he was curled up in a ball and crying hard, and she had never seen him cry like that. Similarly, Cruz testified that he appeared drunk, he seemed "very upset," and he was crying "a lot" when he made the statements. The State objected to the witnesses' statements as hearsay, but defense counsel argued that the statements should be admitted under the excited utterance and present sense impression exceptions to the hearsay rule. *See* Rule 11-803(1)-(2) NMRA. The district court sustained the State's objections and excluded the evidence.

{9} Although the Court of Appeals only certified the jury instruction issue to this Court, we take this opportunity to resolve Suazo's claim that the district court erroneously excluded the witness testimony about statements that he made after the shooting. *See State v. Orosco*, 1992-NMSC-006, ¶ 2 n.2, 113 N.M. 780, 833 P.2d 1146 (stating that this Court has jurisdiction over the entire case following acceptance of certification). "We examine the admission or exclusion of evidence for abuse of discretion, and the trial court's determination will not be disturbed absent a clear abuse of that discretion." *State v. Stanley*, 2001-NMSC-037, ¶ 5, 131 N.M. 368, 37 P.3d 85. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize [the ruling] as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citations omitted). We conclude that there was no abuse of discretion in this case.

{10} There is no doubt that Suazo's anguished statements to Medina and Cruz were hearsay because they were out-of-court statements offered to prove what they asserted—that Suazo did not realize the shotgun was loaded and he did not mean to kill Vigil. *See* Rule 11-801 NMRA (defining as hearsay out-of-court statements offered to prove the truth of what they assert). Such statements are inadmissible unless an exception applies. Rule 11-802 NMRA.

{11} A statement that would otherwise be hearsay can be admitted under the excited utterance exception when it "relat[es] to a startling event or condition" and is "made while . . . under the stress or excitement" caused by that event or condition. Rule 11-803(2). "[T]he theory underlying the excited utterance exception is that the exciting event induced the declarant's surprise, shock, or nervous excitement which temporarily stills capacity for conscious fabrication and makes it unlikely that the speaker would relate other than the truth." *State v. Flores*, 2010-NMSC-002, ¶ 47, 147 N.M. 542, 226 P.3d 641 (internal quotation marks and citations omitted). Thus, "to constitute an excited utterance, the declaration should be spontaneous, made before there is time for fabrication, and made under the stress of the moment." *Id.* (internal quotation marks and citations omitted). In determining whether to admit a statement under the excited utterance exception, the district court should consider the totality of the circumstances and

> consider a variety of factors in order to assess the degree of reflection or spontaneity underlying the statement. These factors include, but are not limited to, how much time passed between the startling event and the statement, and whether, in that time, the declarant had an opportunity for reflection and fabrication; how much pain, confusion, nervousness, or emotional strife the declarant was experiencing at the time of the statement; whether the statement was self-serving[; and whether the statement was] made in response to an inquiry[.]

State v. Balderama, 2004-NMSC-008, ¶ 51, 135 N.M. 329, 88 P.3d 845 (alterations in original) (internal quotation marks and citations omitted).

{12} Under the totality of the circumstances, in this case the district court did not abuse its discretion by excluding testimony regarding Suazo's statements to Medina and Cruz after the shooting. Prior to making the statements, Suazo drove away from the crime scene with his girlfriend and asked her to take the batteries out of his phone. He told her during the drive that he was "gonna go away for a long time." He made several stops, including at his stepmother's house, where he hid the shotgun. The approximately one hour that elapsed between the shooting and the statements, coupled with Suazo's intervening actions and statements, could reasonably be interpreted to indicate that he reflected on what had happened and the gravity of his situation, and therefore his later statements were not sufficiently spontaneous so as to assure their reliability and qualify them as excited utterances.

{13} We likewise reject Suazo's claim that it was error for the district court not to admit the statements under the present sense impression hearsay exception. The present sense impression exception applies to statements "describing or explaining an event or condition, made while or immediately after the declarant perceived it." Rule 11-803(1). Again, given the length of time and Suazo's intervening actions between the shooting and the statements, the district court properly exercised its discretion to refuse to apply this exception and exclude the testimony as hearsay. *See Flores*, 2010-NMSC-002, ¶¶ 51-53 (explaining that the contemporaneity of the event with the timing of the statement is the critical consideration in analyzing whether a hearsay statement qualifies as a present sense impression).

B. The district court erred by including "should have known" in the jury instruction for second-degree murder

{14} At the conclusion of Suazo's trial, the State tendered a modified jury instruction for second-degree murder. New Mexico's uniform jury instruction for second-degree murder would require the jury to find beyond a reasonable doubt that Suazo "knew that his acts created a strong probability of death or great bodily harm" to Vigil or another. UJI 14-210. The State's modified jury instruction in this case inserted "knew or should have known" in place of the word "knew," but was otherwise consistent with the model instruction. The distinction between "knew" and "should have known" was central to this case because if the jurors believed that Suazo did not realize that the shotgun was loaded and the shooting was therefore an accident, as he claimed, they could have reasonably found that he *should have known* of the probability of death or great bodily harm to Vigil because he obviously did not inspect the gun to determine if it was loaded. The district court gave the State's proposed jury instruction over defense counsel's objection. Suazo contends that the district court erred by adding the

phrase "or should have known" in instructing the jury on the mens rea required for second-degree murder.

{15} We review the jury instruction in this case for reversible error because Suazo preserved his objection at trial. *State v. Cabezuela*, 2011-NMSC-041, ¶ 21, 150 N.M. 654, 265 P.3d 705. We conclude that there is reversible error when the jury instructions, taken as a whole, cause juror confusion by "fail[ing] to provide the juror[s] with an accurate rendition of the relevant law." *Id.* ¶ 22 (internal quotation marks and citation omitted); *see also* Rule 5-608(A) NMRA ("The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury."). "When a jury instruction is facially erroneous, as when it directs the jury to find guilt based upon a misstatement of the law, a finding of juror misdirection is unavoidable." *Dowling*, 2011-NMSC-016, ¶ 17. To ascertain whether the challenged instruction in this case accurately stated the law, we must determine whether the requisite mens rea for second-degree murder is satisfied by a jury finding that Suazo should have known that his acts created a strong probability of death or great bodily harm to Vigil. This inquiry requires us to interpret the mens rea component of our second-degree murder statute. "Our primary goal when interpreting a statute is to determine and give effect to the Legislature's intent." *Cook v. Anding*, 2008-NMSC-035, ¶ 7, 144 N.M. 400, 188 P.3d 1151.

{16} We begin with the plain language of the statute, which is "[t]he primary indicator of legislative intent." *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863. Pursuant to Section 30-2-1(B),

> Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death he [or she] *knows* that such acts create a strong probability of death or great bodily harm to that individual or another.

(Emphasis added.) Under the statute, a defendant must know that his or her acts create a strong probability of death or great bodily harm; there is no express requirement that a defendant "should have known." *Id.*; *see also* UJI 14-210 (instructing jurors that they must find that "[t]he defendant knew that his [or her] acts created a strong probability of death or bodily harm" to convict for second-degree murder). The statute's plain language and New Mexico's uniform jury instruction require that the defendant possess knowledge of the probable consequences of his or her acts. *See* § 30-2-1(B); UJI 14-210. By contrast, neither the statute nor the jury instruction explicitly mentions whether a reasonable person "should have known" of the probable consequences as a mens rea standard. We must give effect to this plain language unless we detect some ambiguity in the statute that requires a different interpretation. *State v. Maestas*, 2007-NMSC-001, ¶ 14, 140 N.M. 836, 149 P.3d 933.

{17} We are not persuaded by the State's reliance on *State v. Brown* as a source of ambiguity in the statute that requires us to read the statutory term "knows" to encompass an objective knowledge of the risk through a "should have known" standard. 1996-NMSC-073, ¶ 16, 122 N.M. 724, 931 P.2d 69. In *Brown*, this Court determined that a jury may consider evidence of intoxication when a defendant has been charged with first-degree depraved mind murder because the defendant's "*subjective or actual knowledge* of the high degree of risk involved in his conduct" is an essential element of that offense. *Id.* ¶¶ 13, 19, 35. As part of our analysis in *Brown*, we distinguished between the culpable mental states required by first- and second-degree murder. *Id.* ¶¶ 14, 16. To that end, we opined that a defendant's "subjective knowledge" of the risk under depraved mind murder constituted proof of a "wicked or malignant heart" and "utter disregard for human life," while second-degree murder only required an "objective knowledge of the risk" without any showing that the act was performed with a wicked or malignant heart. *Id.* ¶ 16 (internal quotation marks omitted). Our Court's discussion of the mens rea requirement for second-degree murder in *Brown* was unnecessary to the resolution of that case and was therefore dicta.

{18} Our differentiation between a defendant's subjective and objective knowledge of the risk was intended to draw a principled distinction between first-degree depraved mind murder and second-degree murder. *See id.* ¶ 16. This issue has vexed New Mexico courts since 1980, when New Mexico's current statutory definitions of the mens reas for murder in the first- and second-degree were enacted. 1980 N.M. Laws, ch. 21. The amended statute changed the mens rea for second-degree murder from "malice aforethought" to knowledge that a defendant's acts created a strong probability of death or great bodily harm. *Compare id. with* NMSA 1953, § 40A-2-1 (1963). After this new language was enacted, courts and commentators alike noted the difficulty in distinguishing between the knowledge requirements for first-degree depraved mind murder (knowledge that an act is greatly dangerous to the lives of others, indicating a depraved mind without regard for human life) and second-degree murder (knowledge that an act creates a strong probability of death or great bodily harm to the victim or another person). *See* Leo M. Romero, *Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico*, 20 N.M. L. Rev. 55, 61-69 (1990) (identifying potential distinctions between depraved mind murder and second-degree murder and discussing the efforts of New Mexico courts to differentiate between the two).

{19} This Court first grappled with this thorny distinction in *State v. McCrary*, which was decided more than a decade prior to *Brown*. *McCrary*, 1984-NMSC-005, 100 N.M. 671, 675 P.2d 120. In *McCrary* we determined that first-degree depraved mind murder required proof of the defendant's subjective knowledge that his or her act was greatly dangerous to the lives of others. *Id.* ¶¶ 8-10. We relied on the committee commentary to the uniform jury instruction on first-degree depraved mind murder which existed at that time, which asserted that second-degree murder required an objective test of a defendant's knowledge, presumably implying that a "should have known" standard would satisfy the mens rea requirement for second-degree murder. *Id.* ¶ 8, referring to NMSA 1978, UJI Crim. 2.05, committee commentary (Repl. Pamp. 1982).

{20} However, the committee commentary to a jury instruction is only persuasive to the extent that it correctly states the law. *See State v. Johnson*, 2001-NMSC-001, ¶ 16, 130 N.M. 6, 15 P.3d 1233 (disapproving of a uniform jury instruction and its commentary because it was a "misstatement of [the] law"), *holding limited on other grounds by State v. Sims*, 2010-NMSC-027, ¶¶ 31-32, 148 N.M. 330, 236 P.2d 642. The passage in the commentary relied on by the *McCrary* Court is "doubtful authority"

that objective knowledge is sufficient for second-degree murder. Romero, *supra*, at 65; *see* UJI Crim. 2.05, committee commentary (Repl. Pamp. 1982) (citing Wayne R. LaFave & Austin W. Scott, *Handbook On Criminal Law* 544 (1972)). As Professor Romero has noted, it appears that the drafters of the committee commentary "lifted a sentence out of context and mistakenly assumed that the treatise supports an objective standard for second degree murder." Romero, *supra*, at 65-67. Instead, the quoted portion of LaFave and Scott states that under first-degree depraved mind murder, it is "unusual" that a defendant's subjective realization of the risk will be at issue, and argues that attendant circumstances known to a reasonable person will often be sufficient to establish that the defendant knew that his or her acts were greatly dangerous to the lives of others. *Id.*; *see also* UJI Crim. 2.05, committee commentary (quoting LaFave & Scott at 544). Indeed, in the next paragraph the treatise argues that a subjective realization of the risk should be required to convict for any degree of murder due to the drastic penal consequences of a murder conviction. LaFave & Scott, *supra*, at 544.

{21} To further confuse matters, a little over a year after *McCrary* was decided, we held in *State v. Beach* that second-degree murder contained a specific "element of subjective knowledge." 1985-NMSC-043, ¶ 12, 102 N.M. 642, 699 P.2d 115. *Beach* was later overruled in *Brown* "[t]o the extent that . . . *Beach* . . . holds that second-degree murder contains the same 'subjective knowledge' element as [first-degree] depraved mind murder." *Brown*, 1996-NMSC-073, ¶ 16.

{22} The *Brown* Court overruled *Beach* in dicta, which likely explains why since *Brown* was decided, neither our case law nor our uniform jury instructions have applied the *Brown* dicta to second-degree murder cases. *But cf. State v. Reed*, 2005-NMSC-031, ¶ 81, 138 N.M. 365, 120 P.3d 447 (Serna, J., concurring in part and dissenting in part) (advocating for a "should have known" standard to be incorporated into the uniform jury instruction for second-degree murder based on *Brown* in a case discussing first-degree depraved mind murder); *State v. Baca*, 1997-NMSC-059, ¶ 35, 124 N.M. 333, 950 P.2d 776 (referring to the objective test for second-degree murder in analyzing an ineffective assistance of counsel claim in the context of a conviction for aiding and abetting first-degree depraved mind murder). *Reed* clarified that first-degree depraved mind murder can be differentiated from second-degree murder because depraved mind murder requires a jury finding that the defendant's act "indicated a depraved mind without regard for human life." 2005-NMSC-031, ¶ 21. We laid out several indicators of a depraved mind in *Reed*, including (1) the number of persons subjected to the risk, (2) subjective knowledge that the defendant's act was greatly dangerous to human life, and (3) an element of "intensified malice or evil intent." *Id.* ¶¶ 22-24 (internal quotation marks and citation omitted). Notably, the majority opinion in *Reed* did not adopt the subjective-objective dichotomy urged by the dissent in that case and the *Brown* dicta. *See Reed*, 2005-NMSC-031, ¶ 81 (Serna, J., concurring in part and dissenting in part). However, the *Reed* majority stayed true to *Brown* by clarifying how the knowledge standard for first-degree depraved mind murder was distinct from the knowledge standard for second-degree murder. *Reed*, 2005-NMSC-031, ¶ 21; *see Brown*, 1996-NMSC-073, ¶ 16. The uniform jury instructions have since been revised to elaborate upon the meaning of a "depraved mind" and further distinguish first-degree depraved mind murder from second-degree murder; however, the second-degree murder instruction has never been revised to incorporate an objective "should have known" knowledge standard. *See* UJI 14-203, 14-210 to -213 NMRA.

{23} This Court's hesitancy to adopt the mens rea for second-degree murder advocated by the *Brown* dicta is commensurate with our consistent statements that a negligent or accidental killing could not satisfy the elements of second-degree murder. *See, e.g.*, *State v. Ortega*, 1991-NMSC-084, ¶ 25, 112 N.M. 554, 817 P.2d 1196 (holding that an "unintentional or accidental killing will not suffice" to establish the mens rea element of second-degree murder), *abrogation recognized on other grounds by State v. Marquez*, 2016-NMSC-025, ¶ 14, 376 P.3d 815; *State v. Campos*, 1996-NMSC-043, ¶ 18, 122 N.M. 148, 921 P.2d 1266 ("[A] negligent or accidental killing would not constitute second-degree murder . . . ."); *see also State v. McGruder*, 1997-NMSC-023, ¶ 21, 123 N.M. 302, 940 P.2d 150 (same), *abrogated on other grounds by State v. Chavez*, 2009-NMSC-035, ¶ 26, 146 N.M. 434, 211 P.3d 891. Our longstanding refusal to endorse a theory of negligent murder forecloses the implication in *Brown* that to convict of second-degree murder it would be sufficient for the jury to find that a defendant should have known of the risk of his or her conduct without anything more, because that is essentially a civil negligence standard. *See State v. Consaul*, 2014-NMSC-030, ¶ 39, 332 P.3d 850 (noting the close association between the phrase "knew or should have known" and principles of civil negligence (internal quotation marks omitted)); *see also* Romero, *supra*, at 65 ("To say that a person should have known of the risk imposes a negligence standard based on an objective test of what the reasonable person would have known under the circumstances."). Indeed, it is a "concept firmly rooted in our jurisprudence [that w]hen a crime is punishable as a felony, civil negligence ordinarily is an inappropriate predicate by which to define such criminal conduct" in the absence of some contrary indication from the Legislature. *Santillanes v. State*, 1993-NMSC-012, ¶¶ 30-31, 115 N.M. 215, 849 P.2d 358.

{24} Further, if we were to adopt a "should have known" standard for second-degree murder, we would render inconsistent the culpability requirements under New Mexico's various homicide statutes. For example, the lesser offense of involuntary manslaughter requires that a defendant have acted "without due caution and circumspection." NMSA 1978, § 30-2-3(B) (1994). In *State v. Yarborough*, we clarified that "the State must show at least criminal negligence to convict . . . of involuntary manslaughter." 1996-NMSC-068, ¶ 20, 122 N.M. 596, 930 P.2d 131. The uniform jury instruction for involuntary manslaughter requires proof that a defendant "should have known of the danger involved" in his or her actions and also "acted with a willful disregard for the safety of others." UJI 14-231 NMRA. It would be incongruent to interpret our second-degree murder statute to require a less culpable mental state (ordinary negligence) than the minimum level of culpability required by involuntary manslaughter (criminal negligence). *See State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868 ("We must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction." (internal quotation marks and citation omitted)).

{25} We detect no ambiguity in Section 30-2-1(B) that would require us to interpret the knowledge requirement to extend to situations where a defendant did not know of the risk created by his or her act,

but instead merely should have known of that risk. Despite some confusing language in our case law regarding first-degree depraved mind murder, we have never incorporated an objective "should have known" standard into our cases analyzing second-degree murder, or otherwise implied that ordinary negligence could be a sufficiently culpable mental state to support any kind of murder conviction. Our uniform jury instructions, to which the State's tendered instruction added a "should have known" component, have also never incorporated an ordinary negligence standard for second-degree murder. Accordingly, the instruction in this case misstated the mens rea element of second-degree murder, and it was therefore error for the district court to provide this instruction to the jury.[2]

C. The district court's misstatement of the essential mens rea element is reversible error requiring a new trial

{26} "[I]f an instruction is facially erroneous it presents an incurable problem and mandates reversal." *State v. Parish*, 1994-NMSC-073, ¶ 4, 118 N.M. 39, 878 P.2d 988; *see also State v. Ellis*, 2008-NMSC-032, ¶ 14, 144 N.M. 253, 186 P.3d 245 ("A jury instruction which does not instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury is reversible error." (internal quotation marks and citations omitted)).

{27} Our rules require lawyers to object to erroneous instructions, as defense counsel did in this case. Rule 5-608(D). The purpose of this requirement is to alert the trial court to the problem with the instruction and to allow the court an opportunity to correct the error. *Id.* In this case, a uniform jury instruction has been available for second-degree murder since 1981. NMSA 1978, UJI Crim. 2.10 (1981) ("Second Degree Murder: voluntary manslaughter lesser included offense; essential elements"); UJI Crim. 2.11 (1981) ("Second Degree Murder: voluntary manslaughter not lesser included offense; essential elements"). "[W]hen a uniform instruction is provided for the elements of a crime, . . . the uniform instruction should be used without substantive modification . . . [unless] alteration is adequately supported by binding precedent . . . and where the alteration is necessary in order to accurately convey the law to the jury." Uniform Jury Instructions—Criminal, Contents, General Use Note (2015). For the essential elements of crimes not contained in a uniform jury instruction, the court must draft an instruction, and ordinarily that instruction is adequate if it substantially follows the language of the statute. *See State v. Doe*, 1983-NMSC-096, ¶ 8, 100 N.M. 481, 672 P.2d 654 ("[I]f the jury instructions substantially follow the language of the statute or use equivalent language, then they are sufficient."), *holding modified by Beach*, 1985-NMSC-043, ¶ 12. The modification of the uniform jury instruction in this case was not supported by binding precedent, and it neither accurately conveyed the law to the jury nor substantially followed the language of Section 30-2-1(B). This was not a case where the mens rea element was not at issue or where the evidence was undisputed and indisputable. Instructing the jury with a non-uniform jury instruction compromised Suazo's "fundamental right . . . to have the jury determine whether each element of the charged offense has been proved by the state beyond a reasonable doubt," and it was therefore reversible error. *Cabezuela*, 2011-NMSC-041, ¶ 39 (internal quotation marks and citations omitted).

{28} The State argues that we should not reverse because the jury found beyond a reasonable doubt that Suazo "intended to injure Roger Gage or another," which the State contends no reasonable juror would have found while also finding that Suazo did not know of the strong probability of death or great bodily harm to Vigil. Indeed, in a prior case we held that a failure to instruct on an essential element of an offense does not warrant reversal under a reversible error standard "[w]hen there can be no dispute that the essential element was established." *Santillanes*, 1993-NMSC-012, ¶ 32 (concluding that in conducting its analysis, a court must consider whether there is some evidence, no matter how slight, or a reasonable inference from such evidence, that proves the element in issue) (citing *Orosco*, 1992-NMSC-006, ¶¶ 10-12)).

{29} In *Santillanes* we upheld the defendant's conviction for child abuse under a reversible error standard despite a jury instruction erroneously requiring the jurors to find a civil negligence mens rea rather than the requisite statutory mens rea of criminal negligence. 1993-NMSC-012, ¶¶ 32-34. In that case, the defendant was accused of cutting his seven-year-old nephew's throat with a knife during a scuffle, but he claimed that his nephew had injured himself by jumping into a fishing line strung between two trees, and notably did not argue that he had inadvertently caused the boy's throat to be cut. *Id.* ¶¶ 2, 33. The contested issue was whether the defendant cut his nephew's throat, not whether he cut his nephew's throat with criminal or civil negligence. We relied on the jury's finding that the defendant had cut his nephew's throat with a knife, and concluded that under those facts "no rational jury" could have determined that the nephew's throat had been cut "without satisfying the standard of criminal negligence" that should have been applied in that case. *Id.* ¶ 34. Put another way, the element at issue in *Santillanes* was whether the defendant had committed a specific act, not his mens rea. Thus, the jury's finding beyond a reasonable doubt that the defendant cut his nephew's throat with a knife was also necessarily a finding beyond a reasonable doubt that the defendant acted with at least a mental state of criminal negligence in so doing.

{30} According to the dissent and the State, we should view this case similarly because the jury found beyond a reasonable doubt that Suazo intended to injure Gage or another by shooting a shotgun in Vigil's mouth, which the State contends was effectively a finding beyond a reasonable doubt that Suazo knew the gun was loaded and that shooting it would create a strong probability of death or great bodily harm to Vigil. That Suazo pulled the trigger of the shotgun was not at issue in the case. Instead, the issue was whether he pulled the trigger of a shotgun that he knew was loaded. Therefore, unlike in *Santillanes*, where the instructional error related to what was essentially an uncontested issue, the mens rea element was a central aspect of this case. We cannot say with certainty whether the jury found that Suazo knew the shotgun was loaded, or whether jurors merely found that he should have known because a simple inspection of the shotgun would have revealed whether it was loaded. The latter finding cannot support a second-degree murder conviction because, as we have previously discussed, mere negligence is not enough to prove second-degree murder. The misstatement of the mens rea element misdirected the jury,

[2]We note that the current committee commentary to UJI 14-203 states that second-degree murder requires proof of objective knowledge, citing *Reed* and *Brown*. The committee should revisit this commentary in light of our opinion in this case.

potentially allowing the jurors to convict Suazo based upon a finding that could not support a second-degree murder conviction under the appropriate legal standard.

{31} It is tempting to agree with the dissent and the State that the intent to injure element of aggravated battery satisfies the mens rea requirement for second-degree murder because New Mexico criminalizes intent-to-injure battery, *see State v. Vasquez*, 1971-NMCA-182, ¶ 12, 83 N.M. 388, 492 P.2d 1005 (recognizing that aggravated battery requires proof of an intent to injure). If a jury finds that a defendant intended to injure a person by pulling the trigger of a firearm, it is reasonable to conclude that the jury found that the defendant knew that the firearm was loaded, that it would discharge, and that pulling the trigger created a strong probability of great bodily harm or death. Alternatively, if the jury was misled into believing that the intent to injure element of aggravated battery is satisfied if the jury finds that the defendant should have known that pulling the trigger created a strong probability of great bodily harm or death, then it cannot be indisputable that the jury found that the defendant knew the firearm was loaded and would discharge. The latter situation is what occurred in this case. When discussing the instruction for aggravated battery, the prosecutor told the jurors,

> If you believe that [Suazo] committed second-degree murder, and that he *knew or should have known* that his actions created great bodily harm or death, towards Matthew Vigil, injuring Matthew Vigil, and as a result he injures Roger Gage, that's transferred intent. That's where we get to that element on Roger Gage.

(Emphasis added.) Thus, not only did the prosecution—perhaps negligently—mislead the district court into issuing an erroneous instruction, the prosecution also misled the jury into believing that the erroneous mens rea element for second-degree murder—negligence—was sufficient to support a finding of aggravated battery. We need not decide whether New Mexico recognizes the crime of criminal-negligence battery because in this case the prosecution did not try to make a case for criminal-negligence battery; instead, the prosecution argued a case for negligence battery. The prosecution's errant statement to the jury further undermines the State's premise that the jurors must have believed that Suazo knew that the gun was loaded to convict him of aggravated battery against Gage. Despite the State's contentions in this case, the jury's intent finding under aggravated battery is simply not enough for us to say with certainty that the jury necessarily found a different, and highly contested, mens rea for the offense of second-degree murder.[3]

{32} Having concluded that the error in this case mandates reversal, to avoid double jeopardy concerns, we must examine whether sufficient evidence in this case supports retrying Suazo. *Dowling*, 2011-NMSC-016, ¶ 18. Under a sufficiency of the evidence test, we view the evidence in the light most favorable to the verdict and draw all inferences in favor of the verdict to determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Samora*, 2016-NMSC-031, ¶ 34, ___ P.3d ___ (internal quotation marks and citations omitted). In this case, to retry Suazo for second-degree murder with manslaughter as a lesser-included offense, substantial evidence must exist to support the following elements: (1) Suazo killed Vigil, (2) Suazo knew that his acts created a strong probability of death or great bodily harm to Vigil or any other human being, (3) Suazo did not act as a result of sufficient provocation, and (4) this happened in New Mexico. Section 30-2-1(B); UJI 14-210. The first and fourth elements were undisputed in this case, so the only issue is whether the mens rea and lack of sufficient provocation components of the State's case were met.

{33} Viewing the evidence in the light most favorable to a guilty verdict, we conclude that there was sufficient evidence to support a reasonable jury's conclusion that the mens rea and lack of sufficient provocation elements were met in this case. First, the jury could have reasonably inferred from Suazo's statements, the ambiguous evidence regarding who loaded the gun and when it was loaded, and the steps Suazo took after the crime to conceal evidence, that Suazo knew the gun was loaded and knew that pulling the trigger would cause great bodily harm or death to Vigil. Second, the jurors could have reasonably concluded that the roughhousing between Suazo and Vigil, an activity in which they frequently engaged and had been engaged in throughout that day, was not enough to constitute sufficient provocation to reduce the crime to manslaughter. *See* UJI 14-222 NMRA (" 'Sufficient provocation' can be any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions. The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition. The 'provocation' is not sufficient if an ordinary person would have cooled off before acting.").

III. CONCLUSION

{34} Suazo's evidentiary arguments lack merit. The second-degree murder instruction misstated the mens rea element for second-degree murder, and it therefore requires reversal. We reverse Suazo's conviction for second-degree murder and remand for a new trial.

{35} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

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

NAKAMURA, Justice (concurring in part; dissenting in part).

{36} This case is destined for the criminal law treatises. A shoots C. B is standing between A and C. In order for A to shoot C, A must fire through B's head. If we accept these facts as true, what must A have known were the likely consequences for B of A's shooting C? There can be only one conclusion: A must have known that there was a strong probability B would die. These, of course, are the facts of this case.

{37} Suazo pointed the shotgun at Vigil, and Vigil inexplicably placed the barrel of the shotgun into his mouth. Gage was standing behind Vigil. When Suazo pulled the

[3]Although we cannot state with certainty how the jurors deliberated with respect to each offense, there is at least a possibility that the jurors first considered the second-degree murder charge, and determined Suazo's guilt prior to considering the battery charge. Therefore, the erroneous instruction may have influenced their thinking with respect to battery. After all, once the jurors concluded that Suazo committed second-degree murder, how could they not convict him of the lesser offense of injuring Gage with the same shot?

trigger and fired the shotgun, the shotgun pellets exploded from the cartridge, fired out of the barrel of the shotgun, traveled into Vigil's mouth, passed through Vigil's head killing him, and entered Gage's body causing Gage serious injuries. For perpetrating this act against Gage, Suazo was convicted of aggravated battery with a deadly weapon. Suazo did not challenge the propriety of either the aggravated-battery instruction or his conviction for aggravated battery.

{38} At trial, the jury was instructed that

> For you to find [Suazo] guilty of aggravated battery with a deadly weapon . . . the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [Suazo] touched or applied force to Roger Gage by shooting at him with a firearm.
>
> [Suazo] used a 12 gauge shotgun.
>
> 2. [Suazo] intended to injure Roger Gage or another;
>
> 3. This happened in New Mexico on or about the 21st day of May, 2013.

This instruction mirrors the uniform instruction. *See* UJI 14-322 NMRA.

{39} Aggravated battery is a specific intent crime. *State v. Crespin*, 1974-NMCA-104, ¶ 8, 86 N.M. 689, 526 P.2d 1282. "Specific intent to injure a person is an essential element of the crime. The state must prove beyond a reasonable doubt that the defendant knowingly committed an aggravated battery, purposely intending to violate the law." *Id.* (citation omitted). A firearm is a deadly weapon. NMSA 1978, § 30-1-12(B) (1963) ("'deadly weapon' means any firearm . . . ."). When, as in this case, aggravated battery is committed with a deadly weapon, the jury need not be instructed that the weapon used was likely to cause death or great bodily harm. *See State v. Murillo*, 2015-NMCA-046, ¶ 21, 347 P.3d 284 (explaining that the jury need not find that a switchblade could cause death or great bodily harm because a switchblade is per se a deadly weapon). Deadly weapons necessarily inflict great bodily harm or fatal wounds.

{40} I agree with the majority that the instruction submitted to Suazo's jury on second-degree murder was incorrect. Maj. Op. ¶ 25. But we have previously recognized that requiring reversal in every circumstance where a jury is misinstructed would not only be unwise but would lead to undesirable results. *See State v. Orosco*, 1992-NMSC-006, ¶ 13, 113 N.M. 780, 833 P.2d 1146 ("Applying a rule of automatic reversal is not required by the relevant constitutional principles and fails to take into account our role as an appellate tribunal."). Accordingly, we have held that, even where a jury is misinstructed, the conviction may be affirmed so long as the omitted or misstated element was properly and indisputably established. *Id.* ¶ 12; *see also Santillanes v. State*, 1993-NMSC-012, ¶ 32, 115 N.M. 215, 849 P.2d 358.

{41} The jury's decision to convict Suazo of aggravated battery against Gage indisputably establishes that the jury must also have found that Suazo acted with the required mens rea for second-degree murder. Suazo necessarily knew that, if he committed aggravated battery against Gage with the shotgun, then Vigil would almost certainly die. This must be true because, in order to commit aggravated battery against Gage, Suazo had to fire the shotgun into Vigil's mouth and through his head. Because Suazo necessarily acted with the mens rea required to convict him of second degree murder, the error in the second-degree murder instruction was not reversible. *Santillanes* does not compel a different result.

{42} In *Santillanes*, the jury was misinstructed on the mens rea requirement for child abuse, *id.* ¶¶ 29, 32, but we concluded that the error was not reversible. *Id.* ¶ 34. We noted that "the defendant cut his nephew's throat with a knife" from "just below his right ear across to the left side of his neck below his jaw," and that the jury found the defendant cut the boy during a scuffle. *Id.* ¶¶ 33-34. We concluded that "no rational jury" could have concluded that the defendant perpetrated these acts without also necessarily concluding that the defendant acted with criminal negligence, the mens rea requirement that the state was required to establish. *Id.*

{43} As the majority observes, Maj. op. ¶ 29, we expressly noted in *Santillanes* that the defendant "did not argue that he inadvertently caused the boy's throat to be cut." 1993-NMSC-012, ¶ 33. According to the majority, this indicates that the mens rea element of the offense for which the defendant in *Santillanes* was convicted was not contested. Maj. op. ¶¶ 29-30. By contrast, Suazo maintained at trial that he did not know the gun he fired into Vigil's mouth and through his head was loaded, which was an attempt to show he did not possess the necessary mens rea for second-degree murder. For the majority, this distinction is crucial. *Id.* ¶ 29. The majority contends that Suazo's trial theory sufficiently distinguishes his case from *Santillanes* and precludes this Court from resolving "whether the jury found that Suazo knew the shotgun was loaded, or whether jurors merely found that he should have known because a simple inspection of the shotgun would have revealed whether it was loaded." *Id.* ¶ 30. I do not concur.

{44} Unlike in *Santillanes*, Suazo was convicted of multiple offenses. Suazo's jury was correctly instructed that it had to find that the aggravated battery was intentionally committed, and it so found. Therefore, the jury necessarily rejected Suazo's theory of the case. Only one shot was fired; it killed Vigil and grievously injured Gage. That single shot could not be both intentional and accidental. Thus, if Suazo intentionally fired the shot which injured Gage, he could not have accidentally shot Vigil. Because Suazo's jury found that Suazo intentionally fired the shot that injured Gage, the jury necessarily rejected Suazo's claim that he accidentally killed Vigil.

{45} Lastly, I see no reason to conclude that the erroneous second-degree murder instruction somehow infected the jury's deliberation with respect to aggravated battery. Maj op. ¶ 31 n.3. The district court properly instructed the jury on aggravated battery. *See State v. Privett*, 1986-NMSC-025, ¶ 9, 104 N.M. 79, 717 P.2d 55 (instructing district courts to use uniform instructions when they exist). "The jury is presumed to follow the court's instructions." *State v. Gonzales*, 1992-NMSC-003, ¶ 35, 113 N.M. 221, 824 P.2d 1023, *overruled on other grounds by State v. Montoya*, 2013-NMSC-020, 306 P.3d 426. And as noted, Suazo did not challenge the propriety of the aggravated-battery instruction or his conviction for that offense. Nor am I persuaded that the prosecution's statement about transferred intent misled the jury. Maj op. ¶ 31. Suazo did not object to the prosecutor's statement and the issue was not argued on appeal. Moreover, instruction number one informed Suazo's jury that "[t]he law governing this case is contained in instructions that I am about to give you. It is your duty to follow the law as contained in these instructions." If misdirection occurred, it was cured by proper instructions.

{46} For the reasons set out above, I would affirm Suazo's second-degree murder conviction. I concur that the district court did not abuse its discretion in excluding the statements Suazo made after the shooting.

JUDITH K. NAKAMURA, Justice

ETHICAL ISSUES IN PRO BONO

The Volunteer Attorney Program and
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STATE BAR of NEW MEXICO

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Position Title: Public Defender; Department: Tribal Court; Employment Status: Exempt Grade: E4; Job Summary: The Public Defender will represent individuals subject to any criminal complaint filed in the Mescalero Apache Tribal Court. The Public Defender will work with the Chief Prosecutor's Office to resolve criminal cases by plea agreement or trial. The Public Defender will work to resolve matters in an ethical and professional manner. Supervision: The Public Defender shall work independently on all matters relating to the defense of any individual appearing before court. The Public Defender shall be under the administrative supervision of the Chief Judge for budgetary and employee matters. Duties and Responsibilities: 1. Represent individuals in criminal court for all matters filed against them; 2. Conduct legal research and compose motions and pleas on behalf of the defendants; 3. Create forms for eligibility of representation, conflicts, and any other document needed to represent individuals in criminal court; 4. Work with the Tribe on any issues involving code development; 5. Assist the Chief Judge in the development of the court rules of procedure; 6. Develop relationships with the local, state and federal public defender's office; 7. Work with the Wellness Court Team to help admit potential individuals into that program, and 8. Adhere to the Professional and Ethical Rules of Responsibility. Knowledge, Skills and Abilities 1. Demonstrate oral and written communication skills as well as the ability to perform legal research and possess analytical skills commensurate with the position of a public defender; 2. Demonstrate knowledge of general legal principles in all areas listed in "Duties and Responsibilities"; 3. Demonstrate knowledge of Mescalero Apache Law, Federal Indian Law and other relevant law; 4. Understand, appreciate and promote the ideas of tribal self-determination and tribal sovereignty as it relates to individual rights; 5. Possess and demonstrate a respect and proper candor to the court., and 6. Possess a working knowledge of computers and software and office management. Education: A law degree from an ABA approved law school. Licenses and Certifications: A state or tribal bar license is preferred although not a pre-requisite to obtaining the appointment. However, the candidate must obtain license to practice law within one year of the date of hire; Must possess a valid New Mexico driver's license and be insurable, and Must submit to a background check. Minimum Qualifications:1 to 5 years working in a court as a public defender or a tribal court setting or a court setting of any jurisdiction; If no experience, law courses in trial practice, clinical practice, law journal or moot court competition; Basic understanding of Federal Indian Law, and Knowledge of the Mescalero Apache Tribe. Physical Demands: While performing the duties of this job, the employee may be required to sit for prolonged periods, walk; stand; use hands for dexterity of motion; stoop, bend, kneel or crouch, and have normal auditory and verbal communications skills. The employee must occasionally lift and/or move up to 25 pounds. Work Environment: Work is generally performed in an office setting with a moderate noise level. Extended hours and irregular shifts may be required. Evening and/or weekend work may be required. Tight time constraints and multiple demands are common. Tribal Preference Policy: Tribal Ordinance 06-02, preference will be given to qualified Mescalero Apache Tribal Members, members of other federally recognized tribes, and then to Tribal Affiliates. Applicants not entitled to the preference will receive consideration without discrimination based on age, sex, disability or national origin. Please submit an application, cover letter, resume and 3-5 page writing sample for employment to the Human Resources Department located at the Tribal Offices. Call 575-464-9273 for more information.

Alternate Judge

JOB TITLE: Alternate Judge (Pro Tem)/Appellate Court Judge; STATUS: Employment Contract; REPORTS TO: Chief Judge – Administrative Only; SALARY: DOE; OPENING DATE: May 16, 2017; CLOSING DATE: June 7, 2017; GENERAL DEFINITION: Per the Tribal Code Chapter 2 Section 1, the Chief Judge may appoint Alternate Judges to hear assigned cases on a rotating basis and must qualify per Section 4 of Article XXVI of the Mescalero Apache Constitution. The Alternate Judges shall carry out all duties of an associate judge to fairly and impartially hear and decide all matters assigned by the chief judge at the appellate level and at times at the trial level. SUPERVISION: Under the direct supervision of the Chief Judge for matters related to the administration of the contract. DUTIES & RESPONSIBILITIES: Hear and preside all cases as assigned by the Chief Judge, including but not limited to: appellate cases in criminal, traffic, civil (i.e. domestic relations, probate, repossession, breach of contract, personal injury), juvenile and child welfare cases (i.e. neglect, dependency, delinquency, truancy); Hear any conflict cases at the trial level if necessary; Conduct legal research and issue orders in a timely manner; At times, be called upon to assist the Chief Judge in the development of the court rules of procedure in all areas listed above, and Adhere to the Tribal Code and Tribal Court Judicial Code of Conduct and Judicial Ethics. KNOWLEDGE, SKILLS & ABILITIES: Demonstrate oral and written communication skills as well as the ability to perform legal research and possess analytical skills commensurate with the position of associate judge; Demonstrate knowledge of general legal principles in all areas listed in "Duties and Responsibilities", and Demonstrate knowledge of Mescalero Apache Law, Federal Indian Law and other relevant law:Understand, appreciate and promote the ideas of tribal self-determination and tribal sovereignty; Possess and demonstrate a judicial temperament, and Possess a working knowledge of computers and software. EDUCATION & EXPERIENCE: A law degree from an ABA approved law school, or a masters of Legal Studies with court experience, and at least three years of court experience including at least one year serving as a judge on any level. LICENSES & CERTIFICATES: A member in good standing of a state or tribal bar is highly preferred although not a pre-requisite to obtaining the appointment if candidate has a Masters of Legal Studies with requisite experience; Must possess a valid driver's license, and Must be willing to undergo a background check if selected. MINIMAL QUALIFICATIONS: Must be willing to decide matters on the merits of the briefs and appear up to three times a year for oral arguments on some appellate matters in Mescalero, NM; Pursuant to Chapter 2, Section 2-1-4 of the Revised (September 9, 2016) Mescalero Apache Tribal Code, the successful candidate for the position of Associate or Alternate Judge must: Possess at least one-quarter (1/4) Indian blood and is a member of a federally-recognized Tribe, nation or bank of Indians, or is an Eskimo, Aleut or other Alaskan native; Be not less than thirty-five years nor more than seventy years of age; and Has not been convicted of a felony, or, within one year of a misdemeanor previous to appointment. PHYSICAL DEMANDS: While performing the duties of this job, the employee may be required to sit for prolonged periods, walk; stand; use hands for dexterity of motion; stoop, bend, kneel or crouch, and have normal auditory and verbal communications skills. The employee must occasionally lift and/or move up to 25 pounds. WORK ENVIRONMENT: Work is generally performed in an office and court room setting with a moderate noise level. Extended hours and irregular shifts may be required. Evening and/or weekend work may be required. Tight time constraints and multiple demands are common. Tribal Preference Policy: Tribal Ordinance 06-02, preference will be given to qualified Mescalero Apache Tribal Members, members of other federally recognized tribes, and then to Tribal Affiliates. Applicants not entitled to the preference will receive consideration without discrimination based on age, sex, disability or national origin. Please submit an application, cover letter, resume and 3-5 page writing sample for employment to the Human Resources Department located at the Tribal Offices. Call 575-464-9273 for more information.

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Part and Full Time Attorneys, licensed and in good standing in NM. Minimum of 3-5 years of experience, preferably in Family Law and Civil Litigation, and must possess strong court room, client relations, and computer skills. Excellent compensation and a comfortable, team-oriented working environment with flexible hours. Priority is to fill position at the Santa Fe location, but openings available in Albuquerque. Support staff manages client acquisitions and administration, leaving our attorneys to do what they do best. Please send resume and cover letter to ac@lightninglegal.biz. All inquiries are maintained as confidential.

Associate Attorney
Would you like to make a difference? Bleus & Associates, LLC is presently seeking to hire associate attorney possessing 8+ years of civil litigation experience. Are you a passionate, knowledgeable, hardworking intelligent advocate? If so, it's time we talk. Areas of practice will include all aspects of civil litigation with an emphasis on personal injury; insurance bad faith; and tort matters. Trial experience preferred. Salary D.O.E. Please forward CV to Hiring Partner, 2633 Dakota, NE, Albuquerque, NM 87110; paralegal2.Bleuslaw@gmail.com All inquiries will remain confidential

Associate Attorney
The Santa Fe law firm of Katz Herdman MacGillivray & Fullerton PC is seeking a full-time associate with three to five years of experience to assist in all areas of our practice, including real estate, water law, estate planning, zoning, business, employment, construction and related litigation. Please send resumes to fth@santafelawgroup.com. Please state "Associate Attorney Position" in email subject line.

Associate Attorney
Associate attorney wanted for fast paced, well established, civil litigation defense firm. Great opportunity to grow and share your talent. Inquiries kept confidential. Please send us your resume, a writing sample and references to Civerolo, Gralow & Hill, P.A., via e-mail to kayserk@civerolo.com or fax to 505-764-6099.

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

Legal Assistant
Downtown law firm seeks experienced Legal Assistant. Excellent salary and benefits. Must have experience in insurance defense or personal injury. Knowledge of billing software a plus. Requires calendaring, scheduling, independent work and client contact. People skills are a must and to be able to effectively work with our team. Send resume and references to resume01@gmail.com

Family Law Paralegal
Full-time experienced paralegal needed for family law sole practitioner. Excellent writing, grammar, organizational and communication skills. Experience in drafting letters, pleadings, settlement offers, discovery, etc. Working knowledge of Word and Excel. Please email resume and salary requirements to pjheart@qwestoffice.net.

Paralegal
Paralegal wanted for Plaintiffs civil litigation firm. Growing uptown firm seeks a full time experienced paralegal that is well organized; detail oriented, and has the ability to work independently. Candidate must have prior experience in civil litigation with an emphasis in personal injury. 3+ years experience preferred. Salary commensurate with experience. Please forward resume to: attn. Tonja, Bleus & Assoc. LLC, 2633 Dakota, NE, Albuquerque, NM 87110 Paralegal2. bleuslaw@gmail.com

Paralegal
Albuquerque firm is looking for experienced paralegal. Experience in complex civil, large document management and criminal cases a plus. Send resume to Joseph at jmeserve@rothsteinlaw.com

Services

Attorney/Registered Nurse
Attorney/Registered Nurse licensed to practice law in New Mexico since 1988 with 25+ years litigation experience in medical malpractice cases. Available for contract work -- legal and/or medical records review. Contact phone or text (505) 269-3757. medlegalnm@gmail.com

Experienced Contract Paralegal
Experienced contract paralegal available for help with your civil litigation cases. Excellent references. civilparanm@gmail.com

Office Space

One Month Free Rent-Offices for Rent
Looking for a spacious office that is walking distance to the courthouses? Look no further! Offices rent for $500 and $700 and are furnished. You will have access to the following: phone, copier, fax, conference room, free Internet, lounge and parking space. Call 505-848-9190.

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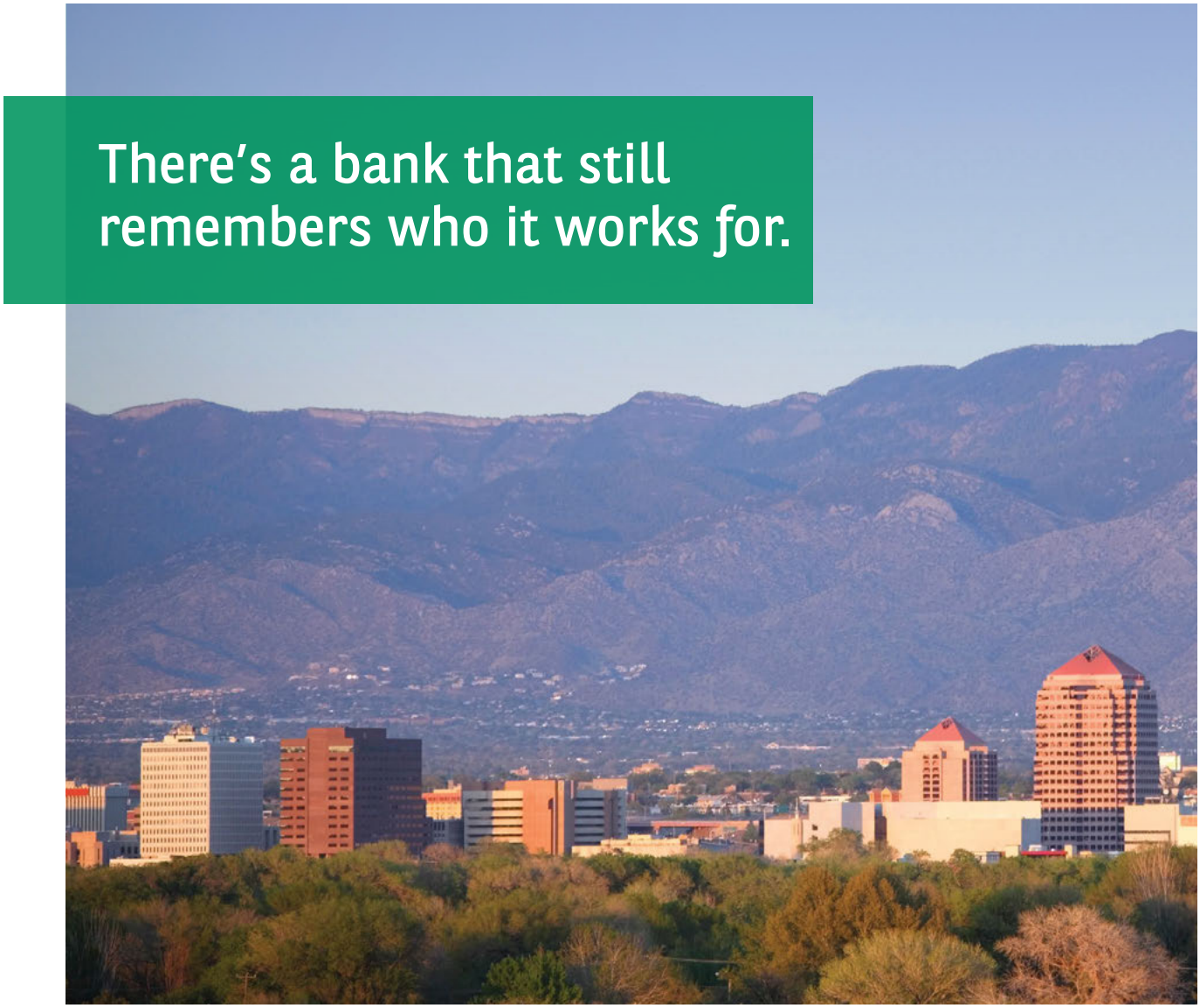
Share offices in beautiful building at 1201 Lomas NW. Ample parking, walk to courthouses. Large office, paralegal office, shared conference room and library (all furnished), kitchen-file- workroom, copier, fax, DSL internet access, phone equipment, security system, other amenities. Call Robert 243-5442.

Miscellaneous

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

Search for Will
Seeking the will of Angelina B. Gabaldon who passed on 05-03-16. Please respond to P.O. Box 35531 Albuquerque, New Mexico 87176.



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Gabe Marquez | RBG Business Banking Officer II, Vice President, NMLS # 637014
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gabe.marquez@bankofthewest.com

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