BAR BULLETIN

Official Publication of the State Bar of New Mexico

June 7, 2017 • Volume 56, No. 23

Jellyfish, by Barry Schwartz (see page 3) www.flickr.com/photos/barryabq

Inside This Issue

STATE BAR of NEW MEXICO

Officers, Board of Bar Commissioners
Scotty A. Holloman, President
Wesley O. Pool, President-elect
Gerald G. Dixon, Secretary Treasurer
J. Brent Moore, Immediate Past President

Board of Editors
Taylor V. Bui
Curtis G. Hayes
Andrew Sefzik
Mark Standridge
Carolyn A. Wolf
Gabrielle L. Dorian
Bruce L. Herr
Michael Sievers
Nancy L. Vincent

State Bar Staff
Executive Director Joe Conte
Communications and Member Services Program Manager Evann Kleinschmidt
505-797-6087 • notices@nmbar.org
Graphic Designer Julie Schwartz
jschwartz@nmbar.org
Account Executive Marcia C. Ulibarri
505-797-6058 • mulibarri@nmbar.org
Digital Print Center
Manager Brian Sanchez
Assistant Michael Rizzo

The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

505-797-6000 • 800-876-6227 • Fax: 505-828-3765
email: address@nmbar.org • www.nmbar.org

June 7, 2017, Vol. 56, No. 23

Table of Contents

Meetings

June

7
Employment and Labor Law Section Board, noon, State Bar Center

9
Prosecutors Section Board
Noon, State Bar Center

13
Appellate Practice Section Board
Noon, teleconference

14
Animal Law Section Board
Noon, State Bar Center

14
Children's Law Section Board
Noon, Juvenile Justice Center

14
Taxation Section Board
11 a.m., teleconference

15
Business Law Section Board
4 p.m., teleconference

15
Public Law Section Board
Noon, Montgomery and Andrews, Santa Fe

16
Family Law Section Board
9 a.m., teleconference

Workshops and Legal Clinics

June

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

21
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

22
Common Legal Issues for Senior Citizens
Workshop Presentation 9:30–10:45 a.m., Mary Esther Gonzales Senior Center, Santa Fe, 1-800-876-6657

About Cover Image and Artist: Barry Schwartz photographs what he sees in daily life to bring out the unusual beauty of usual things. He especially likes shooting older buildings and businesses, salvage yards, ghost towns and cemeteries to preserve the beauty and ruggedness of the past. He uses angles, colors, lighting, shapes and shadows to bring out the uniqueness and beauty. Schwartz is a member of the Albuquerque Enchanted Lens Camera Club, which has been a great help with his photography. A summary of his photography is available at www.flickr.com/photos/barryabq.

Notices

Court News

New Mexico Judicial Compensation Committee

Notice of Public Meeting

The Judicial Compensation Committee will meet at 9 a.m.–noon, July 5, in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe. The Committee will discuss FY 2019 recommendations for compensation for judges of the magistrate, metropolitan and district courts, the Court of Appeals and justices of the Supreme Court. The Commission will thereafter provide its judicial compensation report and recommendation for FY19 compensation to the Legislature prior to the 2018 session. The meeting is open to the public. For an agenda or more information call Jonni Lu Pool, Administrative Office of the Courts, 505-476-1000.

Sixth Judicial District Court

Timothy Aldrich Appointed Judge

On May 26, Gov. Susana Martinez announced the appointment of Timothy Aldrich to Division I of the Sixth Judicial District Court, filling the vacancy created by the retirement of Judge H. R. Quintero.

State Bar News

Attorney Support Groups

- 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#.
- June 19, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- July 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)

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

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 résumé by June 16 to Kris Becker at kbecker@nmbar.org or by fax to 505-828-3765.

Professionalism Tip

With respect to opposing parties and their counsel:

In the preparation of documents and in negotiations, I will concentrate on substance and content.

Committee on Women and the Legal Profession

Professional Clothing Closet

Does your closet need spring cleaning? The Committee on Women seeks gently used, dry cleaned professional clothing donations for their professional clothing closet. Individuals who want to donate to the closet may drop off donations at the West Law Firm, 40 First Plaza NW, Suite 735 in Albuquerque, during business hours or to Committee Co-chair Laura Castille at Cuddy & McCarthy, LLP, 7770 Jefferson NE, Suite 102 in Albuquerque. Individuals who want to look for a suit can stop by the West Law Firm during business hours or call 505-243-4040 to set up a time to visit the closet.

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.

continued on page 7

Legal Education

June

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

7 **Public Defenders CLE Conference**
10.0 G, 2.0 EP
Live Seminar, Albuquerque
New Mexico Public Defender Department
pdd.state.nm.us

7 **Public Safety Assessment**
2.0 G
Live Seminar, Albuquerque
Laura and John Arnold Foundation
928-713-9267

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

8 **Public Defenders CLE Conference**
10.0 G, 2.0 EP
Live Seminar, Albuquerque
New Mexico Public Defender Department
pdd.state.nm.us

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 Coalition 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

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

June

27 **Complete Trust Course**
7.0 G
Live Seminar, Albuquerque
Halfmoon Education
www.halfmoonseminars.com

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

10 **Protecting Consumers Against Fraudulent or Unfair Practices**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

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

18 **Natural Resource Damages**
10.0 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

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 **Current Developments in Employment Law**
17.5 G, 1.0 EP
Live Seminar, Santa Fe
ALI-CLE
www.ali-cle.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

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

4 **Effective Mentoring—Bridge the Gap (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

continued from page 4

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

First Judicial District Bar Association

CLE Luncheon with Kevin Washburn

The First Judicial District Bar Association's next luncheon will be noon–1:30 p.m., June 26, at the Santa Fe Hilton. Kevin K. Washburn will present "Enlisting Tribal Governments in Public Lands Management," a discussion of the laws authorizing tribal contracts and the practical challenges for tribes and the federal government in implementing these initiatives in the public lands context. The price of admission is $15 for members and $20 for non-members. Arrive early to get signed in for CLE credit. For more information or to R.S.V.P., contact Mark Cox at mcox@hatcherlawgroupnm.com. R.S.V.P. by June 22 with your bar number.

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

Rocky Mountain Mineral Law Foundation

Cross-Border Natural Resource Transactions Workshop

The RMMLF Young Professionals Committee has designed a 90-minute video-linked CLE program so that new professionals can learn the basics of the complex area of cross-border natural resource transactions. The workshop will be webcast live at 3 p.m., June 15, at the Modrall Sperling Law Firm, located at 500 Fourth Street, Suite 1000 in Albuquerque. A networking reception will follow. Registration is $30. Visit www.rmmlf.org for more information and to register.

HONORED FOR PUBLIC SERVICE—

Carolyn A. Wolf Named Public Lawyer of the Year

Story and photos by Breanna Henley

On April 28, Carolyn A. Wolf was honored as the 2017 Public Lawyer of the Year at the Capitol Rotunda in Santa Fe. Wolf was selected to receive the award based on her long distinguished legal career in both the public sector and in private practice, as well as her volunteer work following retirement. Throughout Wolf's career she has developed an encyclopedic knowledge of both New Mexico state statutes and case law. She serves as a valuable resource to fellow attorneys and has taught a number of continuing legal education programs. In addition to Wolf's legal knowledge, speakers at the ceremony spoke of her professionalism and dedication to furthering public interest.

Chief Judge Sarah Singleton (left) presents Wolf with Public Lawyer of the Year Award

Public Law Section Chair Cydney Beadles was the master of ceremonies during the program. She began by introducing Board of Bar Commissioners Secretary-Treasurer Jerry Dixon. Dixon mentioned the difference between a lawyer running a law firm as opposed to a lawyer who provides public service. Dixon quoted retired U.S. Supreme Court Justice Sandra Day O'Connor to emphasize his statement: "The ever increasing pressures of the legal marketplace, the need to bill hours, to market to clients, and to attend to the bottom line, have made fulfilling the responsibilities of community service quite difficult. But public service marks the difference between a business and a profession."

Justice Judith K. Nakamura shared the difficulty she faces when friends, family and the public ask her what it is she does as a New Mexico Supreme Court justice and compared it to the challenges public lawyers must face when asked by people outside of the legal profession what it is they do. Justice Nakamura continued that while public law may or may not be as glamorous as fictional characters such as Ali McBeal, Vinny Gambini or Perry Mason make it out to be, it is critically important to the citizens and our democracy, and "the work you do matters. The work you do makes a difference."

During his remarks, UNM School of Law Dean Alfred Mathewson provided interesting statistics regarding alumnae and women in particular. He pointed out that all five of the New Mexico Supreme Court justices, the majority of whom are women, are graduates of the law school; the first recipient of the Public Lawyer of the Year Award, Florenceruth "Flossie" Brown, was also one of the first woman graduates of the law school; and today, both the Public Lawyer of the Year and Othmer Fellowship recipients are women. Dean Mathewson closed his remarks by observing how fitting the State Capitol is for the award ceremony as it is the most public building in New Mexico and reflects deep appreciation for public service.

Chief Judge Sarah M. Singleton of the First Judicial District Court spoke highly of Wolf before presenting her with the award. Wolf has represented numerous offices, boards and licensing agencies. Since her retirement, she saw the need for and volunteered to be an unpaid law clerk for Judge Singleton. Regarding Wolf's manner, Judge Singleton described her cogent arguments, clarity of analysis and exhibits, her straightforwardness and, in addition to her active pro bono work and mentoring, Judge Singleton referred to Wolf as "fiercely proud" of

her family. Judge Singleton compared Wolf to Margaret Chase Smith in talking about the intangible, deeper aspects of commitment: "Public service is more than doing a job efficiently and honestly. It is complete dedication to people and the nation."

Wolf thanked the Public Law Section Board and contributing speakers, Judge Singleton for all she has learned from the judge, Sheila Brown, her friends and colleagues, her husband, Aaron, her daughters Rebekah and Sarah and her granddaughter. Wolf shared what she learned while working in the public sector: It has long provided opportunities for women; the work is intellectually challenging and the lawyer must be a generalist; and it is service that matters and provides value to everyone.

Carolyn Wolf (third from left) with her daughter Rebekah, husband Aaron, and granddaughter

Carolyn Wolf (third from left), Public Law Section Board members (from left to right) Sean Cunniff, Andrea Salazar, Tania Shahani, Cydney Beadles and Felicia Orth and Chief Judge Sarah Singleton

OTHMER FELLOWSHIP

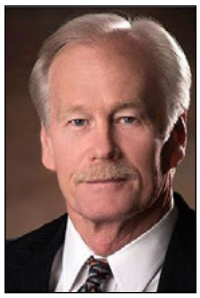
Sheila Brown presented first-year UNM School of Law student Janine Caller with the 2017 Othmer Fellowship. Brown noted that this year marks the ninth year of the fellowship, which encourages law students to become involved in public interest work. Caller, who has prior experience dealing with domestic violence, will be fulfilling that duty this summer at the Santa Fe Dreamers Project where she plans to work to design a Dreams on Wheels-style project for immigrants in need of a U Visa.

Sheila Brown (right) presents Janine Caller with Othmer Fellowship

Hearsay



The Bernalillo County Metropolitan Court has elected a new Chief Judge, the **Honorable Edward L. Benavidez** (left) and a new Presiding Criminal Division Judge, the **Honorable Vidalia G. Chavez** (center). Both Judge Benavidez and Judge Chavez began their roles on May 1. Judge Benavidez succeeds Judge Henry A. Alaniz, who has served as chief judge since 2014. The **Honorable Frank A. Sedillo** (right)will continue as the Presiding Judge over the Civil Division.



Jerry D. Worsham II, shareholder of The Cavanagh Law Firm who is licensed in Arizona, New Mexico, Texas and the District of Columbia, has recently been recertified in 2017 as a "Recognized Environmental Law Specialist" by the New Mexico Board of Legal Specialization, an agency of the New Mexico Supreme Court.

Judge Rod Kennedy (ret.) won the *Santa Fe Reporter* 2017 Photography Contest in April with a picture "Desperados Waiting For a Train." Judge Kennedy was part of a workshop on the role of linguistics and bias in forensic science analyses with the American Academy of Forensic Sciences in February, and in April taught a class on scientific evidence offers of proof to the Rhode Island Public Defenders. He was also invited to lecture the forensic science department at the University of Rhode Island on judicial gatekeeping under *Daubert*.

New Mexico family law titans **David Walther** and **Sarah Bennett** join with next generation lawyers **Amber Macias-Mayo** and **Morgan Honeycutt** to announce the formation of a new family law firm: **Walther Bennett Mayo Honeycutt**. The firm will focus on financially and geographically complex family law.

Keleher & McLeod, P.A.

2017 Southwest Super Lawyers: **Arthur O. Beach** (personal injury products: defense), **Thomas C. Bird** (appellate), **Sean Olivas**, (employment and labor), **W. Spencer Reid** (business litigation), **Gary Van Luchene** (personal injury: general defense).

2017 Southwest Super Lawyers Rising Stars: **Zachary R. Cormier** (employment litigation: defense), **Tina Muscarella Gooch** (civil litigation: defense), **Brian Haverly** (utilities), **Chad F. Worthen** (estate planning and probate).

Lewis Roca Rothgerber Christie LLC

2017 Southwest Super Lawyers and Rising Stars: **Jeffrey H. Albright** (environmental), **Dennis Jontz** (business litigation) and **Bobbie Collins** (rising star—business litigation).

Rodey, Dickason, Sloan, Akin & Robb, PA

Southwest Super Lawyers: Top 25 Lawyers in New Mexico: **Jeff Croasdell**, **Nelson Franse**, **Scott Gordon**, **Bruce Hall** and **Ed Ricco**.

Chambers USA: **Mark K. Adams** (environment, natural resources and regulated industries; water law), **Rick Beitler** (litigation: medical malpractice and insurance defense), **Perry E. Bendicksen III** (corporate/commercial), **David P. Buchholtz** (corporate/commercial), **David W. Bunting** (litigation: general commercial), **Jeffrey Croasdell** (litigation: general commercial), **Nelson Franse** (litigation: general commercial; medical malpractice; and insurance defense), **Catherine T. Goldberg** (real estate), **Scott D. Gordon** (labor and employment), **Alan Hall** (corporate/commercial), **Bruce Hall** (litigation: general commercial), **Justin A. Horwitz** (corporate/commercial), **Jeffrey L. Lowry** (labor and employment), **Donald B. Monnheimer** (corporate/commercial), **Sunny J. Nixon** (environment, natural resources and regulated industries: water law), **Theresa W. Parrish** (labor and employment), **John N. Patterson** (real estate), **Debora E. Ramirez** (real estate), **John P. Salazar** (real estate), **Andrew G. Schultz** (litigation: general commercial), **Tracy Sprouls** (Corporate/commercial: tax), **Thomas L. Stahl** (labor and employment), **Aaron C. Viets** (labor and employment) and **Charles J. Vigil** (labor and employment).

In Memoriam

Harold Daum, 96, died on May 10. He was born on April 26, 1921 in New Braunfels, Texas, to Edgar H. and Erna (Vogel) Daum. He dropped out of high school because of the Great Depression and joined F.D.R's Civilian Conservation Corps, working across the Southwest. He sent money home to help support the family. After that he joined the U.S. Navy in 1938 and served in the Pacific during WWII and the Korean War. In 1960 he retired as a Chief Medical Corpsman. He then became a salesman for Strasenburg Pharmaceuticals and upon retirement from that job became a volunteer for Lawyers Referral for the Elderly Program at the State Bar of New Mexico. Daum's name was read into the Congressional Records for his contributions upon his retirement. Daum and and his wife Edith travel. They visited all 50 states and toured Canada. They also took numerous cruises. He was preceded in death by his wife, Edith; parents; and siblings, Leroy and Leona Daum. He is survived by his two daughters; Mary Ann Jordan and her husband Jim, of Tulare, Calif., and Denise Arnot and her husband Mike of Albuquerque; grandchildren Jimmy Jordan and wife Kelly, Chontelle Adney and husband Steve, Chris Steffen and wife Julie, Ryan Steffen and wife Tanya; great-grandchildren, Kirby Dykstra and husband John, Taylor Jordan and Jacob Steffen; great-great-grandson, John Rhyan Dykstra. Harold is survived by two siblings; Irene Henze and husband Calvin, and Nellrose Weir. He will be greatly missed by his family and friends.

Flori Jo Nunez died suddenly and unexpectedly, from complications following surgery, on May 5 in Las Cruces. Nunez was born Oct. 27, 1974 in Roswell to Steve and Frances Nunez who preceded her in death. Nunez graduated from Roswell High School in 1993, received her Bachelors of Science in Political Science from Eastern New Mexico University in 2000 and her Juris Doctorate from the University of Tulsa College of Law in 2003. She was admitted into the State Bar of New Mexico in 2004. She was an assistant trial attorney for the Chaves County District Attorney's Office, senior Trial Attorney for Allstate and Encompass Staff Counsel and was currently working for the New Mexico Public Defender's Office in Carlsbad. Nunez was a veteran of the U.S. Air Force where she served from 1995-1999. She was awarded Achievement Medal w/1 device, Air Force Good Conduct Medal, National Defense Service Medal, Air Force Overseas Long Tour [auth] Ribbon, Air Force Longevity Service Award Ribbon and Air Force Training Ribbon. Survivors include sisters Carolyn (Doug) Conklin of Wickenburg, Ariz., and Mary Faith Nunez of Roswell, brothers Steve (DeeAnn) Nunez, and Jim Nunez of Roswell. Nunez is also survived by her second mother, Aunt Flo Valdez, of El Paso, and uncles, George Valdez, Jim Valdez and Bob Valdez of Roswell. Flori Jo loved her nieces and nephews who survive her: Brennen, Nicole, Christopher, Taylor, Shelby, Destiny, Aaron and Kylie. She had a special nickname for each of her beloved nieces and nephews. Flori Jo is also survived by special friends Chris Waggoner, Albert Rivas and Katrina Finnegan. Nunez was full life of life. She lit up any room she walked into and had a very contagious laugh. Nunez never met a stranger. She had a huge heart as was reflected by her need to always be the advocate for the underdog. Nunez will be remembered for her vivacious personality and her passion for law and anything political. She loved her special four-legged friends, Crush and Eddie. Her beloved special four-legged friend Bruiser Riley preceded her in death and it nearly broke her heart when he passed on. She carried his remains in a little keepsake urn in her purse with her everywhere she went. Nunez will be greatly missed by all her family and friends who love her very much. She was taken way too soon from us. She didn't get to accomplish all her plans, goals and dreams; but we're sure she's up there in heaven rejoicing with her Momma and Pop and getting all those angels in order.

William C. Salmon, 66, resident of Albuquerque and Murray, Ark., died on Oct. 31, 2016 from complications related to a dissected aorta. He was surrounded by his family, who traveled from near and far to be with him. Salmon was a lawyer and songwriter who enjoyed sharing his music with friends around the campfire, at family weddings, and at his and his wife Linda's infamous Halloween parties. He will be remembered for his kindness, generosity, goofy humor and love for zombies. Salmon was born in Norwalk, Conn., on Feb. 11, 1950, the son of the late Robert Salmon Jr. and Marjorie H. Salmon. He attended public schools in New Canaan, Conn., and graduated from New Canaan High School in 1968. In high school, Salmon was an honors student, on the varsity tennis team, and a member of numerous clubs. He graduated from the University of Connecticut, where he also played varsity tennis, in 1972, and from Ohio Northern University School of Law in 1975. After graduating, Salmon joined the law firm of Rucci & Reardon in New Canaan. Salmon first discovered New Mexico while visiting his brother Rick in 1975. In 1984, he resettled in Albuquerque with Kris Olson and their two daughters. The next year, he and Mark Rhodes founded the law firm of Rhodes & Salmon, PC. He and Kris divorced in 1988, but continued to co-parent. Not long after, Salmon met and married Linda Winter, the great love of his life, with whom he enjoyed exploring the world, at home and abroad. Together they traveled the back roads of New Mexico and Arkansas, the Caribbean, Mexico and much of Europe and the US. In 2015, Salmon retired from law to devote time to music, art and travel. Over the years, he and his band, Swamp de Ville, performed at many venues in and around Albuquerque. Salmon recorded four full-length albums, and his songs twice were nominated for the New Mexico Music Awards. Tunes like "My Secret Airforce" and "Planet Made of Dreams" will play on in the minds of his family and friends. Salmon is survived by his wife of 26 years, Linda Winter, and their children and grandchildren. Children and their partners from Salmon's prior marriage to Kris Olson are Briana Olson and Joe Atzberger, of Seattle, and Chloe Olson-Salmon and Layton Hansen, of Albuquerque. Children from Linda's marriage to Larry Winter are Jesse Winter, his wife, Anita Cordova, and Caroline Wilson. Salmon and Linda's young grandchildren are Jude, Aubrianna, Mariana, and Arlo, all of Albuquerque. Salmon is also survived by brothers Bob of Vero Beach, Fla., and Rick of Tijeras, their wives, and many loving uncles, cousins, nieces, and nephews.

Stephen T. Swaim died on April 27. Swaim was born on Nov. 27, 1971 to Margaret and Jerry Swaim. He went to Loma Heights Elementary, Sierra Middle School and Mayfield High School in 1990. After graduation, Swaim enlisted and proudly served as a U.S. Army paratrooper in the 82nd Airborne in Fort Bragg, N.C. He returned and graduated from NMSU with a Bachelors of Business Administration in Economics. In 2005, Swaim graduated from William H. Bowen School of Law in Little Rock. After law school, Swaim worked proudly as a public defender, giving a voice to those who could not stand up for themselves. He was a practicing attorney at the Pickett Law Firm at the time of his death. He is survived by wife, Lisette C. Bedell Swaim of Las Cruces; parents Margaret and Jerry Swaim; and sister Karen Swaim Linville; many friends, nieces and nephews, aunts and uncles, cousins, in-laws, outlaws, his Brothers at Arms, and his three dogs Tinkerbelle, Rocky and Charlie Brown. Swaim was preceded in death by his cats Max and Buddy; unborn baby Swaim; and his chocolate lab, Thunder Brown. For those who knew Swaim, his smile and laugh are what he will be remembered by most. Nobody laughed at his corny jokes louder than he did himself. He had a huge, loyal heart and cared immensely for others. Swaim conquered his goals and fears, he jumped out of airplanes even though he was afraid of heights. He went to law school even though he thought he would be older than the other students, etc. His love for his wife, Lisette, transcends death as he loved her fiercely and loyally.

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 26, 2017

Published Opinions

No. 34379	2nd Jud Dist Bernalillo CV-12-7714, D YOUNG v T WILLIAM (affirm)	5/25/2017

Unpublished Opinions

No. 36077	2nd Jud Dist Bernalillo CR-12-201, STATE v L HENDERSON (dismiss)	5/22/2017
No. 34789	2nd Jud Dist Bernalillo CV-07-10382, BOA v. P. LIPPER (reverse)	5/23/2017
No. 36040	2nd Jud Dist Bernalillo LR-16-13, STATE v S TSOSIE (affirm)	5/23/2017
No. 35759	3rd Jud Dist Dona Ana CR-14-78, STATE v D LANDON (affirm)	5/24/2017
No. 35636	2nd Jud Dist Bernalillo CV-15-6363, G SEDILLO v CYFD (reverse and remand)	5/24/2017
No. 35319	4th Jud Dist San Miguel CV-14-342, L BALLARD v V FERNANDEZ (affirm)	5/25/2017

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

Dated May 22, 2017

Clerk's Certificate of Address and/or Telephone Changes

Carlos Ruiz de la Torre
1801 Rio Grande Blvd. NW, Suite C
Albuquerque, NM 87104
505-544-5400
505-544-5401 (fax)
ruizesq@gmail.com

Scott D. Johnson
Scott Johnson Trial Attorney, PC
603 NE Aztec Blvd.
Aztec, NM 87410
505-803-1688
505-333-4480 (fax)
sjohnson@johnsonlegalfirm.com

Cydni J. Sanchez
Law Offices of the Public Defender
505 Marquette Avenue NW, Suite 120
Albuquerque, NM 87102
505-835-2212
cydni.sanchez@lopdnm.us

Bryan L. Williams
Ron Bell Injury Lawyers
610 Seventh Street NW
Albuquerque, NM 87102
505-242-7979
866-782-8820 (fax)
bwilliams@898-bell.com

Joshua Monroe Curtis
joshua@curtislawfirm.org
Lisa K. Curtis
lisa@curtislawfirm.org
Kinzer Anne Jackson
kinzer@curtislawfirm.org
Amalia J. Skogen Lucero
amalia@curtislawfirm.org
Curtis and Lucero
215 Central Avenue NW, Suite 300
Albuquerque, NM 87102
505-243-2808
505-242-0812 (fax)

Clerk's Certificate of Name Change

As of May 15, 2017:
Katrina Sanchez Bilal f/k/a Katrina M. Sanchez
Law Offices of the Public Defender
505 Marquette Avenue NW, Suite 120
Albuquerque, NM 87102
505-835-2245
katrina.sanchez@lopdnm.us

As of May 15, 2017:
Elizabeth Logozzo f/k/a Elizabeth Taub
99 Battery Place, Apt. 26E
New York, NY 10280
435-703-3167

As of May 22, 2017:
Courtney A. Miller f/k/a Courtney Alesia Andry
Sanders, Bruin, Coll & Worley, PA
PO Box 550
701 W. Country Club Road (88201)
Roswell, NM 88202
575-622-5440
575-622-5853 (fax)
cam@sbcw.com

Clerk's Certificate of Change to Inactive Status

Effective May 11, 2017:
Iris T. Chung
9304 Harvey Road
Silver Spring, MD 20910
484-885-5622
itlchung@hotmail.com

Clerk's Certificate of Admission

On May 16, 2017:
Arwen Kristine Gaddis
Office of the Ninth Judicial District Attorney
417 Gidding Street, Suite 200
Clovis, NM 88101
575-769-2246
575-769-3198 (fax)
agaddis@da.state.nm.us

On May 23, 2017:
Jeremiah J. Hall
Law Offices of the Public Defender
800 Pile Street, Suite A
Clovis, NM 88101
575-219-6323
575-763-9808 (fax)
jeremiah.hall@lopdnm.us

On May 16, 2017:
Carolyn Armer Holden
Holden & Armer, PC
4505 E. Chandler Blvd., Suite 210
Phoenix, AZ 85048
480-656-0460
480-656-0752 (fax)
dholden@holdenarmer.com

On May 23, 2017:
Luis Joaquin Lanz
Wilkes & McHugh, PA
15333 N. Pima Road, Suite 300
Scottsdale, AZ 85260
602-553-4552
602-553-4557 (fax)
llanz@wilkesmchugh.com

On May 16, 2017:
Sean A. Reed
Mountain States Employers Council
6005 Delmonico Drive, Suite 250
Colorado Springs, CO 80919
303-223-5424
sreed@msec.org

Clerk's Certificate of Revoked License to Practice Law

Effective May 8, 2017:
Joanna Zimmerman
PO Box 649
Gordonsville, VA 22942
575-937-8610
jzimmermanesq@yahoo.com

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective May 31, 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.

Before the Disciplinary Board of the Supreme Court of the State of New Mexico

In the Matter of Daniel M. Salazar, Esq.

Disciplinary No. 01-2016-733

An Attorney Licensed to Practice Law Before the Courts of the State of New Mexico

Formal Reprimand

You are before the Disciplinary Board in connection with your representation of the defendant in a criminal case. On March 28, 2002, you filed an Entry of Appearance, under a contract with the State of New Mexico Public Defender's office on behalf of an assigned defendant, for the purpose of post-conviction Habeas Corpus proceedings. That defendant had filed a Petition for a Writ of Habeas Corpus ("Petition"), on January 31, 2002; the State filed its Response on March 22, 2002. You did not file a Reply on behalf of your client until over four years later, on June 10, 2006. On May 7, 2006, the Court denied the Petition.

On June 16, 2006, you filed a Motion to Reconsider the Order denying the Petition. The court set the Motion to Reconsider for hearing, on June 26, 2006. However, on June 22, 2006, you successfully moved for continuance of the hearing, as you did again five other times, with your last Motion for Continuance filed on October 1, 2008.

Your motions for continuance in 2006 and 2007 were based, in part, on your asserted need for more time to conduct discovery, yet you conducted no discovery. Moreover, you took no action to compel the State to produce the discovery you claimed to have sought. In sum, you took no action to advance the Petition.
On December 8, 2014, you stipulated on behalf of the defendant to a dismissal without prejudice of the Petition, with a stipulation that the defendant could re-file a Motion for Habeas relief. By letter dated June 4, 2015, your client filed a complaint with the Disciplinary Board, in which he alleged, in part, that you had not communicated with him, since January 2009.

You claim that you withdrew from representation in or about January 2009, after your contract with the Public Defender's Office was terminated; however, there is no evidence that you informed your client, and you never filed a Motion to Withdraw. In addition, your December 8, 2014 stipulation on behalf of the defendant belies your contention. Contrary to your claim during the disciplinary process, you remained the defense counsel of record.

Your conduct violated the following Rules of Professional Conduct: Rule 16-101, by failing to provide competent representation to your client; Rule 16-103, by failing to represent your client diligently; Rule 16-104, by failing to communicate with your client; Rule 16-116(A), by failing to withdraw from representing a client in an orderly fashion; Rule 16-302, by failing to expedite litigation; and Rule 16-804(D), by engaging in conduct that was prejudicial to the administration of justice.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The formal reprimand will be filed with the Supreme Court in accordance with 17-206(D), and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin.

Dated May 19, 2017
The Disciplinary Board of the
New Mexico Supreme Court

By
Curtis R. Gurley, Esq.
Board Chair

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-026

No. 33,692 (filed November 29, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JORGE BERNARDO HUERTA-CASTRO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
FERNANDO R. MACIAS, District Judge

HECTOR H. BALDERAS
Attorney General
MARIS VEIDEMANIS
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

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

Opinion

Roderick T. Kennedy, Judge

{1} Defendant was convicted of twelve counts of criminal sexual penetration of a minor. Six of these counts of the indictment pertained to one child, and six to another. Otherwise, all twelve charges in the indictment were exact duplicates with precisely the same language. Defendant's motion for a bill of particulars was denied prior to trial; his motion for a directed verdict was denied. Defendant now asserts on appeal that these identical counts violated his right to due process and subjected him to double jeopardy. We agree. As such, ten of the twelve charges against Defendant are dismissed. The remaining two charges are supported by sufficient evidence and would be affirmed but for cumulative error that caused prejudice to Defendant. Reversed and remanded for retrial on one count as to each victim.

I. BACKGROUND

{2} Defendant was indicted on twelve counts of criminal sexual penetration of a minor (CSPM). Six of the twelve counts read as follows:

> [O]n, about or between August 15, 2012, and October 13, 2012, in Dona Ana County, the above-named defendant did cause [Child 1] to engage in sexual intercourse and/or caused the insertion of any object into the intimate part of [Child 1], and [Child 1] was twelve years of age or younger, a first degree felony, contrary to § 30-9-11(D)(1), NMSA 1978.

In the remaining six counts, the first two references to Child 1's name were replaced with Child 2's name.[1] Other than the name substitution, all twelve counts were indistinguishable. The State acknowledged that all references to Child 1 in counts seven through twelve should have referenced Child 2, and it later amended its indictment to correct the naming error on counts seven through twelve, resulting in two sets of six identical counts as to each child.

Motion for a Bill of Particulars (Statement of Facts)

{3} Defendant filed a motion for a bill of particulars. The district court held a hearing on the motion, during which Defendant requested more particularity on each of the twelve counts. Specifically, defense counsel requested details regarding the time, date, location, and actions alleged in each count of the indictment. Characterizing the indictment as a "shotgun indictment," defense counsel explained to the district court that it was unclear what he was defending against in each count, and as such, he could not effectively defend against any of the counts. The inability to formulate a defense revolved particularly around the time of day of the incidents, whether Defendant might have been at work, what day or week it was, or even whether he was around at these times.

{4} The State conceded that it could not provide specific dates because of the young ages of Children, but told the court that Children could narrow the incidents by the time of day and in relation to other events. Additionally, the State pointed out that it could provide a beginning and end date for the abuse and could specify that it took place in the home. The State also asserted that it had physical evidence to show when the last incident occurred.

{5} The district court took note of the young age of Children—six and eight years old at the time of the incidents—and pointed out that the inability of Children to pinpoint a specific date did not reflect a deficiency in the indictment. The district court based its interpretation of the indictment on its reliance on the State's assertion that witness interviews yet to occur would provide evidence that twelve different incidents occurred. The district court concluded that the issues with the indictment could be resolved through the subsequent interviews and denied Defendant's motion. The district court noted that if, after conducting the interviews, Defendant could provide additional argument regarding the issue, he could file further motions. Defendant did not file any other motion regarding deficiencies in the indictment.

{6} At trial, the State presented testimony from Child 1, Child 2, their mother (Mother), their grandmother (Grandmother), the investigating detective, and the forensic interviewer. Defendant presented testimony from a pediatrician. At the time of the alleged abuse, Defendant lived with his girlfriend, Mother, in Las Cruces, New Mexico with Child 1 and Child 2. Mother would leave for work early in the mornings, and Defendant would wake Children and get them ready for school. At trial, Child 1 and Child 2 testified to Defendant putting his penis and fingers in each of their vaginas and anus while their sibling was showering. Both Child 1 and Child 2 testified that Defendant acted in this way more than six times.

{7} Child 2 testified that Defendant first did these acts to her on "a day before school started." The State's questioning

[1]The children in this case have the same initials for their first and last names. We will identify them as Child 1 and Child 2 throughout this opinion.

regarding this incident, and Child 2's responses thereto, were specifically limited to Defendant's actions toward her alone. It was not proven when school started, nor that August 15, 2012, was a date relevant to the start of school. Child 2 did not remember when the last incident of this sort occurred, and Child 1 gave no testimony regarding a final incident.

{8} The State presented some evidence that the alleged abuse ended on October 13, 2012, through the testimony of Grandmother who stated that on that date, Child 1's genital area was red, irritated, and had a rash. Grandmother testified that Child 2 also reported having been abused, though it is unclear when she made this allegation, and Grandmother did not see similar injuries on Child 2. After Grandmother told Mother about the rash and abuse, Mother took Children to the emergency room on October 13, 2012. Children were not examined at that time, but police were dispatched.

{9} Detective Martinez testified that, based on his interview with Mother while at the hospital, the last incident had occurred six to eight days earlier. However, Detective Martinez later clarified that during subsequent interviews with Mother, he discovered that the last incident had actually occurred fourteen days before Children were taken to the hospital.[2] Children were taken to a forensic interview on October 14, 2012, and they were later examined by a pediatrician on October 30, 2012. The pediatrician indicated that her examination of Children did not reveal any injuries, and that her findings did not necessarily mean that Children were not sexually abused.

{10} Once the State rested its case, defense counsel made a motion for directed verdict, pointing out that the State had failed to produce any evidence that the events occurred in the charging period or that six separate incidents occurred as to each child. The district court denied the motion but acknowledged that Defendant's argument had merit because no evidence supported any crime occurring with regard to the charged date of August 15, 2012, and allowed Defendant to argue to the jury that no evidence suggested that the abuse took place within the charging period. The jury found Defendant guilty of all twelve counts of CSPM. Defendant appealed to this Court. Other facts will be discussed as needed in the course of the opinion.

II. DISCUSSION

{11} Defendant alleges that the charging documents in this case violated his right to due process and right to be free from double jeopardy because they lacked the requisite level of specificity. Defendant also asserts that there is insufficient evidence to support his conviction on all twelve counts. We first address Defendant's argument regarding the specificity of the charging documents. Finding reversible error on that issue, we then decide whether sufficient evidence existed to support all or any of the counts in order to satisfy double jeopardy. Finally, we evaluate Defendant's claims that he was prejudiced by the State's failure to turn over exculpatory evidence in a timely manner or by cumulative error.

A. Adequacy of Notice From Cookie-Cutter Counts and Due Process

{12} Defendant first asserts that the district court erred in not granting his motion for a bill of particulars[3] prior to trial, and that at the end of trial, the district court erred in not dismissing charges for the lack of differentiation between them.

{13} "The object of a bill of particulars in criminal cases is to enable the defendant to properly prepare his defense, and, to achieve that fundamental purpose, it must state as much as may be necessary to give the defendant and the court reasonable information as to the nature and character of the crime charged[.]" *State v. Mosley*, 1965-NMSC-081, ¶ 4, 75 N.M. 348, 404 P.2d 304 (citation omitted). In cases involving child victims, allegations of criminal behavior often lack specificity as to the date, location, or details of a particular incident within the period of time for which a defendant is charged. *See State v. Vargas*, 2016-NMCA-038, ¶ 39, 368 P.3d 1232. We recognize that because the State has a compelling interest in protecting child victims, our courts can be "less vigorous in requiring specificity as to time and place when young children are involved than would usually be the case where an adult is involved." *Id.* ¶ 40 (internal quotation marks and citation omitted). This flexibility does not, however, permit the State to proceed based on a lack of adequate notice of the conduct upon which an indictment is based.

{14} Procedural due process requires "the State to provide reasonable notice of charges against a person and a fair opportunity to defend[.]" *State v. Baldonado*, 1998-NMCA-040, ¶ 21, 124 N.M. 745, 955 P.2d 214. This includes a requirement that the State provide defendants with a reasonable ability to protect themselves from being convicted more than once for the same behavior. *State v. Dominguez*, 2008-NMCA-029, ¶ 5, 143 N.M. 549, 178 P.3d 834. In sum, the State is able to proceed with prosecution only for those acts for which it is able to provide a factually distinct basis. *Id.* ¶¶ 10-11. A charging defect encompassed by cookie-cutter allegations within a broad time period operates in two ways to deny a defendant's rights. It gives rise to the possibility that a defendant might suffer double jeopardy in his initial trial by being convicted and punished multiple times on undifferentiated counts for what might have been the same offense, and it renders a defendant unable to plead a specific conviction or acquittal as a bar to future prosecution. *Id.* ¶ 9. Procedurally, Defendant exercised his rights in the three ways in which he could most efficiently raise the issue of lack of specificity in the charges: (1) pre-trial through a motion for a statement of facts under Rule 5-205(C); (2) at the close of the State's case in a motion for directed verdict; and (3) at the close of trial, in a motion to dismiss for lack of sufficient evidence to support all of the counts charged in the indictment. We address each in turn.

B. A Statement of Facts Was Improperly Denied; Reversal Is Required

{15} In this case, the indictment charged six factually undifferentiated acts per victim occurring between two dates, about two months apart. Defendant moved for a bill of particulars, citing *Baldonado*, 1998-NMCA-040, ¶¶ 26-29, and preserving the issue for this appeal. *See State v. Altgilbers*, 1986-NMCA-106, ¶ 46, 109 N.M. 453, 786 P.2d 680 (holding that a defendant who does not raise lack of notice by way of requesting a statement of facts before trial has waived a claim to lack of notice). Defense counsel detailed the vagueness and the effect on his inability to formulate a defense. Specifically, Defendant could not ascertain from the charging document around what time of day things might have

[2]Mother's testimony did not lend any clarification to this discrepancy.

[3]While the terms "bill of particulars" and "statement of facts" are used interchangeably in our jurisprudence, we note that "statement of facts" is the term adopted in our Rules of Criminal Procedure. *See* Rule 5-205(C) NMRA.

happened, or relating whether Defendant was at work, what day or week it was, or where he was during these times. As to the incidents charged, counsel said, "they all happened at basically the same time." The motion hearing took just over ten minutes before the district court denied Defendant's motion for a bill of particulars.

{16} As defense counsel acknowledged that the indictment's lack of specificity could be due to Children's inability to provide more specific information, the court asked, "Then how do I make that occur; that's not a deficiency in the indictment, that goes to kind of the weight of the evidence that would be presented by the State." With this basis for its decision, the district court mistakenly shifted the focus of our law from a statement of facts that "give[s] the defendant and the court reasonable information as to the nature and character of the crime charged," *Mosley*, 1965-NMSC-081, ¶ 4, to the evidence the State would subsequently provide by way of discovery and at trial to prove the specific allegations. The remedy for an erroneous failure to provide adequate information as to the nature of the charges is reversal, *State v. Graves*, 1963-NMSC-183, ¶ 12, 73 N.M. 79, 385 P.2d 635, and failure to specify individual charges' factual basis is judged at the time the statement of facts is requested, not whether prejudice might have resulted (or been cured) by trial on the merits. *Id*. Thus, any error in denying a bill of particulars occurs at the time of denial, not after evidence is produced at a later time. That principle has not changed, although *Baldonado* and *Dominguez* have since applied this principle to the specific problem of "the proper balance to be struck between the due process imperative to provide reasonable notice of charges against a criminal defendant, and the need to allow the State reasonable leeway in prosecuting crimes committed against children of tender years." *Baldonado*, 1998-NMCA-040, ¶ 1. In *Graves*, our Supreme Court noted that the rule for a bill of particulars "would seem to make it mandatory that certain basic information, not evidence, be furnished." 1963-NMSC-183, ¶ 11. A district attorney is not required to plead evidence in a bill of particulars. *Mosley*, 1965-NMSC-081, ¶ 4. By emphasizing the possibility of the State eventually producing discovery by way of interviews yet to be conducted, or judging the quality of the indicted charges by the weight of evidence to be produced at trial, the district court applied the incorrect legal standard resulting in the court's failure to order a statement of facts as required in *Baldonado*.

{17} Our Supreme Court recognized long ago that a bill of particulars is the "means [through which] the right of an accused to appear and defend and to demand the nature and cause of the accusation against him, contained in [Article II, Section 14] of the New Mexico Constitution, is assured." *State v. Campos*, 1968-NMSC-177, ¶ 11, 79 N.M. 611, 447 P.2d 20. In *Campos*, relying on *Graves*, our Supreme Court "recognized that if a defendant asked for a bill of particulars he was entitled to sufficient information to enable him to prepare a defense." *Campos*, 1968-NMSC-177, ¶ 10. However, as mentioned above, "we have never held that the State may move forward with a prosecution of supposedly distinct offenses based on no distinguishing facts or circumstances at all, simply because the victim is a child." *Dominguez*, 2008-NMCA-029, ¶ 10. This is not to say an indictment for indistinct counts must fail entirely; in *State v. Gardner*, we held that with respect to counts for which the children's statements did not have enough specific information to charge distinct incidents of abuse, the State could still proceed with a prosecution, since evidence of a course of conduct could support a single count of abuse. 2003-NMCA-107, ¶ 28, 134 N.M. 294, 76 P.3d 47.

{18} In *Dominguez*, the district court took up the defendant's motion for a bill of particulars to distinguish ten identical charges in the indictment (virtually identical to those in this case) and held the indictment provided sufficient notice to the defendant only because the bill of particulars filed by the State *after* the indictment described separate incidents. We held that the court properly dismissed five counts that could not be linked to a specific incident of abuse. 2008-NMCA-029, ¶¶ 10-12. We held in *Dominguez*, based on *Gardner*, 2003-NMCA-107, ¶¶ 26-28, that the charging of multiple acts in a period of time without factual differentiation between incidents or offenses permits no more than a single charge based on a course of conduct. *See Dominguez*, 2008-NMCA-029, ¶ 10. We carried this rule forward in *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92, to hold that two indistinguishable counts of vaginal CSPM and two of anal CSPM violated the defendant's rights. In *Tafoya*, we held again that a lack of differentiation between the counts of penetration necessitated reversal of one count of each because the duplicative and undifferentiated counts established nothing more than a pattern of conduct. *Id.* ¶ 24.

{19} When the need for a bill of particulars is judged at the time the indictment is before the court, evidence that is disclosed later is of no consequence to the district court's consideration. In *Baldonado*, we rejected a position that the State's only obligation was to "frame the charge as it determines appropriate and provide full discovery." 1998-NMCA-040, ¶ 19. Our Supreme Court noted that the rule for a bill of particulars "would seem to make it mandatory that certain basic information, not evidence, be furnished." *Graves*, 1963-NMSC-183, ¶ 11. In this case, the district court explicitly built its denial of Defendant's motion not on the sufficiency of facts alleged in the charging document, but on the possibility of later discovery of evidence by way of interviews with the victims or other state witnesses to substitute for the paucity of facts available in the charging document itself. This is clearly insufficient under *Baldonado*, where the charging document must be evaluated as to its adequacy *prior to*, *and apart from*, speculation on evidence yet to be produced, and certainly prior to submitting any evidence to a jury. There, our ruling rejected this *post-facto* path to justification of an insufficient indictment. *See* 1998-NMCA-040, ¶ 25 ("Even granting the defendant discovery of the State's evidence may not provide adequate notice if the State, perhaps for tactical reasons, has simply failed to engage in investigational efforts to narrow the time period. Due process requires more than simple notice of the prosecution's evidence in these circumstances."). The district court erred in denying the bill of particulars based on the occurrence of subsequent witness interviews.

{20} Accordingly, in *Baldonado* we held that each case requires examination by the district court on a count-by-count basis as to whether an indictment is reasonably particular with respect to the time of the offense. *Id*. ¶ 26. In other words,

> what is required is an especially diligent scrutiny of the facts of the incident as they may be disclosed. The aim is to narrow the time frame of the occurrence as complained of—if not to the extent of an exact date or dates, then possibly in respect of seasons of the year, or incidents in

> the victim's life such as a death in the family, or a change in a family member's job routine, or the beginning of the school year or of vacation time or of extracurricular activities. When the trial court is satisfied that these sources of information have been exhausted, it will then be in a position to strike the necessary balance to determine whether "fair notice" has been given.

Id. ¶ 28 (internal quotation marks and citation omitted). *Baldonado* set out an extensive outline for the process by which a district court should assess allegations of insufficient specificity in the charging document. *Id.* ¶¶ 26-29.

{21} The district court was obliged, but did not attempt, to analyze the sufficiency of the indictment based on the facts underlying the charges according to the analytical framework we dictated in *Baldonado*, but moved the problem down the road by relying on the possibility that further witness interviews might produce relevant information, and on Defendant's ability to question the weight of the State's evidence at trial based on any lack of temporal specificity. This is the root of the district court's first error. In *Baldonado*, we reversed and remanded to the district court, requiring it to apply the method we adopted to determine whether the indictment was reasonably particular. *Id.* ¶¶ 29-33.

{22} In *Dominguez*, we affirmed the district court's culling of inadequate counts in the charging document when it used the method outlined in *Baldonado*. Under *Dominguez*'s more strict rule, it is a fair view that the charges in Defendant's indictment here are facially based on courses of conduct over a two-month period, and not "anchored to particular offenses" supporting no more than one count for each child victim. 2008-NMCA-029, ¶ 8. It is clear that the district court's failure to order the State to produce a bill of particulars to address the insufficiency of the indictment to charge specific and distinct offenses violated Defendant's rights to due process and requires reversal of five of Defendant's convictions. The sixth count as to each victim is sufficient in that it reflects Defendant's alleged course of conduct.

B. Sufficiency of the Evidence

{23} Based on our reversal, we must address Defendant's argument that sufficient evidence did not support his convictions.

{24} In reviewing the sufficiency of evidence on appeal, we consider the evidence presented at trial in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict. *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. The evidence supporting a conviction is sufficient when "substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). Substantial evidence is that which a reasonable mind accepts as adequate to support a conclusion. *State v. Arrendondo*, 2012-NMSC-013, ¶ 10, 278 P.3d 517. The jury instructions given in this case required the State to prove beyond a reasonable doubt that Defendant "caused [Children] to engage in sexual intercourse and/or anal intercourse, or caused the insertion to any extent, of his penis and/or fingers into the vagina and/or anus of [Children]," that Children were "under the age of thirteen," and that the acts happened in New Mexico on or between August 15, 2012 and October 13, 2012. *See* UJI 14-957 NMRA. They were differentiated only insofar as they gave the name of each child in six instructions per child. They combined two types of intercourse and sexual conduct ("sexual intercourse and/or anal intercourse") in the same count. A trial court has a duty "to withdraw a case from the jury and direct a verdict for a defendant when the State has failed to come forward with substantial evidence that the defendant committed the offense charged." *State v. Maes*, 2007-NMCA-089, ¶ 22, 142 N.M. 276, 164 P.3d 975 (internal quotation marks and citation omitted).

1. Pattern of Conduct

{25} Children testified as to a pattern of conduct where Defendant would put his penis and fingers in each child's vagina and anus before she went to school in the mornings. The testimony revealed Defendant did this to both Child 1 and Child 2. Children testified that Defendant did this more than six times, with only one instance tied to a potentially ascertainable but unproven date (the first day of school). No other evidence tied a single incident to a certain time or place. Children were able to describe an erect male penis as well as ejaculation, and testimony was given that children of that age would not have been able to do so without having seen it before. Undifferentiated multiple acts against a victim within a period of time is evidence sufficient under *Dominguez* to support a conviction on one count per child for a pattern of conduct.

{26} Child 1 provided no testimony at trial regarding any specific instances of abuse. In fact, when the State asked her about a specific incident—the putative last one before the incidents were reported—she could not remember and did not provide any details regarding what occurred, timing, or location. Child 2 also did not remember any specific details about a last incident of abuse or when it occurred. Grandmother testified to irritation on Child 1's genitals that she discovered on October 13, 2012, prior to the trip to the hospital that prompted Children to disclose the abuse. However, Children were not examined at all when at the hospital, and Children were not physically examined until two and a half weeks after Children were taken to the hospital to be examined by a pediatrician who found no physical signs of abuse on either child. Thus, no injuries existed to tie to any proximate act of abuse, either as a cause of injury, or with regard to the timing of abuse. The pediatrician testified that her finding was no indication that abuse had not taken place and that knowledge of such things is common in cases where abuse had occurred. The pediatrician also testified that Children's descriptions to her of sexual behavior would not, in her belief, be possible from girls of Children's ages without some trauma having occurred, and that one of the girls described "mixed emotions of being afraid." While this testimony corroborates the existence of abuse, it still supports nothing more than a general count for Defendant's course of conduct with regard to Child 1.

{27} Child 2's responses about the day before school started were specifically limited to Defendant's actions toward her alone, and did not involve Child 1. Again, the crime attached to the date was not proven because the date school started was not proven to be within the charging period stated in the indictment.

{28} Child 2 had no recollection as to a specific final incident of abuse, although the State attempted to tie the end of the period in which abuse occurred to October 13, 2012, when Grandmother observed irritation on Child 1's genital area, and Mother took Children to the emergency room. Grandmother testified that this was the second instance of such irritation, having seen a similar outbreak

a month previously. Detective Martinez testified that, according to interviews with Mother, she told him at the hospital that the last incident had occurred either six to eight days prior to the hospital visit, or as stated in a later interview, actually "up to fourteen days" before Children were taken to the hospital on October 13, 2012. As to this or other instances of abuse, Grandmother did not check Child 2 for similar injuries to those she reported with regard to Child 1. This testimony again supports no more than a single "course of conduct" count against Defendant. To allow counts relating to specific alleged occurrences to be decided by a jury without sufficient evidence would leave a jury unable to distinguish between any single act and the general course of conduct, giving rise to the double jeopardy problem of possible multiple convictions for the same act.

{29} For lack of specificity as to time, date, place, or other distinguishing facts, the testimony presented at trial supported no more than one count as to each child for the pattern of conduct that included the six alleged incidents per child, and the district court should have directed a verdict and allowed no more than those two counts—one for each victim—to go to the jury based on a pattern of conduct. *See State v. Chavez*, 2008-NMCA-126, ¶ 23, 145 N.M. 11, 193 P.3d 558, *rev'd on other grounds*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891; *State v. Castañeda*, 2001-NMCA-052, ¶ 15, 130 N.M. 679, 30 P.3d 368 (holding that one continuous act amounting to child abuse not involving harm to multiple victims supports only one count; where harm occurs, "it is entirely appropriate to charge the perpetrator with a separate count . . . for each victim").

{30} We conclude that there was sufficient evidence presented at trial to support only two of the twelve counts brought against Defendant, and those based only upon a course of conduct with regard to each child.

C. *Brady* Violations

{31} Defendant argues that the State engaged in misconduct by failing to disclose evidence that was material to his defense. Defendant properly preserved this issue by making a timely objection at trial. In a motion to dismiss, defense counsel pointed to two instances in which the State failed to provide material evidence that was favorable to the defense. Defendant's first claim of error is that the State failed to either acknowledge the existence of or provide copies of a report written by the pediatrician who examined Child 1 and Child 2 until just before trial started. Defendant's second claim of error is that the State did not disclose that Mother had applied for a visa that, because of her participation in this case and cooperation with law enforcement, would allow her to remain in the country legally during the pendency of this suit. We examine each assertion in turn.

1. Standard of Review

{32} In New Mexico, an alleged *Brady* violation equates to a charge of prosecutorial misconduct, which appellate courts review for an abuse of discretion. *State v. Trujillo*, 2002-NMSC-005, ¶¶ 48, 50, 131 N.M. 709, 42 P.3d 814. As such, we will affirm the district court's decision "unless its ruling was arbitrary, capricious, or beyond reason." *State v. Turrietta*, 2013-NMSC-036, ¶ 35, 308 P.3d 964 (alteration, internal quotation marks, and citation omitted); *see Case v. Hatch*, 2008-NMSC-024, ¶ 47, 144 N.M. 20, 183 P.3d 905 (noting that "the trial court is in the best position to evaluate the significance of any alleged prosecutorial errors" (internal quotation marks and citation omitted)).

2. Legal Standard

{33} A defendant's due process rights are violated when the prosecution suppresses favorable evidence. *Brady*, 373 U.S. at 86-87; *Trimble v. State*, 1965-NMSC-055, ¶ 12, 75 N.M. 183, 402 P.2d 162 (applying *Brady*). A defendant seeking dismissal for a *Brady* violation must prove three elements: (1) evidence was suppressed by the prosecution; (2) the suppressed evidence was favorable to the defendant; and (3) the suppressed evidence was material to the defense. *Turrietta*, 2013-NMSC-036, ¶ 35. In order to be material under *Brady*, there must be " 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *State v. Baca*, 1993-NMCA-051, ¶ 21, 115 N.M. 536, 854 P.2d 363 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). When considering materiality, we place the suppressed evidence in the context of the entire record, rather than viewing it in isolation. "Implicit in the standard of materiality is the notion that the significance of any particular bit of evidence can only be determined by comparison to the rest." *Trujillo*, 2002-NMSC-005, ¶ 50 (internal quotation marks and citation omitted).

{34} The State points to our Supreme Court's case, *State v. Rondeau*, 1976-NMSC-044, ¶ 40, 89 N.M. 408, 553 P.2d 688, as support for its assertion that because the pediatrician's report and information regarding Mother's U-Visa were not suppressed throughout the entire trial, suppression of that evidence cannot constitute a *Brady* violation. In *Rondeau*, our Supreme Court interpreted *Brady* to mean that where evidence is found during trial, rather than after the trial, no *Brady* violation exists. *Rondeau*, 1976-NMSC-044, ¶ 40 ("We interpret [*Brady*] to mean that a convicted defendant would be entitled to a retrial where the prosecution suppressed, throughout the whole trial, exculpatory evidence material to the guilt or punishment of the defendant.").

{35} We believe *Altgilbers*, 1989-NMCA-160, is more persuasive and applicable in this case. In *Altgilbers*, a defendant asserted that the district court's refusal to grant a mistrial resulted in a violation of his due process rights where he discovered allegedly exculpatory evidence through a witness's statements during trial. *Id.* ¶ 25. This Court, in deciding the case, drew a distinction between evidence disclosed during trial and evidence discovered only after the trial had concluded. *See id.* ¶ 26. We reasoned that, based on this distinction, "[t]he damage to [the] defendant therefore must lie in any impairment to his tactical use of the evidence because of delayed disclosure[,]" but concluded that the "imposition of a barrier to more effective use of evidence would have substantially less impact than total deprivation of use." *Id.* Rather than create a standard establishing "precisely how to weigh any particular factor in determining whether delayed disclosure violates due process[,]" this Court instead reasoned that there was sufficient reason to conclude that delayed disclosure "did not deprive [the] defendant of fundamental fairness, which is the essence of due process." *Id.* ¶ 28.

{36} Though we acknowledge the distinction between discovery of suppressed evidence during and after trial, we see no reason to wholly depart from the considerations of materiality and prejudice set forth in *Brady*. Instead, we read *Altgilbers* to require a consideration of those factors in an assessment of the fundamental fairness of the proceedings. *See* 1989-NMCA-106, ¶ 28. In *Bagley* and *Kyles*, the United States Supreme Court explained that *Brady* is aimed at promoting the effective use of evidence. *See Bagley*, 473 U.S. at 676; *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). *Altgilbers* similarly acknowledges that the State's providing material evidence during

trial stands as an "imposition of a barrier to more effective use of evidence[.]" 1989-NMCA-106, ¶ 26. Thus, it stands to reason that while post-trial discovery of evidence under *Brady* requires "a reasonable probability that . . . the result of the proceeding would have been different[,]" discovery of evidence during trial requires an evaluation of whether the late tender has impeded the effective use of evidence in such a way that impacts the fundamental fairness of the proceedings. *Altgilbers*, 1989-NMCA-106, ¶ 27.

3. Pediatrician's Report

{37} It is hard to imagine more material evidence in a child-rape case than the results of medical examinations of the victims. "The *Brady* requirement of disclosing such material applies to all members of the prosecutorial team, including police authorities." *State v. Wisniewski*, 1985-NMSC-079, ¶ 21, 103 N.M. 430, 708 P.2d 1031 (citations omitted); *see Kyles*, 514 U.S. at 437 (stating that in the context of a *Brady* violation, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). Although it appears unclear from the record when the State had possession of the pediatrician's report, it is undisputed that the prosecution, through its investigating detective, knew "what the medical records were going to reflect." As such, the knowledge that Child 1 and Child 2 had undergone a physical examination—a fact unknown to Defendant until just before the start of the trial—was imputed to the State. The State also had knowledge of the exculpatory aspects of the report, i.e., that neither Child 1 nor Child 2 had suffered any physical injuries to their reproductive organs.

{38} Though the pediatrician's report is not in the record before us, according to her testimony, she concluded that the results of the examinations were consistent with a child who had a history of being sexually abused. This evidence is clearly not favorable to Defendant. On appeal, Defendant asserts error in the district court's refusal to grant a dismissal based on the late disclosure of the pediatrician's report because defense counsel was not able to question the pediatrician prior to trial or consult its own expert about the pediatrician's report and conclusions. Specifically, Defendant asserts that had he been able to interview the pediatrician prior to calling her as a witness, he would have been able to more effectively question her regarding distinctions between different kinds of victims, assaults, and injuries. Defendant also laments his inability to consult with an expert of his own, and he points to contrary evidence that could have been presented to refute the pediatrician's testimony.

{39} At no point subsequent to the report's disclosure during the proceedings did Defendant or defense counsel request a continuance to allow for an interview of the pediatrician. We also note that defense counsel did little to secure an interview with the pediatrician prior to calling her as a witness on his behalf. Defendant points to no evidence to suggest that he attempted to secure an interview with the pediatrician, despite knowing that she would not be testifying until the second day of trial. Additionally, Defendant's argument on appeal asserts prejudice in his inability to present evidence that could have been used to refute evidence that the State initially suppressed but that he himself then presented at trial. As such, we stand unpersuaded that the evidence suppressed by the State—the pediatrician's examination and report—was favorable to Defendant. Had it been truly favorable, Defendant would not have spent several pages of his brief explaining with particularity how he would have undermined the pediatrician's conclusions. We therefore conclude that, although the State did err in suppressing the pediatrician's report, Defendant has failed to demonstrate the prosecutorial misconduct necessary for reversal.[4] *See Turrietta*, 2013-NMSC-036, ¶ 35.

4. U-Visa Application

{40} We find more merit in Defendant's assertion that the State's suppression of information regarding Mother's U-Visa application amounts to a serious discovery violation.[5] Defendant asserts that the State's suppression of the fact that Mother sought a U-Visa deprived him of an opportunity to impeach one of the State's main witnesses by providing evidence that Mother had a strong motive—staying in the United States—for fabricating charges against Defendant.

{41} Recognizing the importance of the U-Visa to Defendant's case, on the first day of trial the district court ordered the State to obtain a copy of the visa application and provide it to Defendant. Following that order, the district attorney's office provided Defendant a receipt for the U-Visa application dated April 10, 2013. The district court again directed the State to obtain and provide a copy of the application to Defendant. After being ordered to produce the application, the State incorrectly represented to the district court that it had only three pages of the twenty-three page application and claimed to have given Defendant access to those three pages.

{42} The second day of trial, the State produced the visa application in its entirety. The application identified the Third Judicial District Attorney's Office as the certifying agency and was dated in December 2012. Although the application referenced attached materials, including a memorandum from the investigating officer in this case and affidavits and letters intending to offer proof that Mother was "the indirect victim of a qualifying crime," none of those other materials were included with the application in the disclosure that the State made. The district court demanded that the State seek and provide those materials and admonished the State for failing to provide the U-Visa information during discovery. Defendant, after receiving copies of the letters and affidavits attached to and referenced in the application, argued that the late disclosure of these materials constituted a *Brady* violation and again requested dismissal. The district court again denied Defendant's motion to dismiss, but suggested that if defense counsel felt the case had been compromised, he could "combat that" by using the documents that had been produced that day when questioning the remaining witnesses. In reaching this decision, the district court reasoned that allowing Defendant to question Mother regarding immigration issues related to the U-Visa could be "interpreted as a sanction against the State for failure to disclose something that they clearly knew about."

{43} It is clear from the record that the

[4]We note here that our conclusion as to the pediatrician's report does not condone the State's behavior in this case.

[5]According to the U.S. Citizenship and Immigration Services, a U-Visa is set aside for victims of certain crimes who have been mentally or physically hurt, and it is available to those who were, are, or are likely to be "helpful to the police or law enforcement" in the investigation or prosecution of a crime. *See* Stanford Law School Immigrants Rights Clinic, *Getting a U-Visa*: *Immigration help for victims of crime* 6 (2012) https://www.ilrc.org/sites/default/files/resources/proseuvisamanual_english.pdf.

State suppressed the production of the U-Visa application to Defendant. Although the State made repeated representations to the district court that it had no knowledge of the U-Visa application, the knowledge of the members of the State's prosecution team is imputed on the State. *See Wisniewski*, 1985-NMSC-079, ¶ 21. The application contained letters from individuals within the district attorney's office, as well as a memorandum from the investigating detective in this case. Mother acknowledged that she received help from the local police department in obtaining and completing the U-Visa application. We agree with the district court's assessment in this regard: "It would have been a very appropriate document to share. . . . [It] has way too many items that came in support of it from the [d]istrict [a]ttorney's office and from law enforcement. Those components of [the application] certainly should have been part of the discovery."

{44} Throughout the trial below, it is clear that the State was not forthcoming with information regarding the U-Visa. The State's representations to the district court regarding the U-Visa evolved throughout the trial, beginning with a denial of knowledge of its existence and ending with production of a twenty-three page application as well as letters from individuals working in the district attorney's office and a memorandum from the investigating detective. The State's actual knowledge of the application is, in this case, adequate evidence for us to conclude that the State erred in suppressing the U-Visa impeachment evidence and acknowledge that the first prong of the *Brady* test is satisfied.

{45} It is also clear that the evidence suppressed was favorable to Defendant. Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule, as both are " 'evidence favorable to an accused.' " *Bagley*, 473 U.S. at 676 (quoting *Brady*, 373 U.S. at 87); *cf. State v. Baca*, 1995-NMSC-045, ¶ 39, 120 N.M. 383, 902 P.2d 65 (considering "egregious error" of improper exclusion of evidence impeaching the State's primary witness in concluding cumulative error occurred). Had the U-Visa information been disclosed earlier, Defendant could have questioned the investigating detective regarding his involvement in Mother's visa application. Defendant could have interviewed the people who submitted the letters and affidavits that accompanied the visa application to determine Mother's position regarding her status as an illegal immigrant. Defendant could also have presented evidence regarding the U-Visa process itself. Such information includes the fact that Mother and Child 1 and Child 2 could legally live in the United States for four years and would be eligible to apply for a green card to live here permanently after three years.[6] Thus, if Mother were successful in obtaining a U-Visa, she could secure United States citizenship for not only herself, but her daughters as well.[7]

{46} Instead of proffering that evidence, Defendant was only allowed to question Mother about the U-Visa. When asked what a U-Visa is, Mother replied, "I don't know. It's something conditional." Mother admitted to having been deported once before in 2006. Such evidence, viewed in conjunction with the impeachment evidence regarding the U-Visa, would have been relevant to the issue of Mother's possible bias; Mother, as an illegal immigrant, submitted a visa application with the assistance of the State and the investigating officer that could allow her to reap substantial immigration benefits for Children and herself through involvement in this case against Defendant. Such evidence would undoubtedly be favorable to Defendant.

{47} Finally, it appears from the nature of the evidence suppressed as well as the central role of the witness whom it impeached, there is a reasonable probability that the result of the trial would have been different if the impeachment evidence regarding the U-Visa had been properly disclosed. Mother's influence over other testifying witnesses has implications for much of the evidence in this case. As evidence of bias and even a possible motivation for lying or fabricating allegations, it taints not only her own testimony, but also the testimony of Children and Grandmother. As such, evidence regarding the veracity of Mother's statements or evidence that she was biased against Defendant is material to the outcome of Defendant's trial. Defendant has demonstrated that evidence regarding Mother's U-Visa application was suppressed, was favorable to him, and was material to his defense. Although Defendant has demonstrated all three *Brady* prongs, we look also to whether the suppression of the U-Visa evidence impeded Defendant's effective use of it in such a way that the fairness of the proceedings is called into question. We conclude that while it was error for the State to withhold the U-Visa application, Defendant has not demonstrated that this error, by itself, is sufficiently egregious to call into question the fairness of the entire trial.

D. Cumulative Error

{48} "The doctrine of cumulative error requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *State v. Woodward*, 1995-NMSC-074, ¶ 59, 121 N.M. 1, 908 P.2d 231 (internal quotation marks and citation omitted), *abrogated on other grounds as recognized by State v. Montoya*, 2014-NMSC-032, 333 P.3d 935.

{49} The district court committed numerous errors in this case. As explained more fully above, the district court erred by not granting Defendant's motion for a bill of particulars. The district court erred by refusing to grant Defendant's motion for directed verdict. The district court erred in allowing six identical, factually undifferentiated counts per child, demonstrating an unawareness of the course of conduct standards enumerated in *Dominguez* and *Baldonado*. The district court made questionable decisions regarding the State's late disclosure of the examining pediatrician's

[6]U.S. Citizenship and Immigration Services, *Victims of Criminal Activity: U Nonimmigrant Status*, Department of Homeland Security (July 28, 2016), https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status; Stanford Law School Immigrants' Rights Clinic, *Getting a U-Visa: Immigration help for victims of crime* 4 (2012), https://www.ilrc.org/sites/default/files/resources/ proseuvisamanual_english.pdf.

[7]U.S. Citizenship and Immigration Services, *Victims of Criminal Activity: U Nonimmigrant Status*, Department of Homeland Security (July 28, 2016), https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status; Stanford Law School Immigrants' Rights Clinic, *Getting a U-Visa: Immigration help for victims of crime* 5 (2012), https://www.ilrc.org/sites/default/files/resources/ proseuvisamanual_english.pdf.

report. The district court allowed the State to improperly withhold material evidence regarding Mother's U-Visa application that was favorable to Defendant. The district court allowed the suppression of the U-Visa information despite the State's repeated refusal to acknowledge that it has a duty to learn of any favorable evidence known to the others acting on the government's behalf and despite the State's misleading representations regarding the level of involvement that police and the district attorney had in assisting Mother with applying for the visa. **{50}** The district court permitted the trial to go forward without allowing Defendant any additional time to conduct a meaningful review of untimely disclosed evidence. Defendant was forced to call a witness without the benefit of a prior interview. Despite eventually being given information that was key to impeaching one of the State's key witnesses, Defendant had no opportunity to effectively use that information to his advantage. The jury was then presented with six identical counts per child, with no way to distinguish between each offense or act. Under these facts and circumstances, we cannot conclude that Defendant had a fair trial. These numerous errors, considered together, rise to the level of prejudice so great that we must conclude Defendant was deprived of a fair trial.

III. CONCLUSION

{51} Based on the foregoing, we reverse Defendant's convictions on ten counts of criminal sexual penetration of a minor and remand for dismissal of those counts. In addition, we remand for Defendant to receive a new trial on two counts representing a single course of conduct as to each child.

{52} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

LINDA M. VANZI, Judge

Certiorari Denied, February 7, 2017, No. S-1-SC-36260

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-027

No. 34,724 (filed November 29, 2016)

S. LOUIS LITTLE,
Plaintiff-Appellant,
v.
THOMAS R. BAIGAS,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
JEFF FOSTER MCELROY, District Judge

SAMUEL M. HERRERA
THE HERRERA FIRM, P.C.
Taos, New Mexico
for Appellant

LEE BOOTHBY
NEW MEXICO LEGAL CENTER, P.C.
Taos, New Mexico
for Appellee

Opinion

Roderick T. Kennedy, Judge

{1} A vacationing tenant renting a home fell from a deck that was built almost ten years earlier by an unlicensed builder. The tenant injured himself in 2009 and sued the lessor of the home in 2011 for his injury. During that suit, the tenant sought to discover from the lessor the identity of the person who built the deck, but the lessor did not identify the builder for almost three years. While waiting for the lessor to identify the builder, the statute of limitations on the claims for the tenant's personal injuries expired. The builder was subsequently disclosed by the lessor and was quickly named as a defendant in the case. The builder filed a motion for summary judgment, claiming that because the statute of limitations had run before he was named as a defendant, he was entitled to dismissal of the claims against him. The tenant responded by asserting that the doctrines of equitable tolling and equitable estoppel applied to block the statute of limitations' operation. The district court granted summary judgment for the builder, and dismissed the tenant's claims against the builder. The tenant appeals that dismissal.

{2} We conclude that the builder made a prima facie showing of entitlement to summary judgment based on the statute of limitations. We conclude that the tenant's basis for asserting equitable tolling and equitable estoppel as bars to the operation of the statute of limitations is insufficient to invoke those doctrines. Although we fully recognize the disdain and enmity with which New Mexico courts view unlicensed contractors, we also conclude that the tenant cannot prevail basing his claims of fraudulent concealment of the builder's identity or the builder's unlicensed status and failure to secure a construction permit for the deck. Since the tenant did not proffer evidence sufficient to establish the elements of either of those doctrines such as would defeat the operation of the statute of limitations, the district court properly granted summary judgment, and we affirm.

I. BACKGROUND

{3} The facts of this case are undisputed. In April 2000, Defendant Thomas R. Baigas built a deck for Defendant Paulette Jacobs. At the time, Baigas was not licensed as a contractor. Neither Baigas nor Jacobs had applied for or obtained a building permit. In the summer of 2009, Plaintiff S. Louis Little was renting a vacation home from Jacobs. While replacing a hot tub cover on the deck in question on the evening of July 14, 2009, Little slipped and fell off the deck, injuring himself in the fall. Little brought suit against Jacobs on August 3, 2011, seeking damages for personal injury. Jacobs, despite discovery requests made by Little in December 2011 and again on January 24, 2012, did not produce the identity of her builder until January 3, 2013, when she found a cancelled check in her records and disclosed that Baigas had constructed the deck. On January 18, 2013, Little amended his complaint, adding Baigas as a defendant and seeking punitive damages. Baigas filed a motion to dismiss pursuant to Rule 1-012 NMRA; we reversed the district court's dismissal of the case, holding that an unlicensed contractor cannot benefit from the statute of repose contained in NMSA 1978, Section 37-1-27 (1967). *Little v. Jacobs*, 2014-NMCA-105, ¶ 1, 336 P.3d 398.

{4} Baigas filed a motion for summary judgment, making two arguments: the three-year statute of limitations for personal injury actions had run by the time Little added Baigas as a defendant, and the discovery rule did not operate to save Little's cause of action. Little responded to Baigas's motion for summary judgment by arguing that the four-year statute of limitations for negligence claims applied and that Baigas was either equitably estopped from raising a statute of limitations defense, or that equitable tolling applied to the statute of limitations.

{5} The district court issued a letter decision acknowledging the undisputed nature of the facts in this case and granting Baigas's motion for summary judgment. As stated in its letter decision, the district court believed that "[t]he crux of the issue" was whether the three- or four-year statute of limitations applied. The district court concluded that Little was bringing a personal injury action, and thus applied the three-year statute of limitations. It then concluded that the doctrine of equitable estoppel did not apply to the case, explaining that no facts showed "that [P]laintiff relied on any representations of . . . Baigas against his interest." The district court also opined that Little's best argument was for equitable tolling, but ultimately concluded that Baigas's failure to procure a contractor's license and building permit did not constitute the extraordinary circumstances required for tolling to apply. The district court therefore issued an order dismissing Little's claims against Baigas. Little filed a timely appeal, asserting that the district court's refusal to apply equitable tolling or estoppel was error.

II. DISCUSSION

A. Standard of Review

{6} Summary judgment is appropriate where there is "no genuine issue as to any material fact," and the movant is entitled to judgment "as a matter of law." Rule

1-056(C) NMRA. We review an order granting summary judgment de novo, viewing "the pleadings, affidavits, depositions, answers to interrogatories, and admissions in the light most favorable to a trial on the merits" and resolving "all reasonable inferences in favor of the party opposing summary judgment[.]" *Madrid v. Brinker Rest. Corp.*, 2016-NMSC-003, ¶ 16, 363 P.3d 1197 (internal quotation marks and citation omitted). Our courts "view summary judgment with disfavor, preferring a trial on the merits." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280. In summary judgment proceedings, the moving party has the initial burden of establishing a prima facie case for summary judgment; in other words, they must make a showing sufficient to "raise a presumption of fact or establish the fact in question unless rebutted." *Id.* ¶ 10 (internal quotation marks and citation omitted). But once the movant makes a prima facie showing, "the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* (internal quotation marks and citation omitted). During summary judgment proceedings, a party cannot rely on allegations of the complaint or argument that facts may exist, but instead must provide evidence to justify a trial on the issues and that gives rise to reasonable inferences. *Id.* "An inference is not a supposition or a conjecture, but is a logical deduction from facts proved and guess work is not a substitute therefor." *Id.* (internal quotation marks and citation omitted).

B. Baigas Made a Prima Facie Case for Summary Judgment

{7} We note at the outset that, although in the district court the parties contested whether the applicable statute of limitations was three or four years, that issue is not before us on appeal. Although Little argued that the four-year statute of limitations for negligence actions applied, and Baigas argued for the three-year statute of limitations on personal injury claims, the district court agreed with Baigas, applying the three-year statute of limitations. On appeal, Little has neither argued that the four-year period should apply, nor asserted error in the district court's application of the three-year period. We therefore conclude that he has abandoned the argument he made below that a four-year statute of limitations applies. *See State v. Flanagan*, 1990-NMCA-113, ¶ 1, 111 N.M. 93, 801 P.2d 675 ("Issues not briefed on appeal are deemed abandoned."); *see also* Rule 12-213(A)(4) NMRA (requiring that a brief in chief set forth an argument, standard of review, explanation of preservation, and citation to authority in support of each issue presented on appeal). This being a case involving personal injury from Baigas's alleged defective construction of the deck, we see no error in proceeding under the three-year statute. The next question we must consider is whether Baigas set forth sufficient undisputed facts to establish a prima facie case that the amended complaint was filed outside of the applicable three-year statute of limitations.

{8} "Under the discovery rule, the statute of limitations begins to run when the plaintiff knows or, with reasonable diligence should know, of his injury and its cause." *Gerke v. Romero*, 2010-NMCA-060, ¶ 12, 148 N.M. 367, 237 P.3d 111. It is beyond cavil that Little knew the date of his injury and its cause; he filed suit against Jacobs within the statute of limitations. It is also undisputed fact that Little filed his second amended complaint naming Baigas as a defendant on January 18, 2013. This date is outside the three-year period for bringing actions based on personal injuries that began on July 14, 2009 and ended three years later. *See* NMSA 1978, § 37-1-8 (1976).

{9} Based on undisputed facts, Baigas established a prima facie case that the statute of limitations as to any claim against him expired on July 14, 2012. We hold that Baigas met his burden of making a prima facie case that the statute of limitations had expired prior to Little amending his complaint to join Baigas as a defendant. Little asserts equitable bars to the operation of the statute of limitations, and we now turn to an examination of whether those doctrines apply.

C. Little Failed to Establish Equitable Tolling or Equitable Estoppel

{10} As noted above, Little twice unsuccessfully requested of Jacobs in December 2011 and January 2012 that she identify the person who constructed the deck. In neither instance did Little pursue the request beyond making it. Jacobs finally dislodged Baigas's identity from a cancelled check on January 3, 2013, after the statute of limitations had run. Based on this late disclosure by Jacobs, Little countered Baigas's motion for summary judgment, alleging that the statute of limitations was either equitably tolled by Baigas's concealing his identity by failing to obtain a building permit for the deck, or that Baigas's "concealment" of his identity should equitably estop Baigas from asserting a statute of limitations defense. He also asserted that whether Baigas concealed his identity was a material fact in dispute that should be presented to the jury because Baigas performed the work illegally as an unlicensed contractor and failed to obtain a building permit that was required for the construction of the deck. Neither of these facts are in dispute for purposes of summary judgment. Little further argued that had Baigas obtained a building permit, his name would have been public record, and discoverable through that public pathway. We can assume that Baigas was more untraceable because of the lack of the license and permit.

{11} Our Supreme Court clarified the difference between equitable tolling and equitable estoppel.

> Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if despite the exercise of all due diligence he is unable to obtain vital information bearing on the existence of his claim. In contrast, the doctrine of equitable estoppel comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations.

Estate of Brice v. Toyota Motor Corp., 2016-NMSC-018, ¶ 11, 373 P.3d 977 (quoting *Shropshear v. Corp. Counsel of Chicago*, 275 F.3d 593, 595 (7th Cir. 2001)). Equitable tolling functions to suspend the statute of limitations, while estoppel bars a defendant from enforcing a statute of limitations. *Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073, ¶ 12, 306 P.3d 524.

1. Equitable Tolling

{12} Equitable tolling is a non-statutory tolling principle that provides relief in cases when exceptional circumstances beyond the plaintiff's control preclude filing suit within the statute of limitations. *See Snow v. Warren Power & Mach., Inc.*, 2015-NMSC-026, ¶ 24, 354 P.3d 1285. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Slusser*, 2013-NMCA-073, ¶ 16 (internal quotation marks and citation omitted). Exceptional circumstances require that a plaintiff demonstrate "an extraordinary event beyond his or her control." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶

15, 135 N.M. 539, 91 P.3d 58. The doctrine does not "assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing." *Slusser*, 2013-NMCA-073, ¶ 14 (internal quotation marks and citation omitted). Where a plaintiff fails to produce sufficient facts showing that either element has been met, equitable tolling should not be applied. *Id*. ¶ 17.

{13} Little cites to *Lopez v. State*, 1996-NMSC-071, 122 N.M. 611, 930 P.2d 146, and our unreported case, *McEaddy v. N.M. State Agency for Surplus Prop*., No. 33,576, 2015 WL 660159, mem. op. (N.M. Ct. App. Jan. 29, 2015) (non-precedential), as support for his assertion that equitable tolling is appropriate. Neither case is helpful; both deal with the notice provision of the Tort Claims Act. *Lopez* specifically declined to apply equitable estoppel, *id.* ¶ 22, while *McEaddy* is not precedent. *See Hess Corp. v. N.M. Taxation & Revenue Dep't*, 2011-NMCA-043, ¶ 35, 149 N.M. 527, 252 P.3d 751 ("[A]n unpublished opinion is written solely for the benefit of the parties to the action and has no controlling precedential value."); *see also* Rule 12-405(C), (D) NMRA (stating that non-reported cases are not precedent); Rule 23-112 NMRA app. (II)(D) (setting out proper form for citing unpublished and non-precedential opinions to enable reviewing court to be apprised of their status). Little also rests his discussion of the elements of equitable tolling on the fact that he was "forced to rely on Jacob[s'] memory and her leisurely attempts at reviewing her records," putting him "at the mercy of Jacob[s] because [Baigas] had effectively concealed his identity by failing to obtain a building permit for the job." Upon our review of the record, and for the following reasons, we cannot conclude that equitable tolling applies in this case.

a. Little Failed to Demonstrate Sufficient Diligence in Pursuing Baigas's Identity

{14} We note that the original complaint and an amended complaint filed in this case against Jacobs some nine months later, mention no one else as possibly liable for Little's injuries.[1] Little promptly requested of Jacobs the identity of the person who built the deck and a copy of the building permit after filing suit against her in 2011. The interrogatory submitted by Little asked Jacobs to "provide the name, address, telephone number of the person or persons who constructed the deck." Little does not direct us to any pleading filed at that time requesting the building permit or any other documents. When Little requested an extension of discovery in August of that year, it related to a medical witness; no search for the deck's builder was mentioned. In January 2012, Little received a supplemental answer from Jacobs that the builder's name was still unknown to her. Jacobs informed Little at the time that because it had "been so long" since the deck was built that Jacobs could not "recall the person's name who installed the deck." However, Jacobs stated she was "working on locating this information and when found, it will be provided." Little alleges no attempts to enforce his requests for production of documents from Jacobs concerning the builder's identity.[2] Neither did he, for nearly a year after this semi-response from Jacobs, make any other efforts to press Jacobs to disgorge the builder's information[3] before the statute of limitations ended in July 2012.

{15} However, almost a year after her last communication on the subject, on January 4, 2013, Jacobs filed a disclosure of lay witnesses and exhibits that listed "Thomas R. Baigas," who might "testify regarding his knowledge of the construction of the deck surrounding the incident of July 14, 2009." Following the disclosure, a pending trial date was vacated, and Little filed his third amended complaint, alleging in the motion to amend that the first two complaints did "not contain sufficient allegations to permit [Little] to have his cause fully and fairly presented to the court and jury" and that he should be permitted to name Baigas as a defendant.

{16} Although the district court determined on undisputed facts that Little "was diligently pursuing his claim," Little's argument before that court was no more than he "did not discover [that] he had a claim against . . . Baigas until . . . Jacobs disclosed the identity of the person who constructed the deck . . . [after which] [Little] immediately sought to amend his complaint[.]" This allegation is only partially true. Little clearly knew that he had a cause of action, as demonstrated by suing Jacobs. His interrogatories indicated a belief the deck's builder shared liability for his injury. The only missing fact was Baigas's name. This is not a picture showing the active pursuit of a tortfeasor whose function, but not identity, is known to an opposing party. Little's discovery of Baigas's identity was in essence the result of no more than passive luck, in which he played no great part in developing. We have previously expressed our inclination to hold a plaintiff to the statute of limitations when a plaintiff has not affirmatively sought necessary information to support a known cause of action. *See Yurcic v. City of Gallup*, 2013-NMCA-039, ¶ 21, 298 P.3d 500; *cf. Reaves v. Bergsrud*, 1999-NMCA-075, ¶ 27, 127 N.M. 446, 982 P.2d 497 (determining that the plaintiff suffered no unfairness in the denial of her motion to name an expert after missing the deadline to do so, where the plaintiff should have known that she needed an expert to testify). By this standard, the district court's finding of diligence on Little's part seems overly generous.

{17} Despite the statute of limitations looming, Little followed no avenues such as motions to compel or depositions of Jacobs (including subpoena duces tecum for her records) directed at ascertaining the identity of the deck's builder. Based on the facts before us, we will not accord the label of "reasonable diligence" to Little's passive acceptance of Jacobs' dilatory practices. *See Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 29, 131 N.M. 317, 35 P.3d 972 ("Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." (alteration, internal quotation marks, and citation omitted)); *cf. State v. Pruett*, 1984-NMSC-021, ¶¶ 6-7, 100 N.M. 686, 675 P.2d 418 (holding that a failure to pursue adequate remedies to ascertain witness information constituted lack of due diligence); *N.M. Feeding Co. v. Keck*, 1981-NMSC-034, ¶ 11, 95 N.M. 615, 624 P.2d 1012 (stating that

[1]The second amended complaint filed in May 2012, only added a claim for damages based on the deck's construction violating the Uniform Building Code.

[2]*See* Rule 1-034 NMRA (providing that a party may serve a request for production of documents to which the recipient is obligated to respond within thirty days).

[3]*See* Rule 1-037(A)(2) NMRA (providing for a party's motion to compel discovery if an interrogatory has not been answered or document has not been provided pursuant to a lawful request under Rule 1-033 (interrogatories) or Rule 1-034 (requests for production).

where discovery procedure was available, a party's failure to use it until three days before trial showed lack of diligence); *State v. Curry*, 2002-NMCA-092, ¶ 19, 132 N.M. 602, 52 P.3d 974 (stating that a failure to use "basic trial preparation" constitutes lack of diligence); *City of Carlsbad v. Grace*, 1998-NMCA-144, ¶ 8, 126 N.M. 95, 966 P.2d 1178 (holding that a party's failure to find its accounting error because of its practice of not checking payments was a lack of diligence).

{18} We believe that in light of the undisputed facts, the district court's finding of sufficient diligence is wrong as a matter of law. To establish his claim of equitable tolling, Little bore the burden of showing he diligently investigated and pursued the identity of all parties responsible for his injury. Based on the evidence before the district court, he failed to satisfy the first prong of the test for equitable tolling by failing to attempt to compel Jacobs' responses to his discovery requests or ask for documents she might have possessed concerning the construction of the deck. *See Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (acknowledging an appellate court "may affirm a district court's ruling on a ground not relied on by the district court" (internal quotation marks and citation omitted)).

B. No Exceptional Circumstances Prevented Little's Discovery of Baigas's Identity

{19} We now turn to the element of whether Little demonstrated that extraordinary circumstances precluded the discovery of Baigas's identity. Neither the district court's nor our analysis supports Little's position. Little bore the burden of demonstrating facts sufficient to show that the circumstances rendering his diligence futile were "extraordinary." *Slusser*, 2013-NMCA-073, ¶ 16. Little's brief in chief rests entirely on the assertion that "[t]he District Court held that as a matter of law, the[] circumstances [of this case] were extraordinary." This is a misrepresentation sufficient to invite our caution to counsel to stick to the record, since in fact, the district court found that the "circumstances are *not* extraordinary circumstances contemplated by the theory of equitable tolling." (Emphasis added.) We agree with the district court.

{20} Little never set forth any evidence, argument, or authority of how his unremarkable actions in regard to Jacobs' unremarkable reticence were extraordinary circumstances sufficient for invoking equitable tolling. Nor has he explained how being an unlicensed contractor or failing to secure a building permit is an exceptional circumstance. Little now suggests that he was at Jacobs' mercy and that had Jacobs not retained the check, "which she was not obligated to do," Baigas would have remained undiscovered; this reveals that Jacobs' having the check is the sole extraordinary event justifying tolling. Without more, we hold that Little has not met his burden.

{21} The fact that Jacobs' faulty memory may have inhibited Little's search was unfortunate but Little did not pursue the facts to meet his burden of showing extraordinary circumstances. The district court disposed of Little's equitable tolling argument on this basis, finding that there were no extraordinary circumstances justifying tolling. We affirm the district court. We next consider Little's assertion that equitable estoppel constitutes a bar to invoking the statute of limitations.

C. Equitable Estoppel

{22} The district court concluded that the "principle of [equitable estoppel] does not apply here" because there was no evidence that Little relied on any representations made by Baigas to Little's detriment. The district court granted summary judgment, finding that Baigas had not purposefully concealed his identity and that Little did not rely to his detriment on any representations made by Baigas, thus defeating Little's claim of equitable estoppel. Appellate courts review a district court's application of the doctrine of equitable estoppel for an abuse of discretion. *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 1993-NMSC-039, ¶ 26, 115 N.M. 690, 858 P.2d 66. "The existence of grounds justifying a claim of equitable estoppel is a question of fact," and the party relying on a claim of equitable estoppel "has the burden of establishing all facts necessary to prove it." *Id.* ¶ 30. "The party must plead the circumstances giving rise to estoppel with particularity." *Id.* ¶ 31.

{23} Equitable estoppel prohibits a party from asserting a statute of limitations defense " 'if that party's conduct has caused the plaintiff to refrain from filing an action until after the limitations period has expired.' " *Slusser*, 2013-NMCA-073, ¶ 22 (quoting *In re Drummond*, 1997-NMCA-094, ¶ 13, 123 N.M. 727, 945 P.2d 457). The doctrine of equitable estoppel is "premised on the notion that the one who has prevented the plaintiff from bringing suit within the statutory period should be estopped from asserting the statute of limitation as a defense." *Id.* (internal quotation marks and citation omitted).

{24} To prevail on his claim of equitable estoppel, Little was required to prove that Baigas "(1) concealed material facts, falsely represented material facts, or made representations of fact different or inconsistent with later assertions in court; (2) had an intent or expectation that such conduct would be acted upon by the plaintiff; and (3) possessed either actual or constructive knowledge of the real facts." *Vill. of Angel Fire v. Bd. of Cty. Comm'rs of Colfax Cty.*, 2010-NMCA-038, ¶ 21, 148 N.M. 804, 242 P.3d 371 (alteration, internal quotation marks, and citation omitted). Additionally, Little had to prove that he "(1) lacked both the knowledge and the means of acquiring knowledge of the truth as to the facts in question; (2) relied on the defendant's conduct; and (3) acted upon that conduct in a way that prejudicially altered his position." *Id.* (internal quotation marks and citation omitted). "Fraudulent concealment may be either active, as with an affirmative effort to conceal the negligence such as a false representation, or the fraud may be passive where, in a confidential relationship[,] a duty to speak exists, and the defendant, with knowledge of his negligence, remains silent." *Kern ex. rel. Kern v. St. Joseph Hosp., Inc.*, 1985-NMSC-031, ¶ 32, 102 N.M. 452, 697 P.2d 135. To obtain estoppel under a theory of passive fraudulent concealment, also known as estoppel by silence, a party must first "establish that there was a duty to speak," and then show that the party asserting estoppel relied upon that silence. *Cont'l Potash, Inc.*, 1993-NMSC-039, ¶ 43. However, "[b]ald allegations of concealment are not sufficient to make out a case of fraudulent concealment." *Id.* ¶ 31; *see also Blea v. Fields*, 2005-NMSC-029, ¶¶ 27-28, 138 N.M. 348, 120 P.3d 430 (establishing elements of fraudulent concealment, and holding that silence, without an act of concealment or evidence of intent to mislead potential claimants, combined with a claimant's reasonable means to learn of the defendant's status, does not support equitable estoppel). The elements of fraudulent concealment also include detrimental reliance by the plaintiff on the acts of the defendant. *McNeill v. Rice Eng'g & Operating, Inc.*, 2006-NMCA-015, ¶ 23, 139 N.M. 48, 128 P.3d 476.

{25} Little fails to demonstrate that he relied to his detriment on anything Baigas did. Jacobs represented facts to Little that "she [was] working on locating this information

and when found, it [would] be provided." As noted above, Little did not pursue the most likely source of Baigas's identity, with the result that a cancelled check found a year after the second response from Jacobs resulted in the filing of the claim against Baigas.

{26} The district court found that "Baigas was not aware of the filing of the original complaint and had no reason to know that the action would be brought against him" and that Baigas not having the proper license or permit did not demonstrate any intent on his part to thwart Little's claim. Little's brief takes liberty with the district court's language, asserting that the court said that Baigas "effectively concealed his identity," when the district court did no more than note that the lack of paperwork "may have had that effect." We agree with the district court's assessment of the facts, since nothing Little alleges demonstrates that Baigas, during the passage of nine years since building the deck, had any actual or constructive knowledge of the facts concerning Little's injury or his suit against Jacobs until after Jacobs revealed his name, and he received a summons and complaint. In evaluating this claim, we are not unmindful of our previous holding that had Little more diligently pursued the cancelled check that Jacobs had in her possession, Baigas's identity may have been revealed sooner. This also plays heavily into requiring that Little establish that he had neither the knowledge nor the means of acquiring knowledge of Baigas's identity. *See Vill. of Angel Fire*, 2010-NMCA-038, ¶ 21.

{27} We agree with Little that there was "no evidence whatsoever" before the district court as to Baigas's intent, as we observe that it is Little's burden to establish Baigas's intent as an element of fraudulent concealment to support his estoppel claim. No confidential or fiduciary relationship or knowledge of possible liability, giving rise to a "duty to speak," exists between the parties in this case. *Cont'l Potash, Inc.*, 1993-NMSC-039, ¶ 43. If anything, the lack of evidence that Baigas intended to conceal either his identity or liability from Little forecloses any conclusion that there was any fraudulent concealment relevant to Little's claim of equitable estoppel.

{28} Little's unfortunate citation to *Lopez*, concerning concealment by silence, incorrectly stated that our Supreme Court applied equitable estoppel against the State when the plaintiff in a slip-and-fall case was inhibited from filing a tort claims notice against the correct party within ninety days by paying attention only to the name on a courthouse. *See* 1996 -NMSC- 071, ¶ 17. The Supreme Court, noting that it was loath to apply estoppel against the State, specifically declined to decide the issue of equitable estoppel in that case. *Id.* ¶¶ 21-22. Little suggests that the district court erred by making findings regarding Baigas's intent in not obtaining a license. After Baigas made his prima facie showing that the statute of limitations had run, the burden shifted to Little to proffer evidence that equitable estoppel was appropriate. Little was required to show that Baigas had the intent to deceive that is required under the equitable estoppel doctrine, but proffered no such evidence. We are therefore not persuaded that there is any evidence that Baigas purposefully concealed any facts from Little or that Little placed any reliance on anything Baigas did. We therefore see no error in the district court's conclusion that the doctrine of equitable estoppel does not apply in this case, and we affirm.

D. Being an Unlicensed Contractor Does Not Preclude Asserting a Statute of Limitations Defense

{29} Little's last argument is that Baigas's status as an unlicensed contractor is sufficient as a matter of law to preclude his reliance on the statute of limitations. However, Little's assertion on this point is grounded only in arguing the public policy that has resulted in legislation that protects licensed contractors against harsh application of the discovery rule for filing causes of action and prevents unlicensed contractors from maintaining an action to be paid for any work they do.

{30} New Mexico's statutes and case law reflect strong public policy against unlicensed contractors. *See Gamboa v. Urena*, 2004-NMCA-053, ¶ 14, 135 N.M. 515, 90 P.3d 534 (recognizing that the Legislature has a "complete intolerance of unlicensed contractors"). Contracting without a license is a crime. NMSA 1978, § 60-13-12(A) (1989). We recognized this position in the first appeal of this case, *Little*, 2014-NMCA-105, ¶ 12, when we cited to a plethora of cases that stand for the proposition that an unlicensed contractor has no cause of action for compensation for his or her work, whether based in contract, equity, or otherwise. *Id.* ¶¶ 12-13. Case law reflects this policy mostly by disallowing unlicensed contractors to recover compensation for unlicensed work, "even if the work was 'expertly performed' and the consumer knew the contractor was unlicensed." *Gamboa*, 2004-NMCA-053, ¶ 15 (quoting *Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶ 16, 111 N.M. 410, 806 P.2d 59 (noting that "[t]he public policy behind the licensing requirement of Construction Industries Licensing Act is so strong that the element of consumer knowledge is of no consequence")). Unlicensed contractors are prohibited from using the courts to recover compensation "under any theory, whether in law or in equity." *Romero v. Parker*, 2009-NMCA-047, ¶¶ 17, 19, 146 N.M. 116, 207 P.3d 350 (noting that "an unlicensed contractor's action for compensation is barred on all equitable principles"). More to the point, we held in *Little* that the statute of repose allowed to contractors under Section 37-1-27 only protects licensed contractors, and not others, based on this Court's and the Legislature's "strong public policy against unlicensed contractors." *Little*, 2014-NMCA-105, ¶¶ 1, 12, 17, 21. Hence, the statute of repose was foreclosed to Baigas in *Little*.

{31} Here, Baigas is maintaining no action on his own behalf to assert rights against Little based on his work, but defending an action brought *by* Little asserting the expiration of the statute of limitations. Precluding a contractor from maintaining any action for payment for work is different from applying the generally applicable statute of limitations to an action to establish a contractor's liability for injury caused by that work. A statute of repose whose protection extends to a limited class of potential defendants is also different from the general statute of limitations that applies to all civil actions. Ultimately, in *Little* we concluded that an unlicensed contractor was outside the limited class of actor protected by the statute of repose provided by Section 37-1-27, which limits the time within which the discovery rule would operate to allow suit for construction defects. *Little*, 2014-NMCA-105, ¶¶ 17-18, 21. We noted that in applying the benefit of the repose to "architects, builders, and those involved in the construction industry[,]" we had previously held that owners who design and construct their own improvements were excluded from its benefit because they are not the described persons whom the statute of repose was designed to protect. *Id.* ¶ 19 (internal quotation marks and citation omitted).

{32} Little concedes there is no law directly on point, and he is asking for us

to construct yet "another detriment" to contracting without a license, as we did in *Little*. *Id.* ¶ 20 (stating that the effect of our holding denying the statute of repose to Baigas created "another detriment" to contracting without a license). However in *Little*, we specifically stated that "our holding does not prevent an unlicensed contractor from defending an action against him." *Id*. Though we acknowledge the importance of the policy denying unlicensed contractors the fruits of licensure—payment for their work and a statute of repose—we have found no basis to hold that equitable tolling or estoppel is triggered as a matter of law by Baigas's unlicensed status or that failing to get a construction permit is, as a matter of law, fraudulent concealment. The statute of limitations is an affirmative defense available to all defendants, and we will not extend our previous holding here to create a legal bar to unlicensed contractors invoking it.

III. CONCLUSION

{33} Though noting New Mexico's "complete intolerance" of unlicensed contractors, *Gamboa*, 2004-NMCA-053, ¶ 14, we decline Little's invitation to expand it to characterize a contractor's failure to obtain a license or building permit as fraudulent concealment as a matter of law sufficient to automatically trigger equitable estoppel. In light of Little's failure to set forth facts sufficient to trigger the application of either equitable estoppel or equitable tolling, we conclude that the district court properly declined to apply the doctrines of equitable tolling and equitable estoppel to this case. We affirm the district court's order granting summary judgment in favor of Baigas.

{34} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

JONATHAN B. SUTIN, Judge

Certiorari Denied, February 7, 2017, No. S-1-SC-36258

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-028

No. 34,462 (consolidated with No. 34,469) (filed December 13, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DARLA BREGAR,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BRIANA H. ZAMORA, District Judge

HECTOR H. BALDERAS
Attorney General
MARIS VEIDEMANIS
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

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

Opinion

J. Miles Hanisee, Judge

{1} New Mexico State Highway 217, in Bernalillo County, begins in Yrisarri, running east a few miles before abruptly turning due north. From there the road tracks a straight line alongside the Sandia mountain range. Bernalillo County Sheriff's Office (BCSO) Deputy Axel Plum was working a late shift patrolling Highway 217 on the night of December 1, 2008, when he discovered a wrecked Jeep Cherokee by the side of the highway. Deputy Plum found two people on the ground near the Jeep: Defendant Darla Bregar and Thomas Spurlin. Bregar was on the driver's side of the car, her body contorted into a position that Deputy Plum would describe at trial as "grotesque." Spurlin was deceased, his body lying further from the Jeep on the passenger side. Bregar was taken to the hospital by ambulance and survived.

{2} Shortly before 5:00 a.m., BCSO Deputies Lawrence Tonna and Gilbert Garcia went to the hospital to interview Bregar. Bregar admitted to driving the vehicle the night before, although she did not remember the crash. Deputy Garcia arrested her and obtained a warrant to have her blood drawn and tested. The result of the test showed that Bregar had a blood alcohol concentration (BAC) of 0.09 at the time of the blood draw.[1]

{3} A grand jury indicted Bregar, charging her with one count of vehicular homicide, contrary to NMSA 1978, Section 66-8-101 (2004, amended 2016), and one count of *per se* DWI, contrary to NMSA 1978, Section 66-8-102(C)(1) (2008, amended 2016). At trial, Bregar testified that she did not remember the accident or whether she was driving the Jeep. She maintained that at the time of the accident, she had been wearing a knee brace that would have prevented her from operating a vehicle. Thus, Bregar's defense was that Spurlin was the driver, or at least that the State had failed to prove that Bregar had been driving beyond a reasonable doubt. The jury returned guilty verdicts on both counts charged in the indictment.

{4} Bregar's appeal of her conviction concerns the district court's denial of her pretrial motion to suppress her statements to Deputy Tonna at the hospital and its admission of certain expert opinion testimony by Deputy Garcia.

MOTION TO SUPPRESS

{5} Bregar's argument in district court and on appeal is that her inculpatory hospital-bed statements to the police officers were not voluntarily made, and therefore, their admission into evidence at trial violated her constitutional right to due process of law under the Fourteenth Amendment of the United States Constitution. *See Colorado v. Connelly*, 479 U.S. 157, 163 (1986). We apply a "totality of the circumstances" test to these claims, *Aguilar v. State*, 1988-NMSC-004, ¶ 7, 106 N.M. 798, 751 P.2d 178 (internal quotation marks and citations omitted), derived from the "three-phased process" set out in Justice Frankfurter's opinion for the United States Supreme Court in *Culombe v. Connecticut*, 367 U.S. 568, 603-05 (1961).

> In the first phase, there is the business of finding the crude historical facts, the external, 'phenomenological' occurrences and events surrounding the confession. In other words, the court begins with a determination of what happened. We are not restricted to examining only those facts deemed dispositive by the trial court. . . . However, when faced with conflicting evidence, we will defer to the factual findings of the trial court, as long as those findings are supported by evidence in the record. . . .
>
> The second phase is a determination of how the accused reacted to the external facts. This is an admittedly imprecise effort to infer—or imaginatively recreate—the internal psychological response of the accused to the actions of law enforcement officials.
>
> The third phase is an evaluation of the legal significance of the way the accused reacted to the factual circumstances. This requires the application of the due process standards to the court's perception of how the defendant reacted. We are not required to accept the trial court's legal conclusion that the police officers did not act coercively.

State v. Cooper, 1997-NMSC-058, ¶¶ 26-28, 124 N.M. 277, 949 P.2d 660 (alteration, internal quotation marks, and citations omitted).

{6} A defendant's right to seek exclusion of his or her statements to police on the

[1]An expert witness for the State at trial estimated that Bregar's BAC would have been around 0.19 at the time of the accident.

basis of whether the confessed statement was "voluntary" is legally grounded upon an established principle that the use of "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." *Connelly*, 479 U.S. at 163 (internal quotation marks and citation omitted). The right to exclude a defendant's statement in state court is derived from Section 1 of the Fourteenth Amendment, which provides that "no [s] tate shall deprive any person of life, liberty, or property, without due process of law." *See Connelly*, 479 U.S. at 163.

{7} Whether a statement to police officers is "involuntary" and therefore subject to exclusion under the Fourteenth Amendment does not turn solely on whether the defendant makes a statement of his own free will, however. For example, in *Connelly*, the defendant confessed to committing a murder as a result of "command hallucinations . . . [that] interfered with [the defendant's] . . . ability to make free and rational choices." *Id.* at 161 (internal quotation marks omitted). The Court noted that although "mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." *Id.* at 165. Instead, there must be some indication that coercive police misconduct brought about the confession. *Id.*; *see also Aguilar*, 1988-NMSC-004, ¶ 20 ("[A d]efendant's mental condition by itself without coercive police conduct causally related to the confession is no basis for concluding that the confession was not voluntarily given.").

{8} The district court held a lengthy hearing on the motion to suppress. Four fact witnesses testified for the State about the circumstances surrounding Bregar's confession, and Bregar called a fifth witness to testify as an expert in "general nursing" regarding Bregar's injuries and mental state at the time of the interview—i.e., explaining "how [Bregar] reacted to the external facts." *Cooper*, 1997-NMSC-058, ¶ 27 (internal quotation marks and citation omitted). Bregar herself did not testify at the hearing on her motion to suppress. Although the district court made relatively scant findings of fact, the witnesses' testimony does not conflict in any significant material respect. We therefore summarize each witness's testimony before evaluating the voluntariness of Bregar's statements.

{9} The first witness at the suppression hearing was Deputy Plum, who testified that Bregar was "nonresponsive" when he first saw her at the scene of the crash and that her breathing sounded "distressed[.]" Deputy Plum immediately called for emergency medical assistance, but did not attempt to reposition Bregar so that she could breathe more easily because he was afraid that doing so would aggravate her other injuries.

{10} The second witness to testify at the suppression hearing was Emergency Medical Technician Carol Morgan (EMT Morgan). EMT Morgan testified that she arrived at the accident scene shortly after Deputy Plum called for medical assistance. Bregar was able to tell Morgan her name, but "[i]t was hard to make out what [Bregar] was saying." Morgan smelled alcohol on Bregar's breath and noted that Bregar was unable to observe events around her or comply with simple requests. Bregar's blood pressure was found to be within "the norm for being involved in an accident." Morgan and several other EMTs at the scene strapped Bregar to a long spine board and put her in an ambulance.

{11} Hospital records show that Bregar had a broken jaw, several fractured ribs, seven broken vertebra, and a "subarachnoid hemorrhage that had an overlying hematoma, which means that she received a [blow] to her head, considered a traumatic injury." Bruising, gas, and fluids in and around Bregar's lungs and chest wall would have made it difficult for her to breathe. Bregar was receiving oxygen through a tube inserted into her nose.

{12} EMT Morgan also recalled that hospital personnel assessed Bregar's mental capacity using the "Glasgow Coma Scale " (GCS). The GCS is a ubiquitous assessment of brain trauma using a patient's eye, verbal, and motor responses to instructions. Eye movements are assessed on a scale of 1 to 4, verbal responses on a scale of 1 to 5, and motor responses on a scale of 1 to 6. A GCS Score of 8 is comatose; 15 is considered "normal." Hospital records showed that Bregar's GCS Score was 12 when she was admitted, but that by the next day (it is unclear at what precise time this second assessment occurred), Bregar's GCS Score had reached 15.

{13} The third witness to testify at the hearing on Defendant's motion to suppress was Deputy Tonna. At the time of the crash, Deputies Tonna and Garcia were both members of the BCSO Traffic Investigation Unit, and were dispatched to the scene to conduct an accident investigation. Deputy Tonna was the lead investigator, gathering evidence and documenting the scene of the crash, while Deputy Garcia took photographs and other measurements. Deputy Tonna noted that the damage to the Jeep was "consistent with it being involved in a rollover." He also observed a large bottle of Svedka vodka on the ground near the vehicle, "completely clean[,] like it had just been placed there." Deputy Tonna was told by EMT Morgan that Bregar had a "strong odor of alcohol emanating from her breath, prior to being transported to the hospital."

{14} Before interviewing Bregar, Deputy Tonna learned that other officers had already been dispatched to the hospital to conduct a DWI investigation, but had been turned away by hospital staff because Bregar "was [still] actively being treated[.]" The interview did not begin until 5:00 a.m., and was not recorded. Deputy Tonna described the interview as follows:

> I started out by identifying ourselves. . . and then I asked [Bregar] if she knew where she was at. She said she was at the hospital. [I] then asked her what had happened with the crash, and at first she said that she didn't wreck. Then, I asked her again where she had been this evening, and she stated that her and Anthony had gone to her friend's, Myra's house, in Tijeras, New Mexico, and that while there, they stayed for two hours and had a few beers.
>
> . . . .
>
> [T]hen I asked her to describe what type of vehicle she had or she drove. She said she had a '97 Jeep Cherokee. Then, I asked her what their plans were after leaving from Myra's house, and she said that—her words were, "I was taking [Mr. Spurlin] home." Then, I asked her if anybody else drives her vehicle, and she said nobody drives her vehicle. I think her words were, "I don't let anybody drive my Jeep."
>
> . . . .
>
> I asked her again how she came to the hospital, and she said she didn't know, and that's when I told her that she had been involved in a rollover crash and that Mr. Spurlin had passed away from his injuries. . . . She became very upset. She started to kind of become

> hysterical, started crying. . . . She said, "What? I was driving?" And she said, "But I never left home."

{15} Deputy Tonna also testified about Bregar's appearance and demeanor during the interview. He said that Bregar's "face was really swollen[,] I think she had bloodshot—red, bloodshot, watery eyes, and I could smell a strong odor of alcohol coming from her." Deputy Tonna said that Bregar was slurring her words and "spoke slowly, but she answered the questions." He added that Bregar seemed "conscious and somewhat alert" during the interview. When cross-examined, Deputy Tonna responded that he had no contact with medical personnel regarding Bregar's state of mind or condition and was unaware of Bregar's injuries beyond what he had learned from EMT Morgan. The interview of Bregar took about ten minutes. At its conclusion, Deputy Garcia notified Bregar that she was under arrest.[2]

{16} Deputy Garcia was the final State's witness to testify. His testimony as to what Bregar said in response to Deputy Tonna's questions largely mirrored Deputy Tonna's own testimony, so we will not summarize that aspect of Deputy Garcia's account here. Deputy Garcia did provide some further detail as to Bregar's demeanor: Deputy Garcia described Bregar as "awake," "coherent," and observed that "she didn't have any problem answering" Deputy Tonna's preliminary questions about her name, address, and other identifying details. Deputy Garcia testified that after Deputy Tonna told her that Spurlin had died, her demeanor changed: "[a]fter [being told of Spurlin's death], she started telling us that she didn't know where she was[.]"

{17} Defendant's only witness at the suppression hearing was Michele Wilkie, a nurse called by the defense to testify as an expert. Wilkie's opinion testimony was based on her review of police reports and hospital records. Wilkie opined that Bregar would have been "disoriented" at the time she was interviewed by Deputy Tonna. Wilkie also opined that the lingering effects of alcohol and pain medication would have added to her confusion and lethargic behavior, which in Wilkie's opinion explained why Bregar appeared unresponsive to hospital personnel. Wilkie added that she would not have let Bregar speak with police because she would have been "concern[ed] . . . that she was not stable enough, medically or psychologically, to answer questions regarding the accident." Wilkie believed that any statements Bregar made to the police would be unreliable because "[s]he really didn't know what had happened to her."

{18} The district court denied the motion to suppress, concluding that "[Bregar's] statement was voluntary and not coerced. The testimony by the officers was credible. The description of the conversation made sense. Her statements were coherent. Her responses were appropriate to the questions asked by the officers."

DISCUSSION

{19} On appeal, Bregar makes three related arguments to support her contention that her pre-arrest hospital-bed statements to Deputy Tonna were involuntary. First, Bregar asserts that Deputy Tonna's failure to make an audio recording of the interrogation means that the State failed to carry its burden of proving that her statements were voluntary. *See Cooper*, 1997-NMSC-058, ¶ 30 ("The [state] bears the burden of proving by a preponderance of the evidence that a defendant's statement was voluntary."). But Bregar did not preserve this argument for appellate review by making it to the district court. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]"); *see also State v. Vandenberg*, 2003-NMSC-030, ¶ 52, 134 N.M. 566, 81 P.3d 19 ("In analyzing preservation, [the appellate courts] look to the arguments made by [the d]efendant below."). Bregar's motion to suppress states that "the State has deprived [the district c]ourt of the ability to listen to the actual interview Deputy Tonna conducted with [Bregar] and to review *de novo* whether the deputy overreached[.]" But this is an argument that the district court should not credit Deputy Tonna's recollection of the interrogation because he did not record it with his belt tape. The district court rejected this argument, finding instead that Deputy Tonna's testimony as to what happened was credible. Faced with the district court's decision to accept the police officer's undisputed account of what happened (we note again that Bregar herself did not testify at the hearing) and the fact that we review the district court's assessment of exactly what happened with substantial deference, *Cooper*, 1997-NMSC-058, ¶ 26, Bregar now argues an entirely different proposition on appeal: that as a matter of law, the State's failure to submit into evidence an audio recording of an interrogation means that the State cannot satisfy its burden of proving that a statement was made voluntarily. We decline to address Bregar's first argument because she did not make it below.

{20} Bregar's second argument is that Nurse Wilkie's testimony at the suppression hearing established that "Bregar [was] susceptible to confusion[, and t]his type of diminished capacity is recognized throughout voluntariness case law." To the extent that Bregar is arguing that her susceptibility alone rendered her hospital-bed admissions involuntary, Bregar again did not preserve the argument by making it below. Even if she had preserved it, *Connelly* rejected an indistinguishable argument when it held that inculpatory statements made as a result of a mental or physical condition are not sufficient to render the statements involuntary in the absence of a causal relationship between the physical or mental condition and police misconduct. *See* 479 U.S. at 165 (stating that "mere examination of the confessant's state of mind can never conclude the due process inquiry"). Instead, what Bregar must show is that Deputy Tonna obtained Bregar's admission using "intimidation, coercion, deception, assurances, or other police misconduct that constitutes overreaching." *State v. Munoz*, 1998-NMSC-048, ¶ 23, 126 N.M. 535, 972 P.2d 847 (internal quotation marks and citation omitted).

{21} Bregar's final argument is that because Deputy Tonna was at the very least aware that Bregar was under the influence of alcohol at the time he asked her questions, his questioning amounted to "deception and manipulation of a known impairment" and thus requires us to reverse the district court's determination that Deputy Tonna did not use coercion to obtain Bregar's admission. We disagree. Initially, we note that Nurse Wilkie's testimony was far from unequivocal about whether the medical records established that Bregar was susceptible to coercion. While she testified that a subarachnoid hemorrhage and lingering influence of alcohol and pain medication would have caused Bregar to feel disoriented, confused, and lethargic, Wilkie also noted that Bregar was scoring a 15 on the GCS (i.e., a normal level of consciousness) by the next day. Deputy

[2]The district court ordered that Bregar's post-arrest statements be suppressed because Bregar was not given a *Miranda* warning when she was arrested. The State has not appealed that order.

Tonna and Deputy Garcia's testimony that Bregar seemed responsive and aware of the circumstances during their interview—which the district court credited—supports a finding that Bregar was lucid and not otherwise specifically susceptible to coercion. The deputies testified that Bregar told them she knew she was in the hospital, that she "spoke slowly, but . . . answered the questions[,]" and seemed "conscious and somewhat alert" during the interview. Significantly, Bregar immediately retracted her admission and denied being the driver when she was informed that Spurlin had died as a result of the accident. The fact that Bregar changed her story and denied driving when she found out that Spurlin had died suggests that Bregar was not suffering from a diminished capacity at the time of her admissions. In other words, this evidence suggests that Bregar was aware that a police officer was asking her questions and that her answers to those questions could implicate her in the commission of a crime. *See id.* ¶ 21 ("[I]f [a] confession is the product of an essentially free and unconstrained choice by its maker, that is if [s]he has willed to confess, it may be used against [her]." (internal quotation marks and citation omitted)).

{22} But even if Bregar had demonstrated some susceptibility to coercive police interrogation techniques, Bregar would need to point to coercive conduct by the police that caused her to admit to being the driver. *See id.* ¶ 23. Here, the district court record does not support such a contention. In this regard, we note Deputy Tonna had no contact with medical personnel regarding Bregar's state of mind or condition and was unaware of Bregar's injuries beyond what he had learned from EMT Morgan. While he had been made aware that hospital personnel would not allow Bregar to be interviewed while being actively treated, nothing in the record suggests that Bregar's treatment was ongoing when Deputy Tonna spoke with her. Thus, there is no direct evidence that Deputy Tonna knew of any specific condition from which Bregar suffered and sought to exploit it by questioning her.

{23} The circumstantial evidence supports a similar conclusion. First, Deputy Tonna's conversation with Bregar was less than 10 minutes long, so there is no indication that Deputy Tonna deliberately prolonged the encounter with the hope of overcoming Bregar's resistance to questioning. *See id.* ¶¶ 35-36 (rejecting argument that a 100-minute-long interrogation "in conjunction with other factors" rendered a confession involuntary and citing other cases where confessions during even longer periods of questioning were found to be voluntarily made); *see also State v. LaCouture*, 2009-NMCA-071, ¶¶ 13-14, 146 N.M. 649, 213 P.3d 799 (finding admissions made during seven-minute hospital-bed interview voluntary). Deputy Tonna's open-ended questions to Bregar asking her to describe the vehicle she drives, what she was doing the previous night, and her interaction with Spurlin did not suggest answers or otherwise pressure Bregar to admit that she was the driver. *Cf. State v. Rettenberger*, 1999 UT 80, ¶ 40, 984 P.2d 1009 (finding a confession involuntary where, among other facts, the defendant's "confession contain[ed] little information that was not first provided or suggested by the interrogating officers"). Nor is there any indication that Bregar was restrained or isolated by police during her interrogation: any immobility was incidental to her hospitalization for injuries suffered during the accident, not a police effort to coerce statements by isolating the defendant. *See State v. Maestas*, 2012 UT App 53, ¶ 33, 272 P.3d 769 ("[The] Officer . . . did not cause [the d]efendant to be isolated from his friends and family or to be connected to medical equipment. Hospital policy and medical treatment, not police tactics, caused [the d]efendant's isolation and lack of mobility[.]").

{24} In *LaCouture*, we evaluated a factually similar hospital-bed admission and ultimately concluded that it was not an involuntary confession under the Fourteenth Amendment. There, the defendant admitted to taking methamphetamine earlier that day and had suffered injuries from a car accident, including "damage to his hip and spine, broken ribs, fractured leg bones (both tibia and fibula), and internal bruising." 2009-NMCA-071, ¶¶ 4, 12. We held that the defendant's statements were voluntary because "[d]espite these injuries, [the defendant] was able to respond coherently" to the police officer's questions, and there was no indication that the police officers had "threaten[ed him], promise[d] special treatment in return for [his] cooperation, physically abuse[d him], or engage[d] in coercion of any type." *Id.* ¶¶ 12-13. We further noted that the questions the officer asked "were benign, revolving around the facts of the accident." *Id.* ¶ 13.

{25} Both Bregar and the defendant in *LaCouture* suffered injuries from a car accident, were under the influence of mind-altering substances, and were confined to a hospital bed at the time of questioning by police officers. Bregar emphasizes that unlike the defendant in *LaCouture*, Bregar suffered a traumatic brain injury as a result of the accident. But as we have already noted, Deputy Tonna did not know of this injury; he cannot have intended to take advantage of an injury that he did not know Bregar had suffered. Bregar asserts that Deputy Tonna failed to "ascertain . . . Bregar understood what was going on" before asking her questions. But she does not explain why Deputy Tonna's preliminary questioning of Bregar to ascertain that she knew where she was and Deputy Garcia's testimony that she seemed "awake" and "coherent," and "didn't have any problem answering" Deputy Tonna's questions is a legally significant distinction from the officer in *LaCouture* asking the defendant if he "understood" the questions he was being asked. 2009-NMCA-071, ¶¶ 12, 18. In any event, while a police officer's subjective knowledge of an infirmity may be probative of a finding that the officer sought to exploit it through coercive police tactics, Bregar does not explain why an *absence* of such knowledge is the same. *See Maestas*, 2012 UT App 53, ¶ 40 ("A police officer is not routinely required to inquire into a defendant's medical condition prior to questioning him. . . . This is especially true of those injured in auto accidents, with which most police officers will have extensive experience and a meaningful frame of reference, and thus less need to seek guidance about the effects of trauma." (citations omitted)). To the extent that Bregar is arguing that officers have an affirmative duty to ascertain an interviewee's medical condition prior to asking questions, the argument was NOT preserved below, so we have no need to grapple with the practical ramifications of such a rule or how it might affect the outcome of this appeal. *See id.* ¶ 40 n.8 (noting that "[a]pplicable patient privacy laws and hospital privacy regulations may well have prevented hospital personnel from sharing" information about a patient's injuries with an investigating officer). Applying *Cooper*'s three-phase totality-of-the-circumstances test, we conclude that Bregar's admission to Deputy Tonna was not the result of coercion and so is not subject to suppression under the Due Process Clause of the Fourteenth Amendment. Accordingly, we affirm the district court's denial of Bregar's motion to suppress those statements.

The District Court's Admission of Deputy Garcia's Opinion Testimony

{26} At trial, the district court permitted Deputy Garcia (the same Deputy Garcia who photographed and measured the accident scene and who accompanied Deputy Tonna when Bregar was interviewed at the hospital) to separately testify as an expert in accident reconstruction. In that capacity, Deputy Garcia informed the jury of his opinion that Bregar was driving the Jeep when it crashed. This opinion was based on several inferences and assumptions that we summarize here before addressing Bregar's argument that the opinion should have been excluded. First, Deputy Garcia considered the location of "yaw" marks on Highway 217 where the Jeep left the road and tumbled down a 3- to 5-foot embankment. Deputy Garcia found "trip" marks where the front left tire of the Jeep caught the dirt on the embankment as it rolled. Based on the "yaw" and "trip" marks and damage to the tires on the left-hand side of the Jeep, Deputy Garcia concluded that as the Jeep left the road it rolled over twice on the driver's side before coming to a rest. Spurlin's body was found on the passenger side of the Jeep about 15 feet away, and Bregar was found on the driver's side of the Jeep, closer to it. Important to Deputy Garcia's assessment, the only window of the Jeep that had been broken during the rollover was that on the front passenger side, so Deputy Garcia reasoned that both Bregar and Spurlin were ejected from the Jeep through the same window.

{27} From this, Deputy Garcia posited that Bregar was the driver because Spurlin was closer to where the Jeep rolled over the first time, while Bregar was found closer to where the Jeep came to rest on the driver's side. Asked how Bregar ended up on the driver's side of the Jeep when it was his opinion that she was ejected from the passenger window, Deputy Garcia explained that "when [Bregar was] getting ejected . . . [the] vehicle [was] tossing her body towards the direction it's rolling." On cross-examination, Deputy Garcia agreed with Bregar's attorney that if Bregar had indeed been thrown from the passenger-side window, his opinion required him to "assume" that Bregar had flown over the car in order to land on the driver's side of the Jeep.

DISCUSSION

{28} Bregar makes three arguments on appeal: (1) the district court abused its discretion when it found that Deputy Garcia was qualified under Rule 11-702 NMRA to offer an expert opinion about "occupant kinematics"; (2) Deputy Garcia's opinion "was based on personal opinion rather than a well-recognized scientific principle"; and (3) Deputy Garcia "was unaware of the predicate facts necessary to make his opinion relevant." We must first sort out our standard of review in this instance, which depends upon whether these issues were raised below or are newly raised to this Court. To this end, if an evidentiary issue is preserved by objection, we review the district court's decision to admit or exclude evidence for an abuse of discretion, which means the decision was "clearly against the logic and effect of the facts and circumstances of the case." *State v. Loza*, 2016-NMCA-088, ¶ 10, 382 P.3d 963 (internal quotation marks and citation omitted). If an appellant fails to object to the admission of evidence below, on appeal we will only review for plain error: that is, an error that "affect[s] a substantial right[.]" Rule 11-103(E) NMRA.

{29} Bregar concedes that her second and third arguments were not preserved and therefore subject to review for plain error, but argues that her first argument was preserved and therefore subject to review for an abuse of discretion. We disagree. Bregar's attorney made the following objections to Deputy Garcia's qualification to testify as an expert: his testimony to the jury (beyond offering his own personal observations at the accident scene) would not be helpful because the "car . . . lost control, went off the road, went into the ditch, and rolled"; his opinion that both occupants of the Jeep were ejected from the front passenger window was a "legal conclusion[and] a question for the jury"; and his testimony as to which Jeep occupant was in which seat, and who was ejected first, was based on "[f]acts not in evidence at this point." Stated simply, it is difficult to point to anything within the objections made that appears to challenge Deputy Garcia's qualification to present expert testimony or the methodology by which his opinion was formed. As we have stated, for an objection to preserve an issue for appeal, "it must appear that [the] appellant fairly invoked a ruling of the [district] court on the same grounds argued in the appellate court." *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717. We require parties to preserve their arguments by making them in the district court, in part, in order to

> (1) . . . specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue.

Sandoval v. Baker Hughes Oilfield Operations, Inc., 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791. Notably, Bregar's district court challenge to Deputy Garcia's expert qualifications lacked any reference to "occupant kinematics" and this specific aspect of accident reconstruction was only addressed for the first time on appeal. The district court—presented instead with evidence that Deputy Garcia was trained and certified in accident reconstruction, had investigated nearly 500 crashes including 100 involving fatalities, and had been qualified as an expert witness in accident reconstruction—was therefore unable to correct any error in qualifying Deputy Garcia as an expert (if indeed it was error) that Bregar now specifically focuses on for the first time on appeal. Moreover, the State was prevented from responding below to the specific challenge now raised and we are denied the opportunity to examine a meaningfully developed record. Accordingly, the question of Deputy Garcia's qualifications to testify in accident reconstruction from the standpoint of occupant kinematics was not preserved.[3]

[3]We note that the State informed the district court that it would ask Deputy Garcia about the origin and movements of Spurlin and Bregar's bodies before and during the crash at the very end of the colloquy on Deputy Garcia's qualifications after the trial court had already found that he would be permitted to offer expert testimony about his reconstruction of the accident. No objection was made by Bregar's attorney at the time, although we note that our rules of preservation do not apply where "a party has no opportunity to object to a ruling or order at the time it is made[.]" Rule 12-216(A) NMRA. But Bregar does not argue this basis for preservation on appeal, and our review of the record indicates that her trial counsel had numerous opportunities to object to Deputy Garcia's qualification to testify to his opinion that Bregar was the driver based on the movement and position of bodies during and following the crash, but did not.

{30} Having determined that all of Bregar's arguments are subject to review for plain error, we shall address the remainder of our analysis separately. First, we discuss whether any one of the three arguments Bregar makes on appeal shows that the district court erred. Second, we discuss whether the error was plain; in other words, whether any of the errors raise sufficiently "grave" concerns about the validity of the jury's guilty verdict that we must reverse it despite Bregar's failure to adequately object to Deputy Garcia's expert testimony below. *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056.

{31} Rule 11-702 NMRA, which governs the admissibility of expert opinion testimony, provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

The proponent of expert testimony under Rule 11-702 must show "(1) the witness . . . [qualifies] as an expert; (2) the specialized testimony [will] assist the trier of fact; and (3) the expert witness testimony [will] be limited to scientific, technical, or other specialized knowledge in which the witness is qualified." *Andrews v. U.S. Steel Corp.*, 2011-NMCA-032, ¶ 11, 149 N.M. 461, 250 P.3d 887 (citing *State v. Alberico*, 1993-NMSC-047, ¶¶ 43-45, 116 N.M. 156, 861 P.2d 192).

{32} When expert witness testimony involves scientific knowledge, as the parties do not dispute to be the case here, "the proponent of the testimony must establish the reliability of the science and methodology on which it is based." *Andrews*, 2011-NMCA-032, ¶ 13. "[I]t is error [for the district court] to admit expert testimony involving scientific knowledge unless the party offering such testimony first establishes the evidentiary reliability of the scientific knowledge." *State v. Torres*, 1999-NMSC-010, ¶ 24, 127 N.M. 20, 976 P.2d 20. Whether scientific knowledge is reliable in turn requires an inquiry into whether the knowledge is derived from "established scientific principles or methods." *Andrews*, 2011-NMCA-032, ¶ 13. New Mexico courts apply a non-exhaustive "list of factors" for answering this question:

> (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; (4) whether the theory or technique has been generally accepted in the particular scientific field; and (5) whether the scientific technique is based upon well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture.

Id. ¶ 14.

{33} As we have stated, Bregar first argues that "the district court erred in finding [Deputy Garcia] qualified to give an opinion about 'occupant kinematics'—i.e., the study of the movement of bodies in an accident." In essence, Bregar contends that "calculat[ing] a person's potential ejection from a vehicle during a rollover from the actual resting location of the occupant . . . requires scientific or technical expertise" that Deputy Garcia did not possess. This expertise, Bregar contends, consists of using "seven . . . equally dense physics equations [to] get a basic idea of the number and timing of rolls over the entire distance of the accident." Bregar contends that additional equations are required to determine "the passenger's ejection trajectory at every moment of the car's rollover." Ultimately, Bregar contends that "[t]his simplified ejection model does not generate a certain ejection point, but rather multiple possible ejection points." Nor does it account for accidents like the Jeep here involving yaw: in that case, additional equations are required. *See generally* Chad B. Hovey et al., *Occupant Trajectory Model Using Case-Specific Accident Reconstruction Data for Vehicle Position, Roll, and Yaw*, from *Society of Automotive Engineers Technical Paper Series*, #2008-01-0517 (SAE Int., April 2008), http://www.hoveyconsulting.com/pdf/Hovey%202008%20Occupant%20Trajectory.pdf. Because Deputy Garcia did not apply these principles in reaching his conclusion that Bregar was driving the Jeep, Bregar contends that the district court abused its discretion in allowing him to so testify.

{34} The problem with this argument is that it fails to address the question of whether Deputy Garcia's opinion was itself based on a reliable scientific methodology. *See Andrews*, 2011-NMCA-032, ¶¶ 13-14. Even if one method (here, occupant kinematics) is the "gold standard" in a field, that does not preclude the use of scientific methods that otherwise meet the baseline reliability criteria of Rule 11-702. *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 105 (Ky. 2008); *see also Chapin v. A & L Parts, Inc.*, 732 N.W.2d 578, 587 (Mich. Ct. App. 2007) ("The only proper role of a trial court [in evaluating the admissibility of expert testimony] is to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable."). As we have noted, Deputy Garcia was trained, certified, and experienced in accident investigation and reconstruction, assigned to a team of deputies tasked with investigating accidents, and had previously testified as an expert in accident reconstruction. On the record before it, we cannot conclude that the district court committed plain error in deciding Deputy Garcia was qualified to testify as an expert in the general field of accident reconstruction in this case.

{35} We think Bregar's second argument—that is, her argument that Deputy Garcia's ultimate opinion was not the result of his expertise in accident reconstruction—is better understood as an argument that the State did not satisfy its burden of showing that Deputy Garcia's opinion (that Bregar was ejected through the passenger window second and therefore was the driver of the crashed Jeep) was the result of a reliable methodology. Viewed this way, we agree with Bregar that the State failed to meet its burden as the proponent of this testimony to establish that Deputy Garcia was qualified to offer this opinion as an expert under Rule 11-702. Accordingly, had Bregar objected to Deputy Garcia's scientific methodology as to this determination, it would have been an abuse of discretion to admit Deputy Garcia's opinion that Bregar was the driver. *See Andrews*, 2011-NMCA-032, ¶ 11 (noting that the proponent of expert witness testimony must prove that the witness is qualified to offer an opinion based on application of scientific methodology).

{36} As we have explained above, the threshold question in determining the admissibility of expert opinion testimony based on scientific knowledge is whether the proponent of such testimony has shown that the knowledge or method in question is reliable. *Id.*; *see also Torres*, 1999-NMSC-010, ¶ 24 (same). Here,

we conclude the State failed to meet its burden. To reiterate, the testimony that the State elicited from Deputy Garcia was that he had been certified as an accident reconstruction expert by the Institute of Police Management, had performed at least fifty reconstructions of "[f]atal[]" car accidents, and that he had been "involved with" many more investigations into non-fatal car accidents. But this testimony, standing alone, does not provide a basis for any meaningful evaluation of whether his ultimate opinion—that Bregar was driving the Jeep—was a result of the application of a reliable scientific method. The State needed to put forward some evidence or testimony that revealed the *content* of his formal qualifications—i.e., what he was taught in accident reconstruction class, what certification with the Institute of Police Management requires, and what methods (mathematical or otherwise) he uses to reconstruct an accident—in order to enable the district court to assess the reliability of these methods in producing the his resulting opinion that Bregar was the driver of the crashed Jeep. Having failed to do so, the district court abused its discretion by allowing Deputy Garcia to opine to the jury that Bregar was driving the Jeep.

{37} To be sure, Deputy Garcia elaborated on his opinion when he testified before the jury that Bregar was the driver because the passenger side window was the only window that broke during the accident, so the first person to be thrown from the Jeep would have had to have been in the passenger seat. Deputy Garcia explained that a rolling vehicle was like a "merry-go-round[,]" in that "when you're getting ejected out, you're going the direction that the vehicle is rolling over." But neither this testimony nor anything else in the record provides a basis for gauging the reliability of Deputy Garcia's "merry-go-round" methodology of extrapolating the position previously occupied by a person who is thrown from a vehicle. *See* Rule 11-702. For all we can tell from the record, it is an ad-hoc theory that he had used only in this one case. Even viewing Deputy Garcia's qualifications and experience generously, there is no basis to find that his opinion in this regard was the result of a reliable methodology, as Rule 11-702 requires. There is no evidence that his theory has been tested, that it had been subjected to peer review and publication, whether it had a known potential rate of error, whether the theory or technique has been generally accepted in the particular scientific field, or whether the scientific technique is based upon well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture. *See Andrews*, 2011-NMCA-032, ¶ 14. The State cites *State v. Vigil*, 1985-NMCA-110, ¶¶ 12,14, 103 N.M. 643, 711 P.2d 920, as holding that accident reconstruction expertise is reliable as a matter of law with respect to opinions regarding body movements during accidents. But *Vigil* was decided when the prevailing test for the admissibility of expert testimony was *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir.1923), which established the "general acceptance" test for the admissibility of an expert opinion. Under *Frye*, the test for the admissibility of expert opinion testimony based on scientific knowledge is whether the "scientific technique or principle about which the expert proposes to testify . . . [is] accorded general scientific recognition." *Alberico*, 1997-NMSC-047, ¶ 39 (internal quotation marks and citation omitted). The *Frye* test was subsequently rejected by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)(holding that the *Frye* test was superceded by the adoption of the Federal Rules of Evidence), and our own Supreme Court in *Alberico*, 1993-NMSC-047, ¶¶ 2, 97. As *Alberico* noted, the problem with this test is that its "inherent vagueness . . . creates ambiguities as to the scope of the pertinent field or fields to which the scientific technique belongs." *Id.* ¶ 41. This case illustrates that concern. Accident reconstruction may be a well-accepted method for determining the movement of vehicles during a car accident, but that does not mean that every opinion offered by experts in accident reconstruction is generally accepted (under *Frye*) or reliable (under our modern Rule 11-702 test).

{38} Moreover, to the extent that *Vigil* remains good law after *Daubert* and *Alberico*'s rejection of the *Frye* standard, we find it (and the other out-of-state cases cited by the State) factually distinguishable. In *Vigil*, the district court specifically determined that the witness's expertise in the field of accident reconstruction "qualified [him] to determine the movement of bodies within the vehicle." 1985-NMCA-110, ¶¶ 12-14. Here, the district court never made any finding that Deputy Garcia's opinion regarding Bregar's position fell within the scope of his expertise in accident reconstruction. Indeed, after Deputy Garcia's testimony had concluded, the district court stated that "Deputy Garcia gave more opinions than [the district judge] was anticipating, some of which I wasn't comfortable with." Moreover, the expert in *Vigil* had testified as to his "training and knowledge of physics and engineering," which the court found sufficient to put the expert's testimony within the trial court's "broad" discretion in determining its admissibility. *Id.* ¶ 16. Here, although Deputy Garcia testified that he was certified as an accident reconstruction expert and had taken an accident reconstruction course, the State did not elicit any testimony from Deputy Garcia to elaborate on what these formal qualifications entailed. In other words, even if it is within the discretion of a district court to conclude that training in and knowledge of physics and engineering is sufficient to make a witness competent to testify about the movement of bodies during a car accident, the total lack of evidence that Deputy Garcia had such training precluded the district court in this case from allowing his expert testimony to be presented to the jury. Accordingly, it was error for the district court to allow Deputy Garcia to testify as an expert that in his opinion Bregar was the driver under Rule 11-702. We therefore do not separately address Bregar's third argument that the admission of this testimony was in error, and proceed to analyze whether the admission of Deputy Garcia's expert testimony satisfies our plain error standard of review.

{39} As we have noted above, our Supreme Court has stated that the standard of review for plain error is whether the erroneous admission of evidence creates "grave doubts concerning the validity of the verdict." *Montoya*, 2015-NMSC-010, ¶ 46 (internal quotation marks and citation omitted). Our Supreme Court has elsewhere characterized the standard of review for plain error as involving some determination of whether "there has been a miscarriage of justice or a conviction in which the defendant's guilt is so doubtful that it would shock the conscience of the court to allow it to stand." *State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071.

{40} In *Lucero*, an expert witness for the State diagnosed the alleged victim of the defendant's child abuse with post-traumatic stress disorder (PTSD), opined that the complainant's symptoms were "consistent with those in children who have been sexually abused[,]" and that

"the cause of the complainant's PTS[D] was the sexual molestation that she had been undergoing." *Id.* ¶ 4. The expert also "recounted several statements regarding sex abuse that the complainant had made to her during her evaluation to the effect that her uncle had 'done it to her.' " *Id.* ¶ 5. Finally, the expert witness

> commented directly on the complainant's credibility. For example, she testified that the complainant 'was consistent in saying that it was her uncle' and was consistent in referring to the rooms in which she was subjected to sexual abuse. [The expert] also commented on the complainant's demeanor, which she said changed when talking about the sex abuse that she endured. She stated that if the complainant were not telling the truth, she probably would have reacted differently than she did.

Id. ¶ 6. Our Supreme Court found that it was plain error to admit this testimony for three reasons. First, the witness "comment[ed] directly [on] the credibility of the complainant[,]" *id.* ¶ 15; second, by naming the defendant as the victim's abuser, the expert's testimony "was tantamount to saying that the complainant was telling the truth[,]" *id.* ¶ 16; and third, the expert's testimony amounted to a direct statement that the complainant's "PTSD symptoms were in fact caused by sexual abuse." *Id.* ¶ 17. These errors, the Court found, were plain because they affected " 'substantial rights although the plain errors were not brought to the attention of the judge.' " *Id.* ¶ 13 (alteration omitted) (quoting Rule 11-103(D) (1993), currently Rule 11-103(E)).

{41} In *Montoya*, the expert witness was a pathologist who had conducted an autopsy on the body of a baby whom the defendant had allegedly killed. The expert

> opined that the injuries to [the victim's] ears were intentional, caused by someone grabbing and pulling them, and could not have been caused by the [victim] herself. [The expert] saw between forty and fifty bruises on [the victim's] back, chest, and abdomen. The [victim] also had subdural and subarachnoid hemorrhages on both sides of the brain, indicative of significant head trauma. [The expert] said these types of injuries were unlikely to be caused by a fall in a bathtub. [The expert] also found significant internal abdominal injuries, which she characterized as classic intentional injuries found in children who were punched or kicked in the stomach.
>
> [The expert] said that [the victim's] death was the result of multiple blunt force injuries. [The expert] concluded that the constellation of injuries on [the victim's] body was a result of intentional, nonaccidental trauma, and that the manner of death was homicide, which she defined as death at the hands of another.

2015-NMSC-010, ¶¶ 12-13. The Court found that the admission of this testimony was not plainly erroneous, distinguishing *Lucero* based on the fact that the expert had not identified the defendant as the person who had caused the injuries, and "unlike *Lucero*, where the expert likely sealed the defendant's fate with her testimony alone, in this case there is ample evidence outside of [the expert's] testimony to support the jury's finding of guilt." *Montoya*, 2015-NMSC-010, ¶ 49.

{42} Although *Montoya* is one of our Supreme Court's most recent applications of the plain error standard, its holding appears to be in tension with *Lucero* and other cases from the same court. According to *Montoya*, the standard of review for plain error is roughly the same as the analysis for constitutional fundamental error: "the [appellate court] must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." 2015-NMSC-010, ¶ 46 (internal quotation marks and citation omitted). But *Lucero* states that the standard of review for plain error is simply whether the error "affect[s] substantial rights[,]" a standard which the court itself characterized as "less stringent" than the standard of review for constitutional fundamental error. 1993-NMSC-064, ¶ 13 (internal quotation marks and citation omitted); *see also State v. Torres*, 2005-NMCA-070, ¶ 9, 137 N.M. 607, 113 P.3d 877 ("The plain error doctrine is not as strict as the doctrine of fundamental error in its application."). By contrast, in the analogous circumstance of harmless error review (where the state bears the burden of proving that an error preserved by the defendant should not result in reversal, instead of the defendant bearing the burden of showing that an unpreserved error should), our Supreme Court has stated that courts should look to the effect that the error had on the jury's conclusion, not whether the other evidence that was presented would have allowed the jury to reach the same conclusion. *See State v. Tollardo*, 2012-NMSC-008, ¶ 42, 275 P.3d 110. This standard is close to the federal interpretation of the "affects substantial rights" prong of plain error review, which the U.S. Supreme Court has said "in the ordinary case means it affected the outcome of the district court proceedings[] and . . . the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (alteration, internal quotation marks, and citations omitted).

{43} But we need not attempt to reconcile these cases here, because we hold that Bregar cannot satisfy her burden of showing that the admission of Deputy Garcia's expert testimony was plainly erroneous under a more permissive standard. Unlike the expert in *Lucero*, Deputy Garcia did not "comment directly [on Bregar's] credibility." 1993-NMSC-064, ¶ 15. Moreover, Deputy Garcia's opinion was not the sole or primary item of evidence indicating Bregar's guilt. Our review of the record makes clear that the unified focus of Bregar's defense was to attack the evidentiary value of Bregar's hospital-bed admissions. And, apart from Deputy Garcia's expert opinion, additional circumstantial evidence that Bregar was the driver figured prominently in the State's case.

{44} In this regard, the jury was instructed that it was to determine whether Bregar's statement was voluntarily made, and both the State and the defense devoted significant portions of their closing statements arguing the issue of whether the jury should credit Bregar's statement. Indeed, Bregar's counsel explained that her lengthy and repeated arguments concerning the voluntariness and the accuracy of the deputies' recollections of the statement were made because that evidence was "so important" to the State's case. The State conceded as much, but did not argue that the jury should believe Bregar's confession was voluntary because of Deputy Garcia's testimony. Instead, the State placed primary emphasis on the fact that Bregar had changed her story when she found out that Spurlin had died, inconsistencies in the testimony of the witness that Bregar had called to the stand to testify that she was not the driver, the fact that Spurlin did not have a driver's license, that Bregar admitted she owned the Jeep, and that her occupation was serving

as Spurlin's live-in caretaker. Finally, the State attacked Bregar's defense that her leg brace prevented her from driving the Jeep by presenting photographic evidence that the driver's seat of the Jeep was found positioned much further back than the passenger's seat. While Bregar's attorney attacked Deputy Garcia's credibility as an expert in closing, her chief concern was attacking his credibility as a lay witness, highlighting circumstantial evidence that Spurlin was the driver (such as the presence of his urine on the driver's seat) and witness testimony to the same effect. Viewed against this independent evidence of Bregar's guilt, we can conclude that Deputy Garcia's expert opinion did not likely affect the outcome of the jury's deliberations. Thus, the district court's erroneous admission of Deputy Garcia's ultimate conclusion as an expert witness was not plain error. Accordingly, we will not reverse the district court's judgment on this ground.

Sufficiency of the Evidence

{45} Bregar's final argument on appeal is that the State failed to present sufficient evidence to establish the corpus delicti of vehicular homicide. "The corpus delicti rule provides that 'unless the corpus delicti of the offense charged has been otherwise established, a conviction cannot be sustained *solely* on the extrajudicial confessions or admissions of the accused.' " *State v. Weisser*, 2007-NMCA-015, ¶ 10, 141 N.M. 93, 150 P.3d 1043 (alteration omitted) (quoting *State v. Paris*, 1966-NMSC-039, ¶ 6, 76 N.M. 291, 414 P.2d 512). New Mexico courts apply the "modified trustworthiness rule" set forth in *Paris*. *State v. Wilson*, 2011-NMSC-001, ¶ 15, 149 N.M. 273, 248 P.3d 315, *overruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37. "[T]he existence of the corpus delicti is demonstrated by the fact that a harm or injury occurred and that the harm or injury was caused by a criminal act." *Weisser*, 2007-NMCA-015, ¶ 10.

{46} Under New Mexico's "modified trustworthiness rule" approach, "a defendant's extrajudicial statements may be used to establish the corpus delicti [of the charged crime] when the prosecution is able to demonstrate the trustworthiness of the confession and introduce some independent evidence of a criminal act." *Wilson*, 2011-NMSC-001, ¶ 15. This independent evidence can consist of either "direct or circumstantial evidence, but such evidence must be independent of a defendant's own extrajudicial statements." *Weisser*, 2007-NMCA-015, ¶ 12 (citations omitted). We review de novo any claim that the State failed to prove the corpus delicti of the charged offense, but we take all findings of fact that support a conviction as given if supported by substantial evidence. *Wilson*, 2011-NMSC-001, ¶ 17.

{47} The jury was instructed that it should find Bregar guilty of vehicular homicide if the State proved beyond a reasonable doubt that she "operated a motor vehicle while under the influence of intoxicating liquor. . . [and Bregar] thereby caused the death of [Mr.] Spurlin[.]" *See* § 66-8-101(A) (defining homicide by vehicle as "the killing of a human being in the unlawful operation of a motor vehicle"); § 66-8-102(A) ("It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.").

{48} Bregar argues that because her confession was the only evidence in support of the jury's finding that Bregar was the driver, her conviction must be reversed. But the State presented independent circumstantial evidence to prove the corpus delicti of homicide by vehicle, including photographs showing that the driver's seat of the Jeep was reclined and pushed much further back than the passenger seat. Because Bregar was wearing a leg brace at the time of the accident, this evidence could have supported a conclusion that Bregar, not Spurlin, was driving the Jeep at the time of the accident. Bregar argues that this evidence cannot be considered because the photographs were taken by Deputy Garcia, and his expert testimony (which we addressed above) was presented in error. But Bregar does not provide any support for her implicit assertion that admission of car accident photographs taken by an investigating officer are subject to Rule 11-702. Accordingly, we do not consider it any further. "[W]here arguments in briefs are unsupported by cited authority, [we assume that] counsel[,] after diligent search, was unable to find any supporting authority." *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329.

{49} Bregar does cite cases where we found the corpus delicti wanting where the evidence is "susceptible to multiple inferences" both for and against the crime having occurred. *Weisser*, 2007-NMCA-015, ¶ 36. Bregar argues that in light of this authority, we should ignore the evidence that the driver's-side seat was reclined more than the passenger-side seat because emergency responders entered the car and turned the ignition off prior to Deputy Garcia's arrival. This, Bregar states in her brief in chief, shows that the picture of the seat equally supports an inference of innocence, because the seat could have been "moved after driving." But our Supreme Court has recently reiterated that the "susceptible of multiple inferences" rule is "no longer an appropriate standard for a New Mexico appellate court" to apply in reviewing the sufficiency of the evidence supporting a verdict. *State v. Garcia*, No. 35,451, 2016 WL 4487786, 2016-NMSC-___, ¶ 24, ___ P.3d ___ (Aug. 25, 2016) (emphasis omitted). Instead, our task on appeal involves first "draw[ing] every reasonable inference in favor of the jury's verdict *and then* . . . evaluat[ing] whether the evidence, so viewed, supports the verdict." *Id.* Although *Garcia* applies this rule to a sufficiency-of-the-evidence challenge, we can see no meaningful reason not to also apply the rule in the context of whether the State has shown a corpus delicti. Here, the position of the seat supports an inference that Bregar was the driver; Bregar's argument that paramedics might have moved the seat when they entered the car goes to the weight of the evidence, not its admissibility. A reasonable inference from this evidence is that Bregar was the driver. As well, we again note that the State presented evidence that the Jeep was Bregar's, that only Bregar was licensed to drive, and that Bregar was responsible for Spurlin's care. Accordingly, the State proved the corpus delicti of vehicular homicide with sufficient evidence apart from Bregar's admissions to survive Bregar's challenge on appeal.

CONCLUSION

{50} We uphold the district court's denial of Bregar's pretrial motion to suppress her hospital-bed admissions. In addition, the district court did not commit plain error by admitting Deputy Garcia's expert opinion testimony that Bregar was the driver. We reject Defendant's challenge to the sufficiency of the evidence supporting a corpus delicti. The judgment of the district court is therefore affirmed.

{51} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
TIMOTHY L. GARCIA, Judge

Classified

Positions

Associate Counsel – New Mexico State Land Office

The New Mexico State Land Office is seeking applications from attorneys for an exempt Associate Counsel position with the agency. Salary: $60,000 - $80,000 annually, plus benefits, depending on experience and qualifications. This is a fulltime exempt position that would advise and represent the Commissioner of Public Lands and State Land Office staff regarding a variety of matters, which may include ground leases (including leases for renewable energy projects), land sales and exchanges, oil & gas leases and related issues, water rights, environmental and other land use regulations, and other areas of natural resources and land use law. The chosen applicant may also assist in rulemaking and administrative matters, including professional service contracts and public records, human resources legal matters and representing the Commissioner in a variety of complex litigation in state and federal court. The position requires a juris doctor or equivalent degree from an accredited law school and a current license, in good standing, to practice law in New Mexico. Some travel is required. Strong writing and analytical skills, interpersonal skills and the ability to work in a team environment are necessary. Experience advising and/or representing governmental agencies acting in a proprietary capacity preferred. Copies of your resume, New Mexico bar card, references, letter of interest and a legal writing sample must be submitted no later than 5:00 p.m. on June 10, 2017 to John L. Sullivan, Acting General Counsel, New Mexico State Land Office, P.O. Box 1148, Santa Fe, NM 87504-1148 or email jsullivan@slo.state.nm.us. The State of New Mexico is an EOE.

Attorney

Atkinson, Baker & Rodriguez, P.C. seeks attorney with strong academic credentials and 3-8 years civil litigation experience for successful, established complex commercial and tort litigation practice. Excellent benefits. Tremendous opportunity for professional development. Salary D.O.E. All inquiries kept confidential. Send resume and writing sample to Atkinson, Baker & Rodriguez, P.C., Attorney Recruiting, 201 Third Street NW, Suite 1850, Albuquerque, NM 87102.

Full-time Law Clerk

United States District Court, District of New Mexico, Albuquerque, Full-time Law Clerk, assigned to the Honorable James O. Browning. $60,367 to $72,356 DOQ. See full announcement and application instructions at www.nmd.uscourts.gov/employment. Successful applicants subject to FBI & fingerprint checks. EEO employer.

Trial Attorney

Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based primarily in Curry County (Clovis). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Ninth District Attorney's Office, Attention: Steve North, 417 Gidding St. Suite 200, Clovis, New Mexico 88101.

Immediate Need - Trial Attorney - Albuquerque, NM
Allstate Insurance Company

Good Work. Good Life. Good Hands®. As Trial Attorney, you will represent clients who are customers of Allstate Insurance Company, Encompass Insurance Company, and Esurance ("the Company") in: bodily injury (BI), property damage, no-fault/PIP, special investigations (SIU), arbitration and subrogation cases. Job Qualifications: Juris Doctorate (J.D.) and member in good standing of the New Mexico state bar; Approx. 2-5 years of litigation experience; insurance defense strongly preferred; Jury trial experience a plus. TO APPLY: Visit www.allstate.com/careers Job ID: 71718

Associate Attorney

Property rights focused law firm seeking full time attorney with several years of experience for practice located in Cheyenne, Wyoming. Applicants should have excellent legal research and writing skills and some experience appearing in court. General public speaking skills are a plus. Firm practice areas include natural resources and environmental litigation, advocacy for private property rights, land use planning, complex right-of-way and easement transactions representing property owners and administrative law. Prefer to hire in top 1/4 of law school class. Salary commensurate with experience. Please send resume, law school transcript, writing sample, and references to Budd-Falen Law Offices L.L.C., P.O. Box 346, Cheyenne, WY 82003, phone (307) 632-5105, fax (307) 637-3891, e-mail main@buddfalen.com. Questions can be directed to Karen Budd-Falen.

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.

Assistant City Attorney
City of Albuquerque

Assistant City Attorney position(s) available within the Litigation Division with desired experience in civil litigation handling pretrial discovery, motion practice, trial preparation, and trial. We are seeking attorneys who have an interest in defending civil rights, personal injury, and premises liability cases within a positive team environment. Salary will be based upon experience and the City of Albuquerque Attorney's Personnel and Compensation Plan with a City of Albuquerque Benefits package. Please submit resume to the attention of "Litigation Attorney Application" c/o Ramona Zamir-Gonzalez, Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or rzamir-gonzalez@cabq.gov. Application deadline is Wednesday, June 14, 2017.

Commercial Litigation Lawyer

Sutin, Thayer & Browne, an Albuquerque Uptown law firm, seeks commercial litigation lawyer with 2-4 years' experience. Must have strong work ethic, sharp legal skills and a self-starting nature, and must be licensed to practice law in New Mexico. Salary commensurate with experience. Attractive benefits package in place. Send cover letter, resume and writing sample to GLW@sutinfirm.com by June 16, 2017. Applications will be kept confidential.

Deputy County Attorney

Gunnison County, Colorado - Salary: $90,555 - $128,090. The Deputy County Attorney works under the direct supervision of the County Attorney and under the policy direction of the Board of County Commissioners. The Deputy Attorney provides legal counsel and will also serve as the operations manager for the County Attorney's Office. For complete position profile and requirements, and to apply online, visit Prothman at http://www.prothman.com/ and click on "Current Searches." For questions, call 206-368-0050. First review: June 25, 2017 (open until filled).

Senior Trial Attorney

Senior Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will based primarily in Sierra County (Truth or Consequences). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary range: $59,802 - $80,000. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and be commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.

Eleventh Judicial District Attorney's Office, Div II

The McKinley County District Attorney's Office is currently seeking immediate resumes for one (1) Senior Trial Attorney. This position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence. Persons who are in good standing with another state bar or those with New Mexico criminal law experience are welcome to apply. Salaries are negotiable based on experience. Submit letter of interest and resume to Kerry Comiskey, Chief Deputy District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter and resume to Kcomiskey@da.state.nm.us by 5:00 p.m. June 16, 2017.

Attorney

The Fifth Judicial District Attorney's office has an immediate position open to a new or experienced attorney. Salary will be based upon the District Attorney Personnel and Compensation Plan with starting salary range of an Associate Trial Attorney to a Senior Trial Attorney ($41,685.00 to $72,575.00). Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs , NM 88240-8335 or e-mail to DLuce@da.state.nm.us.

Senior Trial Attorney/Deputy Trial Union County

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

Attorney

Small insurance defense firm is accepting resumes for an associate attorney. The position will include a heavy emphasis on brief writing and will focus on civil rights defense, personal injury and other insurance defense related issues. Candidates considered for the position must have excellent oral and written communication skills. Would be willing to consider part-time or contract candidates. Please send resume with cover letter and a writing sample to urvashi@childresslawfirm.com or Childress Law Firm, LLC, 6000 Uptown Blvd. Ste 305, Albuquerque, NM 871410. All replies will be kept confidential.

Senior Trial Attorney

The Third Judicial District Attorney's Office is accepting applications for a Senior Trial Attorney in the Las Cruces Office. Attorneys in this position will be responsible for all levels of crimes and must have at least five (5) to seven (7) years as a practicing attorney in criminal law. This is an advanced level position. Salary will be based upon experience and the District Attorney's Personnel and Compensation Plan. Please send interest letter/resume to Whitney Safranek, Human Resources Administrator, 845 N Motel Blvd., Suite D, Las Cruces, New Mexico 88007 or wsafranek@da.state.nm.us. Deadline for the submission of resumes: Open until positions are filled.

Manager, General Counsel Group Analyst & Administrator

PNM Resources has an immediate opening for a Manager, General Counsel Group Analyst & Administrator. Responsible for staff and workflow management, fiscal analysis, resource development, coordination of budget process and management functions for the department. Supervises administrative personnel and is responsible for administering performance management process. Ensures recommendations are communicated and implemented in a timely manner. Reviews systems and recommends improvements to increase the effectiveness and efficiency of the staff Successful candidates should be well organized, including ability to communicate and inspire confidence and trust at all levels; ability to develop and maintain positive working relationships with various departments, upper management, outside law firms and vendors. Knowledge of and experience with law firms/legal departments, legal and office systems and applications. Bachelor's degree in a related field with seven to nine years of related experience, including two years management experience, or equivalent combination of education and/or experience related to the discipline. For a full job description, requirements and to apply, go to www.pnm.com/careers. Deadline is no later than June 14, 2017. PNM is an EEO/AA employer. Women, minorities, disabled individuals and veterans are encouraged to apply.

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

Paralegal 1

Bernalillo County is conducting a search of candidates for a full-time, regular Paralegal 1. Under the general direction, assist with routine aspect of legal and factual data compilation and analysis, drafting legal document an affidavits and general legal procedures, research and writing in support of the county Legal Department. Minimum Qualifications for this positions require High school diploma or GED plus eight (8) years of work experience as a legal secretary or legal assistant that is directly related to the duties and responsibilities specified. OR high school diploma or GED and four (4) years of work experience as a Paralegal. An Associate's degree in Paralegal Studies may substitute for two (2) years of work experience. A Paralegal Certificate from an accredited institution or accredited national association may substitute for one (1) year of work experience. An accredited national association certification as a Legal Assistant or Paralegal preferred. Ability to draft legal contracts, agreements and settlement procedures and other legal documents including pleadings and discovery requests and responses. Knowledge of legal terminology, documents common to a legal office, legal procedures and various court systems. Knowledge of the principles and procedures of legal research and the knowledge of current and developing legal issues and trends in area of expertise. Ability to work independently and resourcefully with minimum supervision. Bernalillo County invites you to consider working for our County as your next career endeavor. Bernalillo County is an equal opportunity employer, offering a great work environment, challenging career opportunities, professional training and competitive compensation. For more information regarding the job description, salary, closing dates, and to apply visit the Bernalillo County web site at www.bernco.gov and refer to the section on job postings. ALL APPLICANTS MUST COMPLETE THE COUNTY EMPLOYMENT APPLICATION.

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

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

Part and Full Time Attorneys
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.

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

Nurse Paralegal
Specialist in medical chronologies, related case analysis/research. Accurate, knowledgeable work product. For resume, work samples, references: maryjdaniels68@gmail.com

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

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.

Office Sharing
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.

BAR BULLETIN
Official Publication of the STATE BAR of NEW MEXICO

SUBMISSION DEADLINES

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

For more advertising information, contact:
Marcia C. Ulibarri at 505-797-6058
or email mulibarri@nmbar.org

Disability Income Insurance for the Legal Community

Lost income due to a disability resulting from sickness or injury could be devastating. **Protect yourself with disability income insurance.**

Short Term/Long Term

Personal • Business • Group

Also available: Life Insurance, Key Person Insurance and Long Term Care Insurance.

THE EDWARD GROUP LLC

INSURANCE & REAL ESTATE

Contact the Edward Group for a **free** consultation.

jbedward@edwardgroup.net
www.edwardgroup.net

877-880-4041 • 505-242-5646
P.O. Box 26506Albuquerque, NM 87125-6506

Licensed in NM #100009838 & 68944 • Plus Many Other States!