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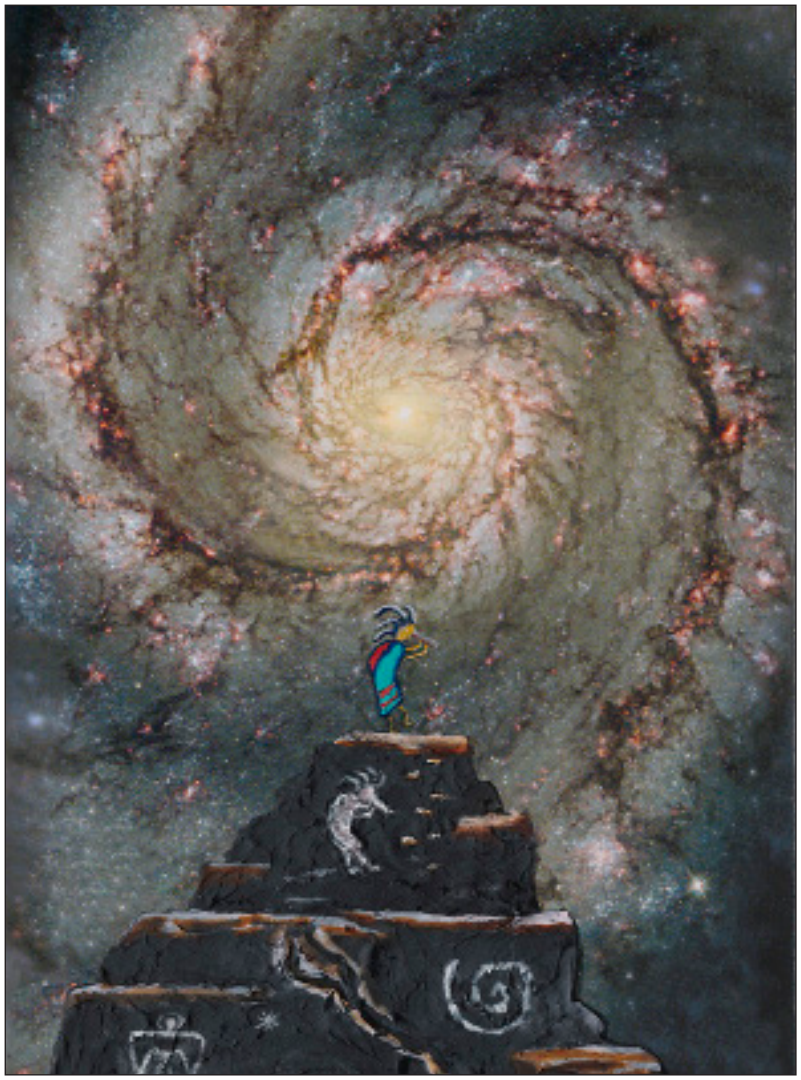
Bar Bulletin

June 6, 2018 • Volume 57, No. 23



In Tune with the Galaxy, by Linda Heath www.lindaheath.com

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About Cover Image and Artist: L. Heath (Linda L. Heath) was trained classically at the San Francisco Academy of Art and by intensive workshops throughout her adult life. Growing up in New Mexico, she has always been fascinated by the blending of ancient cultures here as well as the modem reach into space. Her work uses NASA Hubble photography as a base but uses oil and acrylic paint to add a local spiritual dimension to the deep space pictures. Most of the paintings are proportioned to the Golden Ratio, reflecting her mathematical background and connection to classical art. Her hope is to inspire all of us to reach deeply for a positive spiritual meaning in this increasingly complicated world. For more of her work, visit www.lindaheath.com.

Notices

Court News

New Mexico Supreme Court

The Investiture Ceremony for The Honorable Gary L. Clingman

State Bar members are invited to attend the investiture ceremony for Hon. Gary L. Clingman as associate justice of the Supreme Court of New Mexico on June 15, at 4 p.m., Supreme Courtroom 237 Don Gaspar Ave., Santa Fe, N.M. A reception will immediately following the ceremony in the Supreme Court Law Library.

Second Judicial District Court

Notice to Attorneys and Public

The New Mexico Supreme Court has authorized the Second Judicial District Court Clerk's Office to change it's business hours effective July 1. Business hours for the Second Judicial District Court and the court information desk are Monday-Friday from 8 a.m.-5 p.m. The public service windows for the Court Clerk's Office (Children's Court, Criminal Court, Civil Court and Family Court) will be open Monday-Friday from 8 a.m.-4 p.m. The public service windows for the Domestic Violence Division and the Child Support Enforcement Division will be open Monday-Friday 8 a.m.- noon and 1p.m.-5 p.m. The public service windows for the Center for Self Help and Dispute Resolution will be open Monday- Friday 9 a.m. -4 p.m.

Second Judicial District Court

Notice of Exhibit Destruction

Pursuant to 1.21.2.617 FRRDS (Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy criminal exhibits associated with the following criminal case numbers filed with the Court. Cases on appeal are excluded.

CR-1988-45096; CR-1989-00034; CR-1989-00238; CR-1989-00264; CR-1989-00920; CR-1991-00634; CR-1991-01605; CR-1991-01818; CR-1991-02015; CR-1991-02346; CR-1991-02350; CR-1992-00478; CR-1992-00791; CR-1992-01491; CR-1992-01565; CR-1992-01157; CR-1992-01175; CR-1992-01643; CR-1992-01752; CR-1993-00401; CR-1993-00760; CR-1993-01271; CR-1993-02236; CR-1993-02269; CR-1993-02390; CR-1994-00099; CR-1994-00622; CR-1994-01161; CR-1994-01187; CR-1994-03093; CR-1995-00017; CR-1995-00498; CR-1995-00840; CR-1995-01138; CR-1995-01796; CR-1995-02615; CR-1995-03720; CR-1996-00074; CR-1996-01197; CR-1996-01455; CR-1996-03599; CR-1996-03600; CR-1997-00865; CR-1997-01077; CR-1997-01234; CR-1997-01357; CR-1997-01413; CR-1997-02497; CR-1997-02755; CR-1997-03912; CR-1998-01087; CR-1998-01385; CR-1998-02541; CR-1998-03601; CR-1998-03687; CR-1998-03688; CR-1998-03729; CR-1999-00313; CR-1999-01451; CR-1999-03824; CR-2000-00050; CR-2000-00675; CR-2000-00713; CR-2000-00976; CR-2000-01061; CR-2000-02360; CR-2000-02361; CR-2000-03357; CR-2000-03770; CR-2000-03771; CR-2000-03772; CR-2000-03773; CR-2000-04899; CR-2001-00727; CR-2001-02141; CR-2001-02212; CR-2001-02433; CR-2001-02549; CR-2002-00529; CR-2002-01049; CR-2002-01505; CR-2002-02668; CR-2002-03247; CR-2002-03691; CR-2003-00314; CR-2003-01216; CR-2003-02167; CR-2004-00112; CR-2004-04836; LR-2005-00006; CR-2005-04915; CR-2005-04916; CR-2006-02355; CR-2006-03370; CR-2006-04515; CR-2006-04975; CR-2006-05242; CR-2007-05057; CR-2007-05393; CR-2008-01851; CR-2008-05940; CR-2008-06296

Counsel for parties are advised that exhibits may be retrieved through July 6. Should you have questions regarding cases with exhibits, call to verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.-4:30p.m., Monday-Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Professionalism Tip

With respect to opposing parties and their counsel:

I will cooperate with opposing counsel's requests for scheduling changes

New Mexico Judicial Compensation Committee Notice of Public Meeting

The Judicial Compensation Committee will meet on June 12, from 9:30 a.m.-12:30 p.m., in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe, to discuss fiscal year 2020 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 FY2020 compensation to the legislature prior to the 2019 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.

State Bar News

Attorney Support Groups

- June 11, 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 available. Dial 1-866-640-4044 and enter code 7976003#.
- June 18, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- July 2, 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 Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

Animal Law Section

Animal Talk: Audubon Society

2018 is the 100th anniversary of the enactment of the Migratory Bird Treaty Act and the "Year of the Bird" as declared by the Audubon Society. The MBTA prohibits "take" of protected migratory bird species. Until December 2017, the prohibitions on "take" included incidental take. The U.S. Department of Justice prosecuted individuals and businesses for violations of the MBTA take provisions. On Dec. 22, 2017, the U.S. Department of Interior Solicitor issued an opinion redefining "take" to exclude incidental take. What effect will the opinion have on MBTA enforcement? Join Jonathan Hayes, Executive Director New Mexico Audubon Society, at noon on June 29 at the State Bar Center to learn more. R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Rocky Mountain Mineral Law Foundation Board

The president of the State Bar is required to appoint one attorney to the Rocky Mountain Mineral Law Foundation Board for a three-year term. The appointee is expected to attend the Annual Trustees Meeting and the Annual Institute, make annual reports to the appropriate officers of their respective organizations, actively assist the Foundation on its programs and publications and promote the programs, publications and objectives of the Foundation. Members who want to serve on the board should send a letter of interest and brief résumé by July 2 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Committee on Women and the Legal Profession

Nominations Open for 2017 Justice Pamela Minzner Award

The Committee on Women and the Legal profession seeks nominations of New Mexico attorneys who have distinguished himself or herself during 2017 by providing legal assistance to women who are underrepresented or under deserved, or by advocating for causes that will ultimately benefit and/or further the rights of women. If you know of an attorney who deserves to be added to the award's distinguished list of honorees, submit 1-3 nomination letters describing the work and accomplishments of the nominee that merit recognition to Quiana Salazar-King at Salazar-king@law.unm.edu by June 29. The award ceremony will be held on Aug. 30 at the Albuquerque Country Club. This award is named for Justice Pamela B. Minzner, whose work in the legal profession furthered the causes and rights of women throughout society. Justice Minzner was the first female chief justice of the New Mexico Supreme Court and is remembered for her integrity, strong principals, and compassion. Justice Minzner was a great champion of the Committee and its activities.

Legal Resources for the Ederly Program

Two Upcoming Legal Workshops

The State Bar of New Mexico's Legal Resources for the Elderly Program (LREP) is offering two free legal workshops in Edgewood June 7, 10 a.m.-1 p.m. at Edgewood Senior center and in Socorro June 19, 10 a.m.-1 p.m., at Socorro County Senior Center. Call LREP at 800-876-6657 for more information.

2018 Annual Meeting

Resolutions and Motions

Resolutions and motions will be heard at 1 p.m., Aug. 9, at the opening of the State Bar of New Mexico 2018 Annual Meeting at the Hyatt Regency Tamaya Resort & Spa, Santa Ana Pueblo. To be presented for consideration, resolutions or motions must be submitted in writing by July 9 to Executive Director Richard Spinello, PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or email rspinello@nmbar.org.

Young Lawyers Division

Volunteers Needed for Veterans Civil Legal Clinic

The YLD seeks volunteers to staff the Veterans Civil Legal Clinic from 8:30-10:30 a.m. on June 12, at the N.M. Veteran's Memorial located at 1100 Louisiana Blvd SE in Albuquerque. Volunteers should arrive at 8 a.m. for orientation and complimentary breakfast. The clinics offer veterans a broad range of veteran-specific and non-veteran specific legal services, including family law, consumer rights, worker's comp, bankruptcy, driver's license restoration, landlord/tenant, labor/employment and immigration. To volunteer, visit https://form.jotform.com/71766385703969.

UNM School of Law

Law Library Hours

Summer 2018 Hours
May 12-Aug. 19

Building and 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.

UNM Law Scholarship Classic presented by U.S. Eagle

Join the UNMSOL and other members of the law school community at 8 a.m., June 8, at the UNM Championship Golf Course to play a part in sustaining over $50,000 in life-changing scholarships for law students. Don't delay! The tournament sells out every year. Register at https://goto.unm.edu/golf.

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Board of Bar Commissioners

Meeting Summary

The Board of Bar Commissioners met at the State Bar Center in Albuquerque on May 18, 2018. Action taken at the meeting was as follows:

- Approved the Feb. 23 meeting minutes as submitted;
- Received a clean opinion on the 2017 Audit for the State Bar and Bar Foundation prepared by CliftonLarsonAllen and accepted the audit report;
- Accepted the April 2018 financials for the State Bar and the Bar Foundation;
- Reviewed proposals for a new CLE webcasting service provider and recommended Blue Sky eLearn; authorized the Executive Committee to approve the recommendation once additional research is conducted by staff;
- Reported that a review of current financial policies has been conducted for amendments and updates, and the revised policies will be presented for approval before the end of the year;
- Received a report on the 2018 licensing; there are currently a total of 9,346 active members of which 7,265 are active, 2,069 are inactive; 61 members withdrew, 193 members went inactive and 12 names were submitted to the Supreme Court for suspension;
- Approved tabling the draft Amended and Restated New Mexico State Bar Foundation Bylaws and Articles of Incorporation and formed a committee to review the relationship and address the issues involved in creating an independent board and report back to the Board before the end of the year;
- Reviewed the survey results of the current specialists in response to the Court's decision to discontinue Legal Specialization at the end of the year; the majority of the respondents favor legal specialization and many would like the State Bar to establish a program; the Board referred the issue to the Board's Regulatory Committee to study and make a recommendation;
- Received an update on the transition of MCLE to the State Bar, which will be effective September 1; there will be a roll out of the new oversight at the Annual Meeting with an exhibit table, brochures and a CLE presentation;
- Received a report from the Executive Committee; pursuant to the vacancy in the Third Bar Commissioner District, the Board voted to fill the vacancy at the February Board meeting; however, the bylaws and rules require bar commissioners to be active members of the State Bar and have a principal place of practice in the respective district; the committee determined that the previous appointee was ineligible to serve;
- Voted to appoint Constance G. Tatham to the vacancy in the Third Bar Commissioner District through the end of the year;
- Received a report from the Policy and Bylaws Committee on the following: 1) a letter was drafted to the Court regarding the Board's concerns regarding the Secure Odyssey Public Access Policy and approved for it to be sent to the Court; 2) the Contribution/Donation Policy was revised to remove the deadlines for requests and the revised policy was approved; 3) approved the committee's interpretation of Article IX, Section 9.1, Sections, of the State Bar Bylaws that the Board had the option to approve or deny the creation of a section; and 4) provided 30 days' notice of amendments to Article IX, Section 9.1, Sections, which will be voted on at the August meeting;
- Received a report on the ATJ Fund Grant Commission; an RFP was sent out to the legal service providers; the Commission received nine applications and selected seven legal service providers to fund in the amount of $500,000 pursuant to the Supreme Court's State Plan;
- Received the Client Protection Fund Commission Annual Report for 2017;
- Reported on a meeting of the Annual Meeting Committee to discuss future planning for annual meetings and collaboration with the judiciary; the committee also discussed the annual CLE trip;
- Voted to approve the creation of the Cannabis Law Section;
- Voted to appoint Roberta S. Batley to the ABA House of Delegates for a two-year term through August 2020;
- Voted to appoint Nancy R. Long to the Judicial Standards Commission for a four-year term through June 2022;
- Distributed the Member Handbook developed to assist members with licensing questions;
- Received a report on the JLAP Funding Oversight Board;
- Received copies of letters sent to the Supreme Court with the Board's support of the proposed rule to permit the admission of military spouse attorneys licensed in other jurisdictions and a letter requesting changes to the proposed rule; and
- Received an update on the security system upgrade and cameras for the Bar Center approved by the Board at the December meeting.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the August 9 meeting.

Public Lawyer of the Year Recipient: Anthony C. Porter

Photos by Breanna Henley

Alfred Mathewson, Anthony Porter, Justice Petra Jimenez Maes, and Chris Melendrez

The Public Law Section Board of Directors gathers with award recipients Porter and Peregrino Pompa

On April 27, the Public Law Section gathered at the Capitol Rotunda in Santa Fe to honor **Anthony C. Porter** with its prestigious Public Lawyer of the Year Award. The award recognizes attorneys who have demonstrated excellence in public practice who have provided a significant length of service and served as mentors and role models. For the past 20 years, Porter has served as a special assistant attorney general in the Las Cruces Office of the New Mexico Human Services Department's Child Support Enforcement Division. He has been credited as the "glue" that holds together his branch of the CSED and his tireless dedication to helping stabilize the lives of children. Alfred Mathewson, dean and professor of law at the UNM School of Law, and Senior Justice Petra Jimenez Maes of the New Mexico Supreme Court attended the ceremony to help praise the efforts of Porter and public lawyers in general.

Sheila Brown presented second year UNM School of Law student **Verenice Peregrino Pompa** with the 2018 Othmer Fellowship. The fellowship is presented each year to a law student working in an unpaid public interest position. The fellowship is funded in memory of Craig T. Othmer, a dedicated public practitioner, by the UNM School of Law Association of Public Interest Lawyers, the Public Law Section of the State Bar and the Othmer Family. Peregrino Pompa will be clerking with the New Mexico Center of Law and Poverty this summer.

Sheila Brown, Verenice Peregrino Pompa, and Alfred Mathewson

For more photos, visit www.nmbar.org/photos.

Modern Laws Took Effect January 1

By Jack Burton and Fletcher Catron

New laws took effect Jan. 1, 2018, keeping New Mexico at the leading edge of probate, trust, and related law. The Uniform Probate Code has been amended in several important ways:

- The self-proved-will section is updated.
- The code gives more direction about the possibility of a posthumously conceived child.
- The personal representative has more time to send notice of appointment.
- The section governing priority for appointment as personal representative is uniform.
- If partition is necessary, the new Uniform Partition of Heirs Property Act is used.
- The personal representative handles the decedent's electronic assets under the new Revised Fiduciary Access to Digital Assets Act.

Both of these acts—partition and access to electronic assets—are discussed briefly, along with the changes to the Uniform Probate Code, which is the focus of this article.

The most important update may be the self-proved-will section. It provides an affirmation under penalty of perjury as an alternative to an oath, which remains an option. NMSA 1978, § 45-2-504 (2017). The affirmation accommodates the client or witness who has a religious or other objection to swearing or taking an oath. The client and witnesses must appear before a notary public in connection with either the affirmation or oath. This requirement is unchanged, but is mentioned because of its importance.

The text of the affirmation or oath has also been updated. The language has been simplified and modernized to make it more understandable to the client and witnesses. It follows a provision in a project under development by the Uniform Law Commission.

Three more changes provide guidance for the personal representative if faced with the rare, but important possibility of a posthumously conceived child. *See* NMSA 1978, § 45-2-120 (2011) (explanation of the term "posthumously conceived child"); Unif. Prob. Code § 2-120 cmt. (amended 2010), 8 pt.1 U.L.A. 129 (2013). Generally speaking, the term means a child conceived by means of assisted reproduction after the death of the decedent and with the decedent's consent, provided that the child is in utero within 36 months after the decedent's death and is born within 48 months after the decedent's death. Like a child in gestation at the time of the decedent's death, the posthumously conceived child must survive 120 hours after birth in order to inherit. NMSA 1978, § 45-2-104(A) (1993, as amended through 2011).

First, NMSA 1978, § 45-3-703(F) (1975, as amended through 2017) provides that a personal representative must not delay distribution of an estate pending the possible birth of a posthumously conceived child unless the personal representative has received written notice or has actual knowledge that there is an intention to use a decedent's genetic material to create a child and that the birth of the child could have an effect on the distribution of the estate. "Genetic material" means eggs, sperm, or embryos. NMSA 1978, § 45-3-703(F)(2). This provision has been present in the Comment to Section 3-307 of the Uniform Probate Code since 2010, but was sometimes overlooked, so is elevated to the text of the code to provide better notice of its contents to New Mexico practitioners, judiciary, and public.

If an individual intends to use a decedent's genetic material to create a child of the decedent and if the birth of the child could have an effect on the distribution of the estate, the individual should provide written notice of these facts to the personal representative. If the notice is provided, the personal representative should delay distribution of the estate to the extent warranted by the provisions of NMSA 1978, § 45-2-120 and other law.

If the personal representative does not receive the notice and does not have actual knowledge of the facts that would be provided by the notice, the personal representative must not delay distribution (NMSA 1978, § 45-3-703(A),(F)) and is protected against the possibility of an unknown posthumously conceived child. The Comment explains that, "Should the personal representative properly distribute the estate and a posthumously conceived child is later born, any remedy the child might have is against the other beneficiaries, and not the personal representative. See Sections 3-909, 3-1005." Unif. Prob. Code § 3-703 cmt. (amended 2010), 8 pt.2 U.L.A. 165 (2013).

Second, there is a similar change in the code relating to a possibly-posthumously-conceived child. It provides that the personal representative is under no duty to give notice of appointment to persons

born more than 30 days after the personal representative's appointment, including children born by posthumous conception. NMSA 1978, § 45-3-705(B)(2). This provision is also moved up to the text of the code from the Comment to Section 3-705 of the Uniform Probate Code.

Third, because of the addition of that 30-day provision to the code, it is also necessary to amend the code to allow the personal representative 30 days in which to give notice to the heirs and devisees of the appointment of the personal representative by the court. NMSA 1978, § 45-3-705(A) (2017). Thirty days is also the time in the uniform law. The reason for New Mexico's former nonuniform time is now lost.

These changes may sound esoteric and far-fetched. But they may have critical consequences. Without them, children cannot inherit or receive benefits from deceased parents who wanted the children to inherit and receive the benefits, just like their other children. This has happened in other states. *See, e.g.*, *Astrue v. Capato*, 132 S. Ct. 2021 (2012) (affirming the Social Security Administration's denial of benefits to a deceased father's twins, who were born eighteen months after their father's death, because they would not inherit under the intestacy law of Florida, the state of the father's domicile at the time of his death). Justice Ruth Bader Ginsburg wrote the opinion for a unanimous court. She recognized that the circumstances giving rise to the case were "tragic," but, like the other members of the court, felt constrained to follow the letter of the law.

This result would not happen in New Mexico. New Mexico's modern inheritance law stands in stark contrast to Florida's law. The section that governs priority for appointment as personal representative is amended extensively. NMSA 1978, § 45-3-203(A)(6),(C),(E),(F)(3) (2017). The purpose of the amendments is to make the section uniform.

One result of the amendments is to prevent an attorney for a creditor, who has no other relationship to the decedent, from being appointed personal representative of an estate without first meeting several conditions and obtaining a court order in a formal proceeding (NMSA 1978, § 45-3-203(B)(1)), provided that the lawyer for the creditor may ethically serve at the same time as personal representative of the estate (*See, e.g.*, Rule 16-107(A)(1),(2), NMRA).

Another result is to require notice to more people with higher priority before a person with lower priority can be appointed personal representative. NMSA 1978, § 45-3-203(E).

The changes may also result in fewer creditors, or the lawyers, employees, or agents of creditors being appointed as personal representatives. The changes may also result in judges having a greater degree of confidence that no relative is interested in the appointment before appointing a creditor or the lawyer, employee, or agent of a creditor as personal representative.

The changes may also help to avoid a repeat of the situation that resulted in problems with the Disciplinary Board for a good lawyer several years ago. The situation began with what the lawyer described as a "gap" in this section.

If partition is required for distribution of an estate, the court must use the new Uniform Partition of Heirs Property Act. NMSA 1978, § 45-3-911(B),(C) (2017). Many believe that if this act had been on New Mexico's books 150 years ago, much more real property would still be owned by land grants and the heirs of the owners of the grants.

The uniform act helps preserve family wealth passed to the next generation in the form of real property. If the landowner dies intestate, the real estate passes to the landowner's heirs as tenants-in-common under state law. Tenants-in-common are vulnerable because any individual tenant can force a partition. Too often, real estate speculators acquire a small share of heirs' property in order to file a partition action and force a sale. Using this tactic, an investor can acquire the entire parcel for a price well below its fair market value and deplete a family's inherited wealth in the process.

The new uniform act provides a series of simple due process protections: notice, appraisal, right of first refusal, and if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds. The act is codified at NMSA 1978, §§ 42-5A-1 to -13 (2017).

A personal representative has control over electronic, or digital, assets of the decedent to the extent provided by the Revised Uniform Fiduciary Access to Digital Assets Act. NMSA 1978, § 45-3-711(B) (2017). The uniform act extends the traditional power of a fiduciary to manage tangible property to include management of a person's electronic assets.

The act allows fiduciaries to manage electronic property like computer files, web domains, and virtual currency in the same way that the fiduciary manages tangible property like paper files and books and records.

But the act restricts a fiduciary's access to the content of electronic communications such as email, text messages, and social media accounts unless the original user consented in a will, trust, power of attorney, or other record. The act applies to personal representatives, trustees, guardians, conservators, and agents under a power of attorney. The act is codified at NMSA 1978, §§ 46-13-1 to -18 (2017).

This legislation maintains New Mexico's position at the forefront of probate, trust, and other laws useful to trust and estate lawyers. New Mexico has more modern uniform laws on its books than any other state. But there is more work to be done.

The Uniform Guardianship, Conservatorship, and Other Protective Proceedings Act has been prefiled for the 2018 session of the New Mexico Legislature, where it is pending as Senate Bill 19. The New Mexico Adult Guardianship Study Commission ("AGSC") has recommended enactment of this act. AGSC, Final Report 9 (December 28, 2017).

Concerned citizens plan to introduce the Uniform Directed Trust Act, and hope to obtain a message from Governor Susana Martinez allowing the consideration of both of these acts by the Legislature. Both of these laws are needed in New Mexico and they are needed sooner than later.

About the Authors

Jack Burton coauthored this article on behalf of all of New Mexico's Uniform Law Commissioners (in alphabetical order): Raúl E. Burciaga, Jack Burton, Matthew Chandler Zachary J. Cook, Robert J. Desiderio, Philip P. Larragoite, Antonio Maestas, Cisco McSorley, William H. Payne, Patrick J. Rogers, Raymond G. Sanchez, and Paula Tackett.

Fletcher Catron coauthored this article on behalf of the State Bar Association's Real Property, Trust and Estate Section.

Other Bars

New Mexico Defense Lawyers Association

Save the Date - Women in the Courtroom VII CLE Seminar

The New Mexico Defense Lawyers Association proudly presents Part VII of "Women in the Courtroom," a dynamic seminar designed for New Mexico lawyers. Join us Aug. 17, at the Jewish Community Center of Greater Albuquerque for this year's full-day CLE seminar. Registration will be available online at nmdla.org in July. For more information contact nmdefense@nmdla.org.

New Mexico Criminal Defense Lawyers Association

Expert Essentials CLE

Expert testimony is vital but can be difficult to communicate to a jury of laypersons. To decrease such risks, the New Mexico Criminal Defense Lawyers Association has assembled a robust schedule of experts to explore these issues first-hand. Sign up for the Expert Essentials CLE on June 8, in Albuquerque. Special guests include Professor Christopher McKee from the University of Colorado and Professor Shari Berkowitz from California State University. Afterwards, NMCDLA members and their families and friends are invited to our annual membership party and silent auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar today.

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Legal Education

June

6 **2018 Ethics in Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Expert Essentials**
5.5 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org, 505-992-0050, info@nmcdla.org

8 **Text Messages & Litigation: Discovery and Evidentiary Issues**
1.0 G
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www.nmbar.org

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

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A-1-CA-35896	L Filippi v. Board of Co Comm	Reverse	05/22/2018

UNPUBLISHED OPINIONS

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A-1-CA-34920	D Smith v. R Lucero	Affirm/Reverse/Remand	05/24/2018

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From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADMISSION

On May 22, 2018
Kristin Burnham
Lear & Lear
808 E. South Temple Street
Salt Lake City, Utah 84102
801-538-5000
801-538-5001 (fax)
kristin.burnham@learlaw.com

On May 22, 2018:
Daniel G. Moquin
Navajo Nation Water Rights Unit
PO Box 2010
Window Rock, Arizona 86515
928-871-7510
dmoquin@nndoj.org

On May 22, 2018:
Steve Tarnowski
Native American Disability Law Center
3535 E. 30th Street,
Suite 201
Farmington, New Mexico 87402
505-566-5880
505-566-5889 (fax)
starnowski
@nativedisabilitylaw.org

CLERK'S CERTIFICATE OF SUSPENSION

Effective May 7, 2018, for noncompliance with bar license fee and reporting requirements under Rules 24-102, 24-108, 24-109, 17-202, 17-203, 17-204, and 17A-003 NMRA for the year 2018:

James T. Burns
Albuquerque Business Law
1801-B Rio Grande Blvd. NW
Albuquerque, NM 87104

CLERK'S CERTIFICATE OF NAME AND ADDRESS

As of February 16, 2018:
Breanna P. Contreras
F/K/A Breanna P. Houghton
Bardacke Allison LLP
141 E. Palace Avenue,
2nd Floor
Santa Fe, NM 87501
505-995-8000
breanna@bardackeallison.com

CLERK'S CERTIFICATE OF NAME CHANGE

As of May 18, 2018:
Jose A. Gonzalez
F/K/A Jose A. Howard-Gonzalez
Kemp Smith LLP
221 N. Kansas,
Suite 1700
El Paso, TX 79901
915-533-4424
915-546-5360 (fax)
abe.gonzalez
@kempsmith.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective May 18, 2018:
Sarah M. Gorman
185 West F Street,
Suite 100
San Diego, CA 92101
619-786-3002
smgorman.law@gmail.com

Effective May 17, 2018:
Trevor Thomas White
Shadle & White, PLC
833 E. Plaza Circle,
Suite 200
Yuma, AZ 85365
928-783-8321
twhite@shadlelaw.com

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective May 21, 2018:
Robert Hedrick
PO Box 3346
Los Lunas, NM 87031

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS AND CHANGE OF ADDRESS

Effective May 17, 2018:
Elizabeth A. Knox
PO Box 195664
Dallas, TX 75219
210-602-4390
elizabeth.knox@gmail.com

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS AND CHANGE OF ADDRESS

Effective May 18, 2018:
Joshua R. Zimmerman
Snell & Wilmer LLP
400 E. Van Buren Street
Phoenix, AZ 85004
602-382-6482
jrzimmerman@swlaw.com

CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

Benjamin Allison
Bardacke Allison LLP
141 E. Palace Avenue,
2nd Floor
Santa Fe, NM 87501
505-995-8000
505-672-7037 (fax)
ben@bardackeallison.com

John C. Anderson
Office of the U.S. Attorney
PO Box 607
Albuquerque, NM 87103
505-346-7274
john.anderson@usdoj.gov

Cynthia Aragon
New Mexico Legal Aid Native American Program
PO Box 817
51 Jemez Canyon Dam Road
Bernalillo, NM 87004
505-867-3391
505-227-8712 (fax)
cindya@nmlegalaid.org

S. Charles Archuleta
ADC LTD NM
2100 Air Park Road, SE
Albuquerque, NM 87106
505-492-2662
505-503-7720 (fax)
sarchuleta@adcltdnm.com

Paul G. Bardacke
Bardacke Allison LLP
141 E. Palace Avenue, 2nd Floor
Santa Fe, NM 87501
505-995-8000
505-672-7037 (fax)
paul@bardackeallison.com

Marina A. Cansino
205 Silver Avenue, SW
#427
Albuquerque, NM 87102
505-501-1530
emcordova72@gmail.com

John M. Caraway
2012 Patricia Drive
Carlsbad, NM 88220
575-361-3910
johncaraway@yahoo.com

Frank Cardoza
120 Belle Avenue
Fort Smith, AR 72901
479-785-3756
479-785-5487 (fax)
fdcardoza@gmail.com

Germaine R. Chappelle
Chappelle Law LLC
150 Washington Avenue,
Suite 201
Santa Fe, NM 87501
505-795-1730
gchappelle.law@gmail.com

David Michael Chavez
Law Offices of Luis Yanez
9895 Alameda Avenue,
Suite 108
El Paso, TX 79927
915-228-3422
915-228-3423 (fax)
davidmchavez@gmail.com

Martin J. Chavez
Will Ferguson & Associates
1720 Louisiana Blvd., NE,
Suite 100
Albuquerque, NM 87110
505-243-5566
martin@fergusonlaw.com

Michael R. Comeau
3501SE Park Lane Court
Topeka, KS 66605
505-699-2935
mcomeau@cmtisantafe.com

Kendrick Winsor Dane
O'Brien & Padilla, PC
6000 Indian School Road, NE,
Suite 200
Albuquerque, NM 87110
505-883-8181
505-883-3232 (fax)
kdane@obrienlawoffice.com

Holly P. Davies
Lorber, Greenfield & Polito, LLP
316 Osuna Road, NE,
Suite 302
Albuquerque, NM 87107
505-307-4332
hdavies@lorberlaw.com

Monica A. Davis
New Mexico Probate Lawyers
500 Marquette Avenue, NW,
12th Floor
Albuquerque, NM 87102
505-720-0070
866-897-9491 (fax)
monica
@nmprobatelawyers.com

Hon. Robert Marvin Doughty II
PO Box 1569
Alamogordo, NM 88311
575-430-9458
rmdlaw@qwestoffice.net

Kenneth E. Fladager
N.M. Taxation and Revenue Department
PO Box 630
1100 S. St. Francis Drive
(87505)
Santa Fe, NM 87504
505-827-0734
505-827-0684 (fax)
kenneth.fladager@state.nm.us

Karen Grohman
Henderson & Grohman, PC
PO Box 7895
620 Roma Avenue, NW
(87102)
Albuquerque, NM 87194
505-738-3507
505-393-5325 (fax)
info@hglegalgroup.com

Shammara Haley Henderson
Henderson & Grohman, PC
PO Box 7895
620 Roma Avenue, NW
(87102)
Albuquerque, NM 87194
505-738-3507
505-393-5325 (fax)
info@hglegalgroup.com

Hon. Peg A. Holguin (ret.)
1331 Park Avenue, SW,
Unit 510
Albuquerque, NM 87102
505-681-8110
pegholguin45@gmail.com

Scotty Alan Holloman
New Mexico Junior College
1 Thunderbird Circle
Hobbs, NM 88240
575-492-2791
575-492-2796 (fax)
sholloman@nmjc.edu

Louis William Horowitz
Lorber, Greenfield & Polito, LLP
316 Osuna Road, NE,
Suite 302
Albuquerque, NM 87107
505-307-4332
lhorowitz@lorberlaw.com

Patrick Lopez
Lopez Law N.M., LLC
6300 Riverside Plaza Lane, NW,
Suite 100
Albuquerque, NM 87120
505-309-0780
patrick@lopezlawnm.com

Nickay Bouchard Manning
10400 Academy Road, NE,
Suite 350
Albuquerque, NM 87111
505-271-1053
505-271-4848 (fax)
nickay@giddenslaw.com

Bryson A. Matthews
Fanaff, Hoagland, Clark & Gonzales
11700 Katy Freeway,
Suite 500
Houston, TX 77079
281-368-6971
bryson.matthews@farmersinsurance.com

Jessica M. Maupin
132 Monte Rey Drive S.
White Rock, NM 87547
505-672-8008
maupin@maupinlaw.com

Erin M. McMullen
42 Calle Estevan
Santa Fe, NM 87507
505-819-3361
erin.mcmullen@cox.net

Justin W. Miller
Bardacke Allison LLP
141 E. Palace Avenue,
2nd Floor
Santa Fe, NM 87501
505-995-8000
505-672-7037 (fax)
justin@bardackeallison.com

Paige Bradley Moffett
Santa Fe Title Company
515 Don Gaspar Avenue
Santa Fe, NM 87505
505-819-0000
505-780-5694 (fax)
paigeb@sftitleco.com

Joshua M. Montagnini
457 Elk Avenue
Glenside, PA 19038
505-906-7029
montagnini@gmail.com

Ben A. Ortega
201 Third Street, NW,
Suite 500
Albuquerque, NM 87102
505-503-0956
888-765-5407 (fax)
benortegalawoffice@gmail.com

Eric N. Ortiz
New Mexico Probate Lawyers
500 Marquette Avenue, NW,
12th Floor
Albuquerque, NM 87102
505-720-0070
866-897-9491 (fax)
eric@nmprobatelawyers.com

Jose Roberto Pavon
551 N. Ash Drive
Chandler, AZ 85224
480-289-8900
pavonlaw@yahoo.com

Hon. Sandra A. Price (ret.)
187 Road 2900
Aztec, NM 87410
505-330-1801
505-334-2216 (fax)

Anthony Ray Rascon
Rascon Law Firm LLC
1990 E. Lohman Avenue
Las Cruces, NM 88011
575-405-7911
800-448-0388 (fax)
rasconlawfirm@gmail.com

Lauren Anne Reed
508 Old Austin-Hutto Road
Pflugerville, TX 78660
512-832-7467
lauren.reed@oag.texas.gov

Ashley H. Reymore-Cloud
Office of the Thirteenth Judicial District Attorney
711 S. Camino del Pueblo
Bernalillo, NM 87004
505-771-7400
505-867-3152 (fax)
acloud@da.state.nm.us

David Alan Richter
Slingshot, LLC
317 Commercial Street, NE,
Suite A
Albuquerque, NM 87102
505-414-0678
davidrichter@gmail.com

Francis J. Rio III
Rio Law Firm
119 S. Main Street
Portales, NM 88130
505-226-3936
575-226-3939 (fax)
riolawfirm@gmail.com

Marita B. Robinson
DNA-People's Legal Services, Inc.
709 N. Butler Avenue
Farmington, NM 87401
505-325-8886
mrobinson@dnalegalservices.org

Karl H. Roepke
Roepke Law Firm, LLC
2501 San Pedro Drive, NE, Suite 205
Albuquerque, NM 87110
505-323-0515
khr@roepkelaw.com

Jesus A. Salazar
5900 Indian School Rd., NE
Albuquerque, NM 87110
505-232-7730
jesus11salazar@aol.com

Lisa Y. Schatz-Vance
Second Judicial District Court
PO Box 488
400 Lomas Blvd., NW (87102)
Albuquerque, NM 87103
505-841-7615
505-841-7466 (fax)
albdlsv@nmcourts.gov

Caitlin C.M. Smith
Law Offices of the Public Defender
1422 Paseo de Peralta, Bldg. 1
Santa Fe, NM 87501
505-395-2830
caitlin.smith@lopdnm.us

Kenneth J. Swain
2600 Cerrillos Road
Santa Fe, NM 87505
505-795-5554
ken.swain@state.nm.us

Nicholas John Trost
Parnall Law Firm
PO Box 8009
2025 San Pedro Dr., NE (87110)
Albuquerque, NM 87198
505-268-6500
505-268-8708 (fax)
nick@parnalllaw.com

Alison Michelle Vicroy
3602 E. Sweetwater Springs Drive
Washington, UT 84780
614-561-3038
alisonvicroy@gmail.com

Colin L. Adams
Colin L. Adams Attorney at Law LLC
PO Box 35519
Albuquerque, NM 87176
505-554-4066
866-602-2946 (fax)
cadams@colinadamslaw.com

James P. Baiamonte
900 Lomas Blvd., NW
Albuquerque, NM 87102
505-246-8166
505-848-8566 (fax)
baiamonte@qwestoffice.net

Christopher Paul Lucero
The Lucero Law Office
PO Box 25391
925 Luna Circle, NW (87102)
Albuquerque, NM 87125
505-225-8778
505-288-3473 (fax)
chris@lucerolawoffice.com

L. John Russo
1005 Chuckar Drive, SW
Albuquerque, NM 87121
505-294-6662
505-291-9096 (fax)
ljohnrusso01@gmail.com

Jacob Daniel Vallejos
The Lucero Law Office
PO Box 25391
925 Luna Circle, NW (87102)
Albuquerque, NM 87125
505-225-8778
505-288-3473 (fax)
jake@lucerolawoffice.com

Jill S. Vogel
633 Balfour Drive
San Antonio, TX 78239
210-334-8083
jillvogel452@gmail.com

As of March 8, 2018:
Maldegen, Templeman & Indall, LLP
F/K/A Comeau, Maldegen, Templeman & Indall, LLP
Paula A. Cook
(pcook@cmtisantafe.com)
Caitlin Craft Dupuis
(cdupuis@cmtisantafe.com)
Adela Marie Duran
(dduran@cmtisantafe.com)
Jon J. Indall
(jindall@cmtisantafe.com)
Stephen John Lauer
(slauer@cmtisantafe.com)
Larry D. Maldegen
(lmaldegen@cmtisantafe.com)
Michael J. Moffett
(mmoffett@cmtisantafe.com)
William Phelps Templeman
(wtempleman@cmtisantafe.com)
Maldegen, Templeman & Indall, LLP
PO Box 669
141 E. Palace Avenue (87501)
Santa Fe, NM 87504
505-982-4611
505-988-2987 (fax)

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-021
No. S-1-SC-35382 (filed March 5, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JUAN GALINDO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Jacqueline D. Flores and Cristina T. Jaramillo, District Judges

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

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

Opinion

Barbara J. Vigil, justice

{1} In this horrific case, we affirm Defendant Juan Galindo's convictions for child abuse resulting in the death of his twenty-eight-day-old daughter (Baby) and his convictions for two counts of aggravated criminal sexual penetration (CSP) of Baby. We also affirm Defendant's convictions for child abuse against his thirteen-year-old daughter, B.G., for endangering her emotional health. In addition, we hold that the district court properly admitted into evidence a statement that Defendant gave to law enforcement on the night of Baby's death, as well as photographic evidence revealing the extensive injuries Baby suffered, including fatal, blunt-force trauma to her head and multiple internal and external injuries to her genital and anal areas. We remand this case for resentencing in light of Defendant's duplicative convictions of child abuse resulting in Baby's death and of child abuse against B.G.

I. BACKGROUND

{2} Deputies from the Bernalillo County Sheriff's Department were dispatched to Defendant's home at approximately 3:50 a.m. in response to a call for assistance about an infant who was "choking on milk." When the deputies arrived, they were directed to Defendant's bedroom, where they found Baby wrapped tightly in a blanket that was saturated with blood near her pelvic area. Baby's face appeared bruised and swollen, and she had dried blood near her nose and mouth. Paramedics arrived a short time later and observed that Baby's body was stiff and cool to the touch. Upon removing Baby's clothing, they noted that she was not wearing a diaper and that she had dried blood near her groin area, bruising on her chest, and a distended abdomen. Baby was declared dead at 7:10 a.m., and her body was taken for an autopsy by the Office of the Medical Investigator (OMI).

{3} Dr. Proe, a forensic pathologist with the OMI, performed Baby's autopsy and testified at Defendant's trial about her findings. Dr. Proe described Baby's injuries in detail using photographs that were admitted into evidence over Defendant's objection. According to Dr. Proe, Baby had extensive bruising, including on her face, head, vagina, and anus. Baby also had scrapes and tears of the skin and tissue on her right cheek, around and inside her vagina, and around her anus. Internally, Baby had a skull fracture from the back of her head into the base of her skull, bleeding in the deep tissue of her scalp, and bruising and bleeding in her brain. Baby also had "more than a dozen" rib fractures; a torn liver; and bleeding around her intestines, in the soft tissue behind her vagina, and around her spinal cord.

{4} Ultimately, Dr. Proe concluded that the cause of Baby's death was "multiple blunt force injuries." She clarified, however, that the injuries to Baby's head were "the most severe" and would have been sufficient on their own to cause Baby's death. Dr. Proe also concluded that the injuries to Baby's groin occurred "prior to death" and resulted from separate penetrations of her anus and vagina by a blunt object. Finally, Dr. Proe testified that Baby did not show any signs of choking or of obstructions of her airways. Defendant's medical expert testified at trial and agreed that Baby had died from her head injury and that she did not show signs of choking, coughing, or aspiration.

{5} The State offered testimony about DNA testing that had been done on a number of swabs taken from Baby's vagina, anus, mouth, and a bite mark on her cheek. A DNA analyst testified that she had identified a small number of sperm cells on a swab taken from inside Baby's mouth. A second analyst testified that Defendant could not be excluded as the contributor of the male DNA on the oral swab.

{6} On the morning that Baby died, Defendant was interviewed by Detective Roybal at the department's main office about Baby's death. A video recording of a portion of the interview was admitted into evidence and played for the jury at trial. In the video, Defendant began by explaining that Baby's mother, Pauline, had left with a friend at about 8:00 p.m. to go to the store. After Pauline left, Defendant went out to the shed to work until 9:30 or 10:00 p.m., while B.G. and the other kids watched a movie and kept an eye on Baby. When Defendant came back inside, he gave Baby a bottle, and she "drank about half." Defendant burped her and thought that "she was good."

{7} Defendant explained that next, he changed his clothes and laid down on the bed to rest beside Baby, who was in her bassinet. Suddenly, he looked over and saw that Baby was choking and that her eyes were rolling back. Defendant was frightened that Baby was not breathing and was in danger, so he patted her on the chest and stuck his fingers in her mouth. When that did not help, he started panicking and calling to his daughter, B.G. He took off Baby's clothes and ran out to the kitchen and asked B.G., "What do I do?" B.G. nearly fainted when she saw Baby. Defendant asked B.G. to get some ice to rub on Baby's body, and when Baby did not respond, he panicked and bit Baby

hard enough to make her bleed on her lip and cheek. Defendant described rubbing a "little alcohol pad" under Baby's nose, blowing in her mouth, and rubbing perfume on her face, all in an attempt to revive her. He also said that he had hit Baby hard on the chest and slapped her back and forth across the face. Defendant saw that Baby was bleeding from her mouth, and he kept asking B.G., "What do I do?" B.G. responded that Baby was dead. Defendant eventually wrapped Baby in a blanket and took her body outside and sat with her underneath the porch for "like three hours," until Pauline came home.

{8} Later in the interview, Defendant said that he had taken Baby into the shower at one point to put water on her, that he had slipped, and that she may have hit the back of her head. And after some prompting by Detective Roybal about why Baby had been bleeding from her vagina, Defendant said that he had poked olive oil inside her butt with his finger because she had been constipated. Defendant also used a doll, at Detective Roybal's request, to demonstrate how he had hit Baby on the chest and stomach and had poked inside her butt, "one or two" times. At another point in the interview, Defendant admitted to smoking methamphetamine daily, including "a few tokes" that afternoon, but he claimed that he did not feel high at the time of Baby's death. Defendant also explained that he did not seek help from his brother-in-law or call for help because he was "panicked" and "scared."

{9} Defendant was indicted on numerous charges related to the death, abuse, and sexual assault of Baby and the abuse of B.G. and her two younger siblings who were present on the night that Baby died. At the conclusion of Defendant's trial, the jury was instructed on four theories of child abuse resulting in Baby's death, two counts of aggravated CSP of Baby, six theories of child abuse resulting in great bodily harm to Baby, and three theories of child abuse not resulting in death or great bodily harm to B.G. The jury acquitted Defendant of child abuse resulting in great bodily harm to Baby and convicted him of all of the remaining offenses. The district court entered judgment and sentence on each of Defendant's convictions and, by ordering some of the sentences to run concurrently and others consecutively, sentenced Defendant to two consecutive terms of life imprisonment followed by three years of imprisonment for the abuse of B.G. Defendant appealed. We exercise jurisdiction under Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1) NMRA.

II. DISCUSSION

{10} Defendant argues that there were three errors on appeal: (1) his convictions are not supported by sufficient evidence, (2) his statements to police were involuntary and should not have been admitted at trial, and (3) the district court abused its discretion by admitting photographs of Baby's body and injuries that prejudiced his defense. We address these arguments in turn.

A. Defendant's Convictions Were Supported by Sufficient Evidence

{11} We begin with Defendant's challenge to the sufficiency of the evidence to support his convictions for child abuse of B.G. because it poses the closest question in this appeal. We then address his other challenges to the sufficiency of the evidence in summary fashion.

{12} "In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Garcia*, 1992-NMSC-048, ¶ 26, 114 N.M. 269, 837 P.2d 862 (alteration, emphasis, internal quotation marks, and citation omitted).

1. Child abuse based on endangering B.G.'s emotional health

{13} The jury found Defendant guilty of child abuse not resulting in death or great bodily harm to B.G. based on three alternative theories of abuse under NMSA, Section 30-6-1(D)(1) (2009): (1) *intentionally causing* B.G. to be placed in a situation that endangered her life or health, (2) *recklessly causing* B.G. to be placed in a situation that endangered her life or health, and (3) *recklessly permitting* B.G. to be placed in a situation that endangered her life or health. The State conceded at trial and on appeal that the evidence supporting each theory of abuse against B.G. was limited to endangerment of her "emotional health" and that her physical health had "certainly not" been endangered by Defendant's conduct. We therefore limit our review to whether the State introduced sufficient evidence that Defendant endangered B.G.'s emotional health.

{14} Defendant challenges the evidence supporting his convictions on two fronts. First, he argues that the child abuse statute, Section 30-6-1(D), "does not contemplate, nor even mention, a child's emotional harm," and therefore does not support a conviction based on endangerment of a child's emotional health. Second, he argues that the State has "fail[ed] to articulate any injury to B.G., emotional or otherwise."

{15} Defendant's first argument is answered by *State v. Ramirez*, 2018-NMSC-003, ¶ 50, 403 P.3d 902. *Ramirez* clarified "that Section 30-6-1(D)(1) encompasses abuse by endangerment that results in physical *or emotional* injury as well as those circumstances where the abused child suffers no injury of any kind at all." *Id.* (emphasis added) (citing *State v. Trujillo*, 2002-NMCA-100, ¶ 20, 132 N.M. 649, 53 P.3d 909 ("[T]here may be instances when the risk of emotional harm from a similar incident might be sufficient to support a conviction based on endangerment.")); *see also State v. McGruder*, 1997-NMSC-023, ¶¶ 2, 38, 123 N.M. 302, 940 P.2d 150 (affirming a child endangerment conviction based on evidence that the two-year-old child was "cr[ying] throughout the ordeal," including while she stood behind her mother as the defendant aimed a gun at and threatened to kill her), *abrogated on other grounds by State v. Chavez*, 2009-NMSC-035, ¶¶ 2, 16, 47 n.1, 146 N.M. 434, 211 P.3d 891. In light of *Ramirez*, we hold that just as when a child's physical health is endangered, the crime of child abuse by endangerment may be based on evidence of "a truly significant risk of serious harm" to a child's emotional health. *Chavez*, 2009-NMSC-035, ¶ 22.

{16} Turning to Defendant's second argument, we consider whether the State introduced sufficient evidence that Defendant endangered or injured B.G.'s emotional health. The jury instructions for the alternative counts of *intentionally causing* and *recklessly causing* abuse to B.G. required a finding that "[D]efendant caused [B.G.] to be placed in a situation which endangered the life or health of [B.G.]." *See* UJI 14-604 NMRA (2000, withdrawn 2015); *see also* UJI 14-612 NMRA (effective April 3, 2015). Defendant argues that, under either instruction, B.G.'s "life and health were not

endangered" and that the State failed to introduce "evidence of any possible harm to B.G." or "evidence of the type or nature of the emotional injury" that B.G. may have suffered. We disagree. Defendant views the evidence too narrowly and, in particular, minimizes B.G.'s testimony about her traumatic experience on the night that Baby died. We therefore summarize B.G.'s testimony before we address this argument.

{17} B.G. testified that, on the night that Baby died, she went to the kitchen to make herself some food and that she was "scared" and "shocked" to find Defendant kneeling on the floor, holding Baby's "purple, bluish" body and calling B.G.'s name. B.G. detailed how—even though she told Defendant several times that Baby was dead—Defendant persisted in his increasingly frantic attempts to revive Baby, which included putting Baby's naked body in the kitchen sink and rubbing ice on her, performing CPR on her "very hard," biting her, splashing water on her in the shower, and rubbing perfume on her body. B.G. also described how Defendant "started screaming [her] name again" and "just kept calling [her] name" to help him when she would run back to the other room to try to keep her younger sister and brother away from Defendant and Baby. B.G. testified that she suggested going to get help from relatives who lived nearby and that Defendant had told her, "No." And, she described how Defendant eventually tried to leave with Baby's body but could not get the car started; how B.G. looked for Defendant around 1:00 or 2:00 a.m. and could not find him; and how, shortly after Pauline got home, Defendant appeared from underneath the porch holding Baby's body. B.G. testified that Baby's death made her feel "dead inside."

{18} We have little trouble concluding that the evidence of Defendant's conduct, as found by the jury and described by B.G., was sufficient to show that Defendant exposed B.G. to a truly significant risk of serious emotional harm. As we conclude later in this opinion, sufficient evidence supported the jury's findings that Defendant sexually assaulted and violently abused Baby, resulting in her death. Against that factual backdrop, B.G.'s testimony showed how Defendant, through his repeated calls and screams to B.G. for help, drew her into the frenzied aftermath of his crimes against Baby. B.G.'s testimony also showed how Defendant refused to allow her to seek help and how his efforts to revive Baby became increasingly extreme despite B.G.'s assurances that Baby was dead. And B.G.'s testimony showed how she felt "shocked," "scared," and like she was "dead inside" during and after the events on the night that Baby died. Based on this evidence, the jury reasonably could have found that Defendant endangered B.G.'s emotional health by compelling her to witness and participate in the further abuse of Baby's lifeless body, as Defendant tried to undo the effects of what he already had done. Under these circumstances, the risk of harm to B.G.'s emotional health posed by Defendant's conduct is manifest. *Cf. Folz v. State*, 1990-NMSC-075, ¶ 40, 110 N.M. 457, 797 P.2d 246 (" 'It is hard to imagine a mental injury that is more believable than one suffered by a person who witnesses the serious injury or death of a family member.' " (quoting *Gates v. Richardson*, 719 P.2d 193, 197 (Wyo. 1986))).

{19} To be sure, the State took a risk by not calling an expert to testify about the actual or likely effects of Defendant's actions on B.G.'s emotional health. In a closer case, such an omission could be fatal to the State's case. *See, e.g.*, *Trujillo*, 2002-NMCA-100, ¶ 20 ("In theory, the State might lay an adequate evidentiary foundation proving the likelihood of harm to a child's emotional health as a result of witnessing such an attack on her mother. . . . However, the State presented no such evidence in this case."); *see also Chavez*, 2009-NMSC-035, ¶ 40 ("The State could have met its burden in this case. The risk of serious disease or illness is a matter of science and can be established with empirical and scientific evidence."). But to hold that there was insufficient evidence of a truly significant risk of serious harm to B.G.'s emotional health would be to turn a blind eye to the horrors that she experienced as a result of Defendant's actions on the night that Baby died.

{20} Thus, under the facts of this case, the jury could apply its common knowledge and experience to conclude that Defendant endangered B.G.'s emotional health. *Cf. State v. Sena*, 2008-NMSC-053, ¶ 20, 144 N.M. 821, 192 P.3d 1198 ("Lay persons are well-aware of what it means to act with a sexual intent, and therefore can identify behavior as exhibiting that trait without the aid of an expert witness."). Sufficient evidence therefore supported Defendant's alternative convictions for *intentionally causing* and *recklessly causing* B.G. to be placed in a situation that endangered her life or health.

{21} As a final matter, it appears from the record that the jury was improperly instructed on the alternative theory of *recklessly permitting* B.G. to be placed in a situation that endangered her life or health. At the close of the State's evidence at trial, the district court properly granted Defendant's motion for a directed verdict on all of the alternative child abuse counts that were based on a theory of *permitting* abuse. The district court explained, "Anything where you see the word 'permitted,' essentially," should be dismissed because the evidence did not suggest that a third person was involved in the abuse. *See State v. Nichols*, 2016-NMSC-001, ¶ 33, 363 P.3d 1187 ("[*C*]*ausing* child abuse is synonymous with inflicting the abuse, and *permitting* child abuse refers to the passive act of failing to prevent someone else—a third person—from inflicting the abuse."). Defendant's conviction for *recklessly permitting* B.G. to be placed in a situation that endangered her life or health is similarly not supported by evidence that anyone other than Defendant inflicted the abuse against B.G. We therefore reverse his conviction under that single alternative theory.

2. Child abuse resulting in Baby's death

{22} We next consider the sufficiency of the evidence to support Defendant's convictions of child abuse resulting in Baby's death. The jury found Defendant guilty under four separate theories of abuse under Section 30-6-1: (1) *intentionally* causing Baby to be *placed in a situation that endangered her life or health*, resulting in the death of a child under twelve years of age, contrary to Sections 30-6-1(D)(1) and (H); (2) *intentionally* causing Baby to be *tortured, cruelly confined, or cruelly punished*, resulting in the death of a child under twelve years of age, contrary to Section 30-6-1(D)(2) and (H); (3) *recklessly* causing Baby to be *placed in a situation that endangered her life or health*, resulting in the death of a child, contrary to Section 30-6-1(D)(1) and (F); and (4) *recklessly* causing Baby to be *tortured, cruelly confined, or cruelly punished*, resulting in the death of a child, contrary to Section 30-6-1(D)(2) and (F). Defendant challenges the sufficiency of the evidence supporting all four guilty verdicts.

{23} We begin with Defendant's challenge to his conviction of intentional child abuse resulting in Baby's death. The jury instructions, which are not challenged on appeal, required the jury to find, in part, that Defendant acted "intentionally and

without justification" when he "caused [Baby] to be placed in a situation which endangered the life or health of [Baby]." Defendant argues that there was insufficient evidence that he acted "intentionally and without justification" because the evidence showed—not that he meant to harm Baby—but that he was attempting "to shock [her] into consciousness after he found her not breathing."

{24} Defendant made this very argument to the jury at trial, and the jury rejected it. "We will not invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting our judgment for that of the jury." *State v. Cabezuela*, 2015-NMSC-016, ¶ 23, 350 P.3d 1145 (alterations, internal quotation marks, and citation omitted). The jury was free to credit certain evidence that did not support Defendant's explanation of Baby's injuries. Such evidence included Defendant's interview statements that he was alone with Baby in the bedroom before she stopped breathing; expert testimony that Baby did not show signs of choking and that she died from blunt force trauma to her head; and B.G.'s testimony that Baby was already "purple, bluish" when she first saw Defendant and Baby in the kitchen, that Baby seemed dead "from the start," and that Baby never cried or responded during Defendant's attempts to revive her. The jury also could have found that Defendant was not credible because of inconsistencies between his explanation of Baby's injuries and the medical evidence, particularly about the injuries to her groin area. Based on all of this evidence, including Baby's extremely young age and the extent and severity of her injuries—particularly to her head—the jury could have reasonably concluded that Defendant acted intentionally and without justification. We therefore affirm Defendant's conviction for intentionally causing Baby to be placed in a situation that endangered her life or health, resulting in the death of a child under twelve years of age.

{25} The same evidence supports Defendant's convictions under each of the alternative theories of child abuse resulting in death. Evidence that Defendant *intentionally* caused Baby to be placed in a situation that endangered her life or health, resulting in her death, also satisfies the jury's alternative finding that Defendant *recklessly* caused such abuse. *See State v. Montoya*, 2015-NMSC-010, ¶ 41, 345 P.3d 1056 ("[O]ne cannot intentionally commit child abuse without 'consciously disregard[ing] a substantial and unjustifiable risk,' the definition of recklessness." (second alteration in original) (quoting *State v. Consaul*, 2014-NMSC-030, ¶ 37, 332 P.3d 850)). Similarly, the evidence that Defendant caused Baby to be *placed in a situation that endangered her life or health*, coupled with the State's consistent theory that Defendant violently abused Baby, resulting in her death, also supported the jury's alternative findings that he intentionally caused and recklessly caused Baby to be *tortured, cruelly confined, or cruelly punished*, resulting in her death. *See State v. Lucero*, 2017-NMSC-008, ¶ 37, 389 P.3d 1039 ("[W]hether denominated as abuse by endangerment or as abuse by torture, cruel confinement, or cruel punishment, the State's case against [the defendant] was always based on a theory that he intentionally, physically abused [the baby], resulting in her death."). Sufficient evidence thus supported each of Defendant's convictions of child abuse resulting in Baby's death.

3. Aggravated CSP

{26} Defendant next challenges the sufficiency of the evidence supporting his two convictions of aggravated CSP of a child under thirteen years of age. The jury was given the following instruction for the count that specified penetration of Baby's vagina:

> 1. [Defendant] caused the insertion, to any extent, of an object into the vagina or vulva of [Baby];
> 2. [Baby] was twelve (12) years of age or younger;
> 3. The act of [Defendant] was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;
> 4. [Defendant's] act was unlawful;
> 5. This happened in New Mexico on or between the 28th day of December, 2011 and the 29th day of December, 2011.

See UJI 14-972 NMRA. The jury instruction for the second count was identical except that the first element specified penetration of Baby's anus. Defendant does not dispute that there was sufficient evidence to prove the first element of both instructions. Rather, he argues that the State did not prove that he acted with "a depraved mind without regard for human life" or that his acts were unlawful. Defendant contends that he acted lawfully, in the interest of saving his daughter's life.

{27} As with Defendant's conviction of intentional child abuse resulting in Baby's death, the jury apparently credited certain evidence that did not support Defendant's explanation of events. The jury was free to do so, and we will not substitute our judgment for that of the jury. *See Cabezuela*, 2015-NMSC-016, ¶ 23. The jury could have concluded that Defendant acted both unlawfully and with a depraved mind without regard for human life based on the evidence of Baby's very young age and the severity of the separate injuries to her vagina and anus, which Dr. Proe described as consistent with a blunt object having "been inserted into that area, either forcefully, or if that object was larger than the [orifice]." The jury also could have rejected Defendant's explanation that he was trying to save Baby's life because of the evidence of sperm cells in Baby's mouth. Sufficient evidence supported Defendant's convictions of aggravated CSP.

4. Defendant's duplicative convictions must be vacated

{28} Before we address Defendant's remaining arguments, we hold sua sponte that the district court erred by entering judgment and sentence on each of Defendant's four alternative convictions of child abuse resulting in Baby's death and on each of his three alternative convictions of child abuse of B.G. When a jury returns multiple guilty verdicts based on alternative theories of the same offense, the district court must vacate the duplicative convictions to avoid violating the constitutional proscription against double jeopardy. *See State v. Mercer*, 2005-NMCA-023, ¶ 29, 137 N.M. 36, 106 P.3d 1283 ("The State is authorized to charge in the alternative. However, Defendant's convictions for both alternatives violate her right to be free from double jeopardy." (citation omitted)); *see also, e.g.*, *State v. Silvas*, 2015-NMSC-006, ¶ 8, 343 P.3d 616 ("Double jeopardy protects against multiple punishments for the same offense."). And as we held in *State v. Pierce*, the constitutional error is not rendered harmless by the district court's imposition of concurrent sentences for the duplicative convictions. *See* 1990-NMSC-049, ¶¶ 47-49, 110 N.M. 76, 792 P.2d 408 (citing *Ball v. United States*, 470 U.S. 856, 864-65 (1985) ("The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.")).

{29} On remand, Defendant's duplicative convictions therefore must be vacated, consistent with our case law. *See Pierce*, 1990-NMSC-049, ¶¶ 47-49; *see also, e.g.*, *State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426 ("[W]here one of two otherwise valid convictions must be vacated to avoid violation of double jeopardy protections, we must vacate the conviction carrying the shorter sentence."); *see also Mercer*, 2005-NMCA-023, ¶ 29 (expressing no opinion on which alternative conviction should be vacated if the convictions are for "the same degree felonies").

B. Defendant's Interview Statements Were Voluntary

{30} Defendant argues that his incriminating statements to law enforcement during his interview at the police station should have been suppressed under the Fifth and Fourteenth Amendments of the United States Constitution and under Article II, Section 15 of the New Mexico Constitution. Defendant contends that, although he signed an acknowledgment and waiver of his rights to remain silent, to have an attorney present, and to stop the interview at any time, his statements were coerced and involuntary because he "was functioning under the extreme mental stress of having just witnessed the infant die and not being able to prevent it." As such, Defendant argues that the admission into evidence of the video of his interview was reversible error. We review the voluntariness of Defendant's statements to Detective Roybal de novo. *State v. Cooper*, 1997-NMSC-058, ¶ 25, 124 N.M. 277, 949 P.2d 660.

{31} In determining whether a confession is voluntary, "we examine the 'totality of the circumstances' surrounding the confession in order to decide the ultimate question of voluntariness." *State v. Fekete*, 1995-NMSC-049, ¶ 34, 120 N.M. 290, 901 P.2d 708 (citations omitted). To satisfy due process standards, a confession "must have been freely given and not induced by promise or threat." *Aguilar v. State*, 1988-NMSC-004, ¶ 11, 106 N.M. 798, 751 P.2d 178. "[A] confession is not involuntary solely because of a defendant's mental state. Instead, the totality of circumstances test includes an element of police overreaching." *Fekete*, 1995-NMSC-049, ¶ 35 (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.").The State has the burden of proving the voluntariness of a confession by a preponderance of the evidence. *Fekete*, 1995-NMSC-049, ¶ 34.

{32} Defendant does not argue that his statement was induced by promise or threat or was otherwise coerced—and with good reason. In examining the totality of the circumstances, we see no evidence that Detective Roybal used promises or threats to elicit Defendant's statements. *See Aguilar*, 1988-NMSC-004, ¶ 11. In fact, Defendant's own expert agreed at the suppression hearing that Detective Roybal had not coerced Defendant during the portion of the interview that eventually was played to the jury. Defendant's expert conceded, "I think it's actually a pretty darn good interview by the detective."

{33} Instead of pointing to evidence of coercion, Defendant argues that "Detective Roybal overreached when he continued with the interrogation" after he "observed that [Defendant] was not attentive to the nature of the rights he was giving up." Without citing any legal authority, Defendant implies that Detective Roybal was constitutionally required to end or delay the interview when Defendant asked about his family's well-being, rather than about his rights, as he signed the acknowledgment and waiver. This argument lacks merit. Our cases applying federal due process standards are clear: a finding of involuntariness must be based on some evidence that "the police used fear, coercion, hope of reward, or some other improper inducement." *Cooper*, 1997-NMSC-058, ¶¶ 44-49 (holding that the defendant's confession was voluntary when he "was most likely in a weakened mental state" and the officers used "psychological tactics of empathy and compassion" without fear, threats, or coercion). Absent evidence of such impropriety, Defendant's statements were not coerced or involuntary.

{34} Defendant argues that we should interpret Article II, Section 15 of the New Mexico Constitution to foreclose the admission of incriminating statements even when there is no evidence of coercion. N.M. Const. art. II, § 15 ("No person shall be compelled to testify against himself in a criminal proceeding . . . ."). Defendant urges us to follow *State v. Caouette*, in which the Maine Supreme Court held that "police elicitation or conduct . . . is not a *sine qua non* for exclusion" of a confession under the Maine Constitution. 446 A.2d 1120, 1123 (Me. 1982). Rather, "to find a statement voluntary, it must first be established that it is the result of [the] defendant's exercise of his own free will and rational intellect." *Id. Caouette* relied on and extended a previous interpretation of the Maine Constitution that required proof beyond a reasonable doubt of the voluntariness of a confession. *See id.* at 1122 (citing *State v. Collins*, 297 A.2d 620 (Me. 1972)); *contra Fekete*, 1995-NMSC-049, ¶ 34 ("The prosecution has the burden of proving the voluntariness of a defendant's statement by a preponderance of the evidence.").

{35} We decline to follow *Caouette* in this case. Instead, we continue to apply the federal rule: "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Connelly*, 479 U.S. at 164. Otherwise, every inculpatory statement would require courts to "divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision." *Connelly*, 479 U.S. at 165-66. Defendant's case demonstrates that such a burdensome requirement would be unnecessary. The district court agreed with Defendant that, under existing law, a portion of his interview should be suppressed because Detective Roybal's questioning became "overtly coercive" and "he began to suggest some theories of what may have happened that night." Up to that point in the interview, however, we agree with the district court that the State met its burden to show by a preponderance of the evidence that Defendant's statements were voluntary and were not coerced.

C. The Photographs of Baby's Body Were Properly Admitted

{36} Defendant next argues that the district court erred by admitting photographs of Baby's body and injuries into evidence at trial. Before trial, Defendant moved to exclude "all photographs of the victim's corpse at trial" under Rule 11-403 NMRA, including photographs taken by investigators at Defendant's trailer and during Baby's autopsy. The district court reviewed all of the photographs proffered by the State in a pretrial hearing, excluded six as cumulative and admitted the rest. Defendant argues on appeal that the photographs are "gruesome" and that their admission was unfairly prejudicial and cumulative of trial testimony.

{37} Under Rule 11-403,

"[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice

. . . or needlessly presenting cumulative evidence." "The trial court is vested with great discretion in applying Rule [11-403], and it will not be reversed absent an abuse of that discretion." *State v. Martinez*, 1999-NMSC-018, ¶ 31, 127 N.M. 207, 979 P.2d 718 (alteration in original) (internal quotation marks and citation omitted). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Moreland*, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363 (internal quotation marks and citation omitted).

{38} "Graphic photographs of the injuries suffered by deceased victims of crime are by their nature significantly prejudicial, but that fact alone does not establish that they are impermissibly so." *State v. Bahney*, 2012-NMCA-039, ¶ 43, 274 P.3d 134. The test is whether they are admissible for a proper purpose, such as "depicting the nature of an injury, clarifying and illustrating testimony, and explaining the basis of a forensic pathologist's expert opinion." *Id.*

{39} The State argues that the photographs in Defendant's case were relevant to establish that the crimes actually occurred and that the photographs were necessary to refute Defendant's only defense—that he inflicted Baby's injuries in an attempt to revive her. We agree. The photographs are graphic, heartbreaking, and difficult to view, but they convey the nature and extent of Baby's injuries in a manner that words cannot. As the district court explained,

> [T]he reason these pictures are coming in, I think they are helpful to the jury. I think they certainly illustrate . . . clearly what the injuries are, but also they're in direct response to the Defendant's own statement, they essentially respond to the Defendant's recitation of the events, and that's really the strongest reason they need to come in.

Further, the district court made a reasoned determination on the record with respect to the photographs' admissibility, choosing to exclude other photographs of Baby. The district court properly exercised its discretion in admitting the photographs of Baby.

III. CONCLUSION

{40} We affirm Defendant's convictions for child abuse resulting in Baby's death, for two counts of aggravated CSP of Baby, and for causing B.G. to be placed in a situation that endangered her life or health. We reverse Defendant's conviction for *recklessly permitting* the abuse of B.G. for insufficient evidence. We remand for further proceedings, including vacating Defendant's duplicative convictions that were based on alternative theories, consistent with this opinion.

{41} IT IS SO ORDERED.
BARBARA J. VIGIL, Justice

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

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-022
No. S-1-SC-35445 (filed March 5, 2018)

STEPHEN PACHECO, in his official capacity as
Custodian of Records for the First Judicial District Court,
and the FIRST JUDICIAL DISTRICT COURT OF
NEW MEXICO,
Petitioners,
v.
HON. JAMES M. HUDSON,
Fifth Judicial District Court Judge,
Respondent,
and
VALLEY MEAT COMPANY, LLC, and
RICARDO DE LOS SANTOS,
Real Parties in Interest.

ORIGINAL PROCEEDING

SCOTT FUQUA
FUQUA LAW & POLICY, P.C.
Santa Fe, New Mexico
for Petitioners

A. BLAIR DUNN
WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP
Albuquerque, New Mexico

HECTOR H. BALDERAS,
Attorney General
JAMES C. JACOBSEN,
Assistant Attorney General
Santa Fe, New Mexico
for Respondent

LINDA HELEN BENNETT
L. HELEN BENNETT, P.C.
Albuquerque, New Mexico
for Real Parties in Interest

Opinion

Charles W. Daniels, Justice

{1} New Mexico's Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2013) (IPRA), was enacted to provide the public with broad access to public records reflecting "the affairs of government and the official acts of public officers and employees." Section 14-2-5.

{2} In this superintending control proceeding arising from an IPRA action filed in one district court seeking an order for disclosure of records directed to another district court, we clarify the constitutional and statutory procedures for IPRA enforcement actions to compel production of court records, and we hold that IPRA actions directed at a district court's records must be filed against the lawfully designated IPRA custodian and must be filed in the judicial district that maintains the records.

{3} We also hold that (1) contents of an officeholder's personal election campaign social media website and (2) internal decision-making communications that are at the core of the constitutional duties of the judicial branch, such as preliminary drafts of judicial decisions, are not public records that are subject to mandatory disclosure and inspection under IPRA.

I. BACKGROUND

{4} Although the issues in this superintending control proceeding relate to the interpretation of the scope of IPRA, the controversy arose from a civil case in the First Judicial District Court, *State ex rel. King v. Valley Meat Co., LLC*, No. D-101-CV-2013-3197 (Valley Meat case). Because of the multiplicity of actions in three different courts that we must address, we will refer to the various parties by name rather than their party designation in any of the separate suits.

{5} On Saturday, January 18, 2014, early in the proceedings in the Valley Meat case, A. Blair Dunn, counsel for Valley Meat Co., e-mailed an IPRA request to First Judicial District Court Executive Officer Stephen Pacheco for production of, among other things, communications and records relating to the Valley Meat case, including "all communications between . . . Judge Matthew Wilson and his staff . . . and Court Clerk's staff" and "[a]ny communications received by Judge Matthew Wilson and his staff, Judge Raymond Ortiz and his staff, and any member of the Court Clerk's staff to/from any outside person or organization."

{6} On the same date, Mr. Dunn also e-mailed a separate IPRA request to First Judicial District Judge Matthew Wilson, the assigned judge in the Valley Meat case, to not only provide the same records requested from Mr. Pacheco but additionally to produce information relating to the "Keep Judge Matthew Wilson Facebook page" on an Internet social media website maintained by Judge Wilson's personal election campaign. In particular, the IPRA request sought production of communications posted by members of the public on Judge Wilson's personal election campaign Facebook page, including a copy of the Facebook page, a list of people who had clicked a button to indicate they "Liked" the Facebook page, copies of all private Facebook messages to or from Judge Wilson, copies of the "permissions settings" for the Facebook page, and copies of any posts by the page administrators or by members of the public, including any deleted posts.

{7} On February 3, Mr. Pacheco responded to both IPRA requests, advising Mr. Dunn that as executive officer of the First Judicial District Court he, and not Judge Wilson, was the district court's custodian of records designated to receive and respond to IPRA requests. *See* § 14-2-7 (providing that each public body shall designate at least one custodian of public records to receive and respond to IPRA requests).

{8} Mr. Pacheco's response individually addressed each of Mr. Dunn's requests and stated that the court was producing all pertinent and producible public records that had been located by both electronic and manual searches. The response noted that

the court was not in a position to produce items related to Judge Wilson's personal election campaign Facebook page, none of which were "used, created, received, maintained or held by or on behalf of the First Judicial District Court." The response also advised that privileged communications that "are exempt from disclosure under IPRA" would not be produced.

{9} On February 24, Mr. Dunn filed an IPRA enforcement lawsuit in the Fifth Judicial District Court on behalf of Valley Meat Co. and its manager Ricardo De Los Santos (collectively Valley Meat), naming as defendants Judge Wilson and the First Judicial District Court but not Mr. Pacheco. The lawsuit, assigned to Fifth Judicial District Judge James M. Hudson, alleged that "Defendants have violated the New Mexico Inspection of Public Records Act by failing to produce the public records properly requested by the Plaintiffs as required by the IPRA" and sought injunctive relief, damages, and attorney fees.

{10} On March 17, the office of the Attorney General answered the complaint on behalf of the judicial defendants, Judge Wilson and the First Judicial District Court. On April 11, the Attorney General's office filed a motion for summary judgment with supporting affidavits, asserting that all known unprivileged IPRA public records had been disclosed. The motion noted that the disclosed records included thirteen pages of e-mails that had already been known to Mr. Dunn before he filed his IPRA request but that had not been located in the court computer system until after the IPRA lawsuit was filed.

{11} With respect to those late-disclosed e-mails, the motion for summary judgment and supporting affidavits reported the process that led to their belated production. To locate the requested categories of e-mails, First Judicial District Court personnel sought assistance from the Administrative Office of the Courts' Judicial Information Division (JID), which maintains and oversees the state judiciary's computer systems. JID personnel conducted four server searches between January 22 and 30 for e-mails responsive to Mr. Dunn's requests but did not find those particular e-mails.

{12} After Mr. Pacheco provided the initial February 3 IPRA response, district court staff learned that Mr. Dunn claimed to be in possession of a number of Judge Wilson's e-mails that would have been covered by Mr. Dunn's IPRA request but that had not been disclosed in the February 3 response. Court personnel then conducted several additional e-mail searches, finding in Judge Wilson's alternative court e-mail account, dedicated to communicating proposed text for court documents among parties and the court, thirteen additional pages of emails related to the Valley Meat case that had been received by, sent by, or copied to Judge Wilson's chambers. Although Mr. Dunn had been a party to all those e-mails when they were first transmitted, Mr. Pacheco formally reprovided copies of these additional emails to Mr. Dunn in a March 17 supplemental IPRA response.

{13} Before ruling on the motion for summary judgment, Judge Hudson had examined in camera five e-mail files that the First Judicial District Court had withheld from the February 3 production on grounds of privilege and concluded that four of the five constituted communications between Judge Wilson and his staff or the court's staff attorney that were protected from disclosure by a constitutional judicial deliberation privilege. As Judge Hudson noted in his written decision, Valley Meat conceded those four privileged communications were exempt from disclosure.

{14} Judge Hudson also ruled that the judicial deliberation privilege did not apply to the fifth e-mail exchange in which Judge Wilson had requested assistance in proofreading an unfiled draft order in the Valley Meat case from Stephanie Wilson, who was an employee of the Supreme Court Law Library and the spouse of Judge Wilson. Judge Hudson ruled that the judicial deliberation privilege did not protect that e-mail exchange because Stephanie Wilson was neither a member nor an "essential extension[] of" Judge Wilson's First Judicial District Court staff.

{15} With regard to the Facebook requests, Judge Hudson concluded that Judge Wilson had not been acting in any official judicial capacity in establishing or maintaining his election campaign Facebook page and concluded that the Facebook contents were not public records of the First Judicial District Court and consequently were not governed by IPRA.

{16} Judge Hudson also addressed the thirteen pages of e-mails that had been located and produced before his ruling but after the IPRA lawsuit was filed. Although Mr. Dunn had been a party to or had been copied on each of those e-mails at the times of their original transmissions, and therefore already possessed them when the First Judicial District Court provided its timely February 3 initial IPRA response, Judge Hudson noted that IPRA requires production of public records without regard to whether the requestor already has the records. He concluded that although those emails had been produced by the time of his ruling, the failure to locate and produce them within the fifteen-day IPRA production period constituted an unlawful failure to produce.

{17} Based on these rulings, Judge Hudson granted partial summary judgment in favor of the judicial defendants on all issues except the undisclosed e-mail exchange between Judge Wilson and Supreme Court Law Librarian Stephanie Wilson regarding the request to proofread a preliminary draft of an order in the underlying lawsuit and the thirteen pages of e-mails disclosed after commencement of the IPRA enforcement action. As to those matters, he ruled that Valley Meat would be entitled to recovery of costs and attorney fees under Section 14-2-12(D) as a prevailing party in the enforcement lawsuit.

{18} Following entry of the partial summary judgment, the First Judicial District Court filed a petition for a writ of superintending control in this Court to have us consider issues of judicial immunity and the scope of IPRA.

{19} After initial briefing and oral argument we remanded the matter to the Fifth Judicial District Court with instructions that Judge Hudson complete the adjudication of all issues outstanding in the case before we entered a final disposition in the superintending control case before us. We also directed Judge Hudson to dismiss Judge Wilson as a named defendant in the IPRA action and to substitute Stephen Pacheco, the lawfully designated IPRA custodian of public records for the First Judicial District Court.

{20} On remand, Judge Hudson ordered that records custodian Stephen Pacheco be substituted for Judge Wilson as a defendant and, assisted by stipulations of the parties, issued a final judgment essentially confirming his earlier rulings. He concluded that Pacheco and the First Judicial District Court were liable for Valley Meat's attorney fees and costs related to the enforcement action for the late-produced e-mails and the e-mail exchange between Judge Wilson and Supreme Court Law Librarian Stephanie Wilson regarding the draft judicial order. But Judge Hudson did not make an assessment of costs and fees,

believing he did not have the constitutional authority to order their payment by the terms of Article VI, Section 13 of the New Mexico Constitution, which prohibits a district court from issuing orders "directed to judges or courts of equal or superior jurisdiction."

{21} Following the issuance of the final judgment in the district court, the matter came back before this Court for final resolution of the writ of superintending control.

II. DISCUSSION

{22} This Court has long recognized and enforced the important goals served by IPRA. *See San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 16, 150 N.M. 64, 257 P.3d 884 ("In order for government to truly be of the people and by the people, and not just for the people, our citizens must be able to know what their own public servants are doing in their name."); *State ex rel. Newsome v. Alarid*, 1977-NMSC-076, ¶ 34, 90 N.M. 790, 568 P.2d 1236 ("The citizen's right to know is the rule and secrecy is the exception. Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed."), *superseded by statute on other grounds*, *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶¶ 15-16, 283 P.3d 853.

{23} We are guided by the Legislature's clear statement of its purpose in enacting IPRA:

> 14-2-5. Purpose of act; declaration of public policy.
>
> Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees. It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

Section 14-2-5.

{24} Because the parties below stipulated to the relevant facts, we are presented with issues of pure statutory and constitutional construction. Our review of a lower tribunal's interpretation of statutory or constitutional law is de novo. *State Eng'r of N.M. v. Diamond K Bar Ranch, LLC*, 2016-NMSC-036, ¶ 12, 385 P.3d 626. "A statute must be interpreted and applied in harmony with constitutionally imposed limitations." *El Castillo Ret. Residences v. Martinez*, 2017-NMSC-026, ¶ 25, 401 P.3d 751. We also review de novo a district court's construction of the law relating to privileges. *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 6, 139 N.M. 671, 137 P.3d 611. Whether specific communications are subject to IPRA is a mixed question of fact and law that we review de novo. *Dominguez v. State*, 2015-NMSC-014, ¶ 9, 348 P.3d 183.

{25} Our primary goal in interpreting statutory language is to "give effect to the intent of the Legislature." *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022 (internal quotation marks and citation omitted). "We look first to the plain meaning of the statute's words, and we construe the provisions of the Act together to produce a harmonious whole." *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 14, 146 N.M. 453, 212 P.3d 341 (internal quotation marks and citation omitted).

{26} With those guiding principles in mind, we now consider the applicability of IPRA to the production requested in this case.

A. Contents of an Officeholder's Election Campaign Social Media Website Are Not Public Records of a Public Body Within the Scope of IPRA

{27} IPRA textually makes clear that it is aimed at "the affairs of government" and the "official" acts of public officers and employees. Section 14-2-5. Section 14-2-6(F) defines "public body" as

> the executive, legislative and judicial branches of state and local governments and all advisory boards, commissions, committees, agencies or entities created by the constitution or any branch of government that receives any public funding, including political subdivisions, special taxing districts, school districts and institutions of higher education.

Section 14-2-6(G) defines "public records" as

> all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.

{28} Judge Hudson found that Judge Wilson did not act in an official capacity in establishing or maintaining his personal election campaign Facebook page and that Judge Wilson did not use the Facebook page "to conduct judicial business" or "perform[] . . . public functions." Judge Hudson also concluded that the Facebook page itself did not meet the definition of "public body" for purposes of Section 14-2-6(F) because it "was not created by the [C]onstitution or judicial branch. Nor is there any indication it received any public funding. Therefore, the Facebook page is not a public body or extension of a public body."

{29} We recognize that it is possible for a public body to involve a private entity in conducting governmental business and subject the otherwise private entity's records relating to that governmental activity to IPRA requirements. New Mexico precedent applies nine nonexclusive factors in a totality-of-factors test to determine whether a private entity has acquired such a role:

> 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether the services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who[se] benefit the private entity is functioning.

State ex rel. Toomey v. City of Truth or Consequences, 2012-NMCA-104, ¶ 13, 287 P.3d 364 (alteration in original).

{30} In *Toomey*, a city obtained a public access television channel and retained

authority to manage the channel and to adopt rules, regulations, and procedures pursuant to that authority. *Id.* ¶ 24. The city then contracted with a private nonprofit corporation to manage the channel. *Id.* ¶¶ 1, 11, 24. The city leased public property to the corporation for one dollar per year for use as a public access television center. *Id.* ¶ 24. As the exclusive source of funding for the nonprofit corporation, the city previewed the corporation's operating budgets and oversaw its accounting. *Id.* The *Toomey* court applied the nine factors to determine that although the channel was a private entity, to the extent that it was acting on behalf of the city its records became subject to IPRA disclosure requirements. *Id.* ¶ 25.

{31} None of the *Toomey* factors were found by Judge Hudson to be present in this case. Judge Hudson specifically wrote that "[t]here is no basis to conclude that Judge Wilson was acting in any official judicial capacity in establishing or maintaining the Facebook page, that the Facebook page was used to conduct judicial business, or that there is any nexus between Judge Wilson's judicial conduct and his personal campaign activities."

{32} We have identified nothing in the record to contradict Judge Hudson's findings. There is no evidence that Judge Wilson's personal election campaign or its Facebook site were acting on behalf of the First Judicial District Court or any other public body, or that any government funding was involved in maintenance of the Facebook site or any of its activities, or that Judge Wilson conducted public business through the site. Both the wording of IPRA and the *Toomey* factors weigh against subjecting Judge Wilson's Facebook page to the public record requirements of IPRA.

{33} Even though there was no evidence Judge Wilson communicated anything about the Valley Meat case on his election campaign site, Valley Meat argues in effect that members of the public caused the contents of the election campaign site to become public records of a public body when they posted several unsolicited extrajudicial comments about the Valley Meat case that was pending before Judge Wilson. These comments urged him to stop the slaughter of horses for use as food and praised his rulings in the case. None of those comments by third parties satisfy any of the *Toomey* factors. It would blur any standards imposed by IPRA if we were to hold that third-party comments about an officeholder's performance of the officeholder's official duties that are communicated through social media, news outlets, online discussion sites, or other nongovernmental entities would transform those entities into public bodies and subject their records to IPRA disclosure and inspection obligations.

{34} To the extent Valley Meat expresses a concern about the need to discover whether judges are engaged in inappropriate unofficial communications, it confuses the public records focus of IPRA with discovery procedures that may be employed for production of communications outside the public record, whether in litigation or in judicial discipline actions. This Court is sensitive to concerns about the pitfalls judges may encounter when using social media. *See State v. Thomas*, 2016-NMSC-024, ¶ 49, 376 P.3d 184 ("While we make no bright-line ban prohibiting judicial use of social media, we caution that 'friending,' online postings, and other activity can easily be misconstrued and create an appearance of impropriety."); New Mexico Code of Judicial Conduct, Rule 21-001(B) NMRA ("Judges and judicial candidates are also encouraged to pay extra attention to issues surrounding emerging technology, including those regarding social media, and are urged to exercise extreme caution in its use so as not to violate the Code.").

{35} While we recognize that the use of social media is widespread in modern election campaigns for candidates seeking offices in all three branches of government, we caution that social media can pose particular risks of an appearance of impropriety on the part of judges who must participate in political elections. *See* Rule 21-001(B) (requiring judges to "avoid both impropriety and the appearance of impropriety"). This case is a good example. Even though there was no evidence Judge Wilson used his election campaign website to communicate to anyone about the case before him, the site did not block third persons from posting whatever they chose on his site, such as their comments about the Valley Meat case. Those third parties certainly had a First Amendment right to express their opinions about the acts of Judge Wilson or any other government official, just as they could write letters to a newspaper or picket the courthouse or other government building. But their right to free expression did not require that his campaign permit their postings on a site maintained in the Judge's name.

{36} Even if a judge engages in misconduct with respect to off-the-bench election campaign activities, which is not present in this case, that would not be decisive in determining whether records are subject to IPRA. If a judge or any other public employee has engaged in misconduct beyond the performance of official activities, the fact that evidence of the misconduct may be found outside public records does not transform that evidence into a public record maintained by a public body. We agree with Judge Hudson that in the circumstances presented in this record, the contents of Judge Wilson's personal election campaign Facebook page were not public records of a public body subject to IPRA disclosure requirements.

B. The Judicial Deliberation Privilege Protects the Confidentiality of Draft Judicial Orders and Other Internal Judicial Decision-Making Processes

{37} Five of Judge Wilson's e-mail communications had been withheld from IPRA production by Mr. Pacheco on the ground of privilege. All five related to reviewing a draft copy of a preliminary injunction order that Judge Wilson had been preparing for issuance in the underlying Valley Meat case. Four of those e-mails were communications between Judge Wilson and staff employed directly by the First Judicial District Court. The fifth was a communication between Judge Wilson and Stephanie Wilson, the wife of Judge Wilson, who was employed by the judicial branch as a Supreme Court law librarian and who had been asked by Judge Wilson to assist in proofreading the draft order.

{38} IPRA explicitly recognizes that there are some categories of public records that should be protected from disclosure. In Section 14-2-1, after the broad policy statement that "[e]very person has a right to inspect public records of this state," IPRA specifically lists a number of documents where policy considerations in confidentiality override public disclosure, including physical and mental health records, reference letters, opinions about students or employees, confidential law enforcement records, materials donated to schools under confidentiality limitations, trade secrets, attorney-client communications, confidential business plans of hospitals, and terrorist attack defense plans. Section 14-2-1(A)(1)-(7).

{39} The statutory exceptions conclude with the addition of a catch-all category, "as otherwise provided by law." Section 14-2-1(A)(8). As New Mexico precedent

recognizes, that term includes "statutory and regulatory bars to disclosure," "constitutionally mandated privileges," and "privileges established by our rules of evidence." *Republican Party*, 2012-NMSC-026, ¶ 13.

{40} We have previously expressed our sensitivity to the concern that "adopting evidentiary privileges may increase the risk of interfering with the truth-seeking process of litigation." *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 18, 138 N.M. 398, 120 P.3d 820. Rule 11-501 NMRA limits litigation privileges to those provided in the New Mexico Constitution or the New Mexico Supreme Court rules. *See Estate of Romero*, 2006-NMSC-028, ¶ 11 (declining to recognize a law enforcement or public interest privilege because "[u]nless such privileges are required by the constitution, or provided for in the rules of evidence or other court rules, these privileges do not exist").

{41} We have applied a similar approach to IPRA privileges. In *Republican Party*, 2012-NMSC-026, ¶¶ 33-35, 43, we recognized that the Constitution requires an executive privilege protecting the confidentiality of the Governor's decision-making thought processes in order to protect the full and independent functioning of the executive branch, despite the fact it is not spelled out in a statute or court rule.

{42} In *Republican Party*, we held that an executive privilege protected from IPRA disclosure the confidential communications between the Governor and close advisors "relate[d] to the Governor's constitutionally-mandated duties." *Id.* ¶ 45. We noted that the executive privilege in New Mexico requires a balance between "the public's interest in preserving confidentiality to promote intra-governmental candor [and] the individual's need for disclosure of the particular information sought." *Id.* ¶ 49 (internal quotation marks and citation omitted).

{43} This Court has not previously addressed the need for a judicial deliberation privilege, but other jurisdictions have done so. *See, e.g.*, *Williams v. Mercer* (*In re Certain Complaints Under Investigation by an Investigating Comm. of Judicial Council of Eleventh Circuit*), 783 F.2d 1488, 1520 (11th Cir. 1986) ("[T]here exists a privilege . . . protecting confidential communications among judges and their staffs in the performance of their judicial duties."), *superseded by statute on other grounds*, *In re McBryde*, 120 F.3d 519, 524 (5th Cir. 1997); *Thomas v. Page*, 837 N.E.2d 483, 490-91 (Ill. App. Ct. 2005) ("Our analysis leads us to conclude that there exists a judicial deliberation privilege protecting confidential communications between judges and between judges and the court's staff made in the course of the performance of their judicial duties and relating to official court business."); *In re Enforcement of a Subpoena*, 972 N.E.2d 1022, 1033 (Mass. 2012) ("This absolute privilege covers a judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other nonpublic materials. The privilege also protects confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases.").

{44} We agree that we should "join other courts, State and Federal, that, when faced with attempts by third parties to extract from judges their deliberative thought processes, have uniformly recognized a judicial deliberation privilege." *In re Enforcement of a Subpoena*, 972 N.E.2d at 1032.

{45} The question that remains for resolution is the scope of the privilege. All parties before us have acknowledged that some form of judicial privilege must protect the judicial decision-making process from mandated IPRA disclosure. Valley Meat concedes in its briefing, for example, that judicial privilege should protect "a judge's case notes, research, mental impressions, analysis, drafts of orders and decisions, or communications between and among judges and their staffs that bear on these categories of documents." Judge Hudson concluded that a judicial deliberation privilege "must, at a minimum, shield from public disclosure a judge's notes, research, mental impressions, analysis, and drafts of orders and decisions."

{46} The issue presented to us for resolution is whether the privilege is circumscribed by organizational charts of employees of particular judicial entities or whether a more functional analysis related to protection of the judicial decision-making process is called for. Judge Hudson concluded, as conceded by Valley Meat, that four of the withheld e-mail communications, those between Judge Wilson and staff of the First Judicial District Court, were protected by the judicial deliberation privilege.

{47} But Judge Hudson held that the e-mail exchange between Judge Wilson and Supreme Court Law Librarian Stephanie Wilson requesting assistance on a draft judicial order fell outside protection of the privilege. Judge Hudson reasoned that because Stephanie Wilson was employed by a separate entity within the judicial branch, the Supreme Court Law Library, instead of directly by the First Judicial District Court, the judicial deliberation privilege protecting a judge's decision-making thought processes did not apply. We disagree. We believe that such a formalistic approach takes too narrow a view of the fundamental purposes underlying the judicial deliberation privilege.

{48} Valley Meat does not dispute that the e-mail communication between Judge Wilson and Stephanie Wilson related to a request for assistance in proofreading a judicial order Judge Wilson was drafting. [1] Valley Meat has taken the position, unsupported by any authority, that our judges must be "relegated to a lonely burden devoid of substantive communications with other district court judges" and their staffs.

{49} We believe it would be an unreasonable and unprincipled limitation on the full exercise of a judge's research, drafting, and decision-making processes to hold that the confidentiality of that process is forfeited when a judge seeks assistance from judicial branch employees and entities beyond the staff who work directly under the judge or who are named in their individual court organizational charts. A few examples are illustrative.

{50} All judges in the New Mexico judiciary are provided access to third-party computerized legal research assistance that is essential to the preparation of judicial opinions and orders. Yet despite the fact that compelled production of a judge's research queries and results would disclose the kinds of decision-making

[1]Because we resolve this issue on the ground of judicial deliberation privilege, we need not address whether the e-mail was also protected from disclosure by the spousal communication privilege, which protects from compelled disclosure a communication made to a person's spouse that was "not intended for further disclosure except to other persons in furtherance of the purpose of the communication." Rule 11-505 NMRA

processes sought to be protected by the judicial deliberation privilege, those commercial research services appear nowhere in any individual court organizational charts. To hold that research trails reflected in communications between a judge and those services are unprivileged and subject to compelled disclosure would elevate form over substance and be inconsistent with the core purposes of the deliberation privilege.

{51} All e-mails sought in this case, as with all judicial branch e-mails, were routinely communicated to and stored in the computer servers of JID, a statewide entity operating under the supervision of the Administrative Office of the Courts (AOC). Neither JID nor AOC appear anywhere in the First Judicial District's organizational chart. The organizational chart approach taken by Valley Meat and Judge Hudson would not have protected any of the e-mails in this case from compelled disclosure, including those communications within the First Judicial District that Valley Meat has conceded to be privileged.

{52} The New Mexico Code of Judicial Conduct recognizes that a judge, in the performance of his or her duties, may consult with court staff, court officials, and other judges, "provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter." Rule 21-209(A)(3) NMRA. But many of our state's district judges have no law clerks or other personnel to provide expert legal research and editing assistance in their individual courts. In the single-judge Tenth Judicial District, for example, the district judge not only has no law clerks or staff counsel, he has no fellow judge to consult with. It serves no functional purpose to limit a judge's consultation with other judicial branch colleagues to those persons, if any, who happen to be on a particular court's staff.

{53} The New Mexico Supreme Court Law Library, which technically employed Stephanie Wilson, is a separate judicial branch entity that is not placed within the organizational chart of any district court, but its judicial branch staff provides legal information to judges throughout the state's judiciary. As part of their official job requirements, Supreme Court law librarians must, among other duties, (1) "provide for effective access to legal information for the courts, the state and the public," (2) "perform legal research at the most comprehensive level," and (3) "maintain confidentiality and use discretion when dealing with sensitive information." *See* http://humanresources.nmcourts.gov/job-descriptions-salary-tables.aspx (follow Job Classification Descriptions hyperlinks for Law Librarian 1, Law Librarian 2, Law Librarian Senior, and State Law Librarian) (last visited Feb. 26, 2018).

{54} With these considerations in mind, we perceive no principled reason why the judicial deliberation privilege would protect a judge's thought processes that are reflected in a draft order sent to a subordinate for review but would fail to protect the same thought processes reflected in the same draft order when it is submitted to a Supreme Court law librarian or other judicial branch colleague for review. We therefore hold that the communications between Judge Wilson and Supreme Court Law Librarian Stephanie Wilson were exempt from IPRA disclosure by the judicial deliberation privilege.

C. A District Court Does Not Have Constitutional Jurisdiction to Order IPRA Relief or Sanctions Against Another District Court

{55} IPRA specifically requires that each New Mexico public body shall designate at least one custodian of public records who shall be responsible for receiving and responding to IPRA requests. Section 14-2-7. Section 14-2-11(C)(4) provides that "[a] custodian who does not" timely respond to an IPRA request "is subject to an action to enforce the provisions of the Inspection of Public Records Act and the requester may be awarded damages," which shall "be payable from the funds of the public body." Section 14-2-12(A) provides that the enforcement action may be brought by the attorney general, a district attorney "in the county of jurisdiction," or "a person whose written request has been denied." And Section 14-2-12(B) provides that "[a] district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of" IPRA.

{56} Instead of filing its IPRA enforcement action, seeking what it claimed to be public records of the First Judicial District Court, against the lawfully designated records custodian, First Judicial District Court Executive Officer Stephen Pacheco, Valley Meat filed its IPRA action against the court and Judge Wilson as named defendants. And instead of filing the action in the First Judicial District Court, Valley Meat filed in the Fifth Judicial District Court. Those filing decisions raise two issues: (1) who is the proper defendant in an IPRA enforcement action, and (2) which "district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce" IPRA requirements pursuant to Section 14-2-12(B)?

{57} The first question is clearly answered in the text of IPRA itself. The designated records custodian is the only official who is assigned IPRA compliance duties, *see* § 14-2-7, and is the only official who statutorily "is subject to an action to enforce" IPRA, *see* § 14-2-11(C). In our thirteen New Mexico judicial districts, the designated custodians are the district court executive officers, who have overall responsibility to oversee the administration of their respective courts and fulfill statutory responsibilities assigned to the clerk of the court. *See* http://humanresources.nmcourts.gov/job-descriptions-salary-tables.aspx (follow Job Classification Descriptions hyperlinks for Court Executive Officer descriptions) (last visited Feb. 26, 2018).

{58} The second question is not directly addressed in the IPRA statute, but is governed instead by the New Mexico Constitution. Section 14-2-12 provides only that "[a] district court may issue a writ of mandamus" or other enforcement action to compel compliance but does not directly answer the question of which district court may issue the enforcement orders. For actions directed at custodians of records for a district court, the answer lies in the New Mexico Constitution.

{59} Article VI, Section 13 of the New Mexico Constitution provides the jurisdictional authority of our district courts. In relevant part, it specifies,

> The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise in the exercise of their jurisdiction; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction.

Id.

{60} Even if IPRA had purported to permit one district court to order a separate district court to comply with statutory production requirements, which it did not, a statutory provision, such as IPRA or a general venue statute like NMSA 1978, Section 38-3-1 (1988) (permitting suit in

a county where a party resides), cannot override a constitutional prohibition. *See State v. Nunez*, 2000-NMSC-013, ¶ 47, 129 N.M. 63, 2 P.3d 264 (holding that a legislative enactment cannot transgress a constitutional limitation).

{61} New Mexico precedent recognizes that a lawsuit against a court employee, such as a designated records custodian, in his or her official capacity is a suit against the court itself. *Williams v. Bd. of Cty. Comm'rs of San Juan Cty.*, 1998-NMCA-090, ¶ 15, 125 N.M. 445, 963 P.2d 522 (holding that sovereign immunity barred suit against Navajo police officers and the Navajo Nation's president in their official capacities (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)
("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.")); *Ford v. N.M. Dep't of Pub. Safety*, 1994-NMCA-154, ¶ 16, 119 N.M. 405, 891 P.2d 546 (recognizing that "a suit for damages against a state official in his or her official capacity is essentially a suit for damages against the state itself").

{62} New Mexico's case law is consistent with law in other jurisdictions. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State."); *Jackler v. Byrne*, 658 F.3d 225, 244 (2d Cir. 2011) ("[A] claim asserted against a government official in his official capacity is essentially a claim against the governmental entity itself."); *Briscoe v. United States*, 268 F. Supp.3d 1, 9 (D.D.C. 2017) ("'[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity' of which the named officer is an agent." (citation omitted)); *Wright v. Cleburne Cty. Hosp. Bd., Inc.*, ___ So. 3d ___, 2017 WL 6629201 at *6 (Ala. 2017) ("If a plaintiff chooses to sue [a government] official or employee in [the official's or employee's] official capacity, such a claim is treated as a claim against the 'governmental entity' because it constitutes an attempt to reach the public coffers." (citation omitted)).

{63} Judge Hudson and the parties have at least in part recognized the constitutional prohibition against seeking to have one district court order relief from another district court. Judge Hudson concluded that he could not order payment of fees and costs of the IPRA enforcement suit against the First Judicial District Court and its records custodian because of his court's lack of constitutional jurisdiction. Valley Meat concedes that Judge Hudson was correct in that conclusion and suggests in its briefing that we should accept his findings and conclusions directed at the First Judicial District Court and order that court to pay fees and costs in the exercise of our own original jurisdiction.

{64} But both Judge Hudson and Valley Meat ignore the larger implications of Article VI, Section 13's denial of district court jurisdiction. The entirety of an IPRA enforcement action brought in one district court against another district court is barred by the New Mexico Constitution. Any IPRA enforcement action is an action to compel performance by the named defendant, as Section 14-2-12(B) recognizes: "A district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of [IPRA]."

{65} Instead of captioning its lawsuit to compel compliance with IPRA as a mandamus or a suit for injunctive relief, Valley Meat called it a "Verified Complaint for Declaratory Judgment Ordering Production." Apart from the facts that the lawsuit was clearly a suit for a coercive "judgment ordering production" under IPRA and that Valley Meat was not attempting to seek noncoercive relief under the Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to -15 (1975), it could not have done so because an IPRA enforcement action is governed by IPRA. *See State ex rel. Regents of E.N.M. Univ. v. Baca*, 2008-NMSC-047, ¶ 22, 144 N.M. 530, 189 P.3d 663 (holding that a party with a statutory right to judicial review must not "circumvent the established procedures for judicial review" under the statute).

{66} We conclude that the Fifth Judicial District Court had no constitutional jurisdiction to litigate any aspect of an IPRA enforcement action against the First Judicial District Court. To the extent that Valley Meat or any litigant harbors a concern that the judges of a district court would not fairly and impartially rule in an IPRA enforcement action against its own records custodian, the judicial branch has procedures in place to safeguard against both the reality and the appearance of impropriety in such situations.

{67} Article VI, Section 15 of the New Mexico Constitution vests the Chief Justice of this Court with the authority to designate an active or retired judge to hold court in any judicial district in cases of disqualification or other unavailability on the part of active judges in the district, an authority that is routinely exercised in suits involving an employee of the district court as a party.

{68} Pursuant to that authority, for example, this Court maintains standing orders to designate outside judges to preside over cases in which a judge or employee of a district court is a party. When the IPRA action against the First Judicial District Court was filed in the Fifth Judicial District, for example, a judge from either the Fourth or Seventh Judicial District was required to be designated as a First Judicial District judge to hear such cases. New Mexico Supreme Court order, February 12, 2014 (No. 14-8500). This mechanism complies with the constitutional prohibition against district courts issuing orders to other district courts, permits full enforcement of IPRA, and avoids the appearance of judicial bias.

{69} In this case, because the Fifth Judicial District Court had no constitutional jurisdiction to adjudicate any part of the IPRA enforcement action against the records custodian of the First Judicial District, including both the adjudication of IPRA violations and the assessment of resulting fees and costs, we enter a writ of superintending control directing Judge Hudson to dismiss the IPRA proceeding in its entirety. And because we have determined that there is no IPRA dispute remaining to be resolved by any court as a result of Valley Meat's having received all IPRA production to which it was entitled, there is no further enforcement action regarding the records requests in this matter that can now be taken in the First Judicial District Court.

III. CONCLUSION

{70} For the reasons stated herein, a writ of superintending control will issue directing Respondent James M. Hudson to vacate the previously entered summary judgment and to dismiss for lack of jurisdiction the complaint in *Valley Meat Co., LLC v. Pacheco*, D-504-CV-2014-86.

{71} IT IS SO ORDERED.
CHARLES W. DANIELS, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice

Certiorari Denied, March 26, 2018, No. S-1-SC-36837

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-027

No. A-1-CA-35247 (filed December 20, 2017)

WANDA COLLINS, as Personal Representative of the ESTATE OF WILLIAM "MACK" VAUGHAN,
Plaintiff-Appellant,
v.
ST. VINCENT HOSPITAL, INC.,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Sarah M. Singleton, District Judge

STEPHEN DURKOVICH
Santa Fe, New Mexico

LEE R. HUNT
HUNT & MARSHALL
Santa Fe, New Mexico

SETH T. COHEN
COHEN AND ZEDALIS, LLC
Santa Fe, New Mexico
for Appellant

EMIL J. KIEHNE
ELIZABETH A. MARTINEZ
MODRALL, SPERLING, ROEHL, HARRIS & SISK, PA
Albuquerque, New Mexico
for Appellee

Opinion

Jonathan B. Sutin, Judge

{1} The simple question in this unnecessarily complicated and convoluted direct liability action is whether the jury's determination that a hospital's negligence was not a cause of the death in question must be reversed based on district court instruction-related error. We hold that the court did not err, and we uphold the jury's verdict and the court's judgment dismissing Plaintiff's claim.

BACKGROUND

Pertinent Medical History

{2} William "Mack" Vaughan presented at the emergency department of Defendant St. Vincent Hospital, Inc. (the Hospital) in Santa Fe, New Mexico in August 2002 with complaints of abdominal pain. He was seen in the emergency department by Dr. Martin Wilt, who was a subcontractor/partner of Northern New Mexico Emergency Medical Services, and who ordered a CT scan. The scan was reviewed by Dr. J.R. Damron, a radiologist and employee of Santa Fe Radiology, who concluded that the most likely diagnosis was a diverticular abscess in the colon, but it was also possible that Vaughan had a neoplasm, which is cancer. Dr. Wilt consulted with Dr. Anna Voltura, a surgeon, to evaluate Vaughan. Dr. Voltura's working diagnosis was diverticular abscess. She recommended that Vaughan be admitted and placed on IV antibiotics. Vaughan refused, saying that he wanted to go home, and upon discharge, he was prescribed antibiotics. Vaughan was instructed to follow up with Dr. Voltura in one week for any problems. Vaughan was advised that he would need surgery in the future, and Dr. Voltura warned Vaughan that his condition was serious and that he could potentially die if it were left untreated.

{3} Dr. Damron dictated a CT scan report, and the report was transcribed the next day. The written report contained Dr. Damron's findings that "[m]ultiple diverticula in the sigmoid colon are present. An abscess associated with a diverticulitis would be a first consideration with neoplasm as the etiology being the second consideration." Drs. Voltura and Wilt testified that they did not recall seeing or receiving copies of Dr. Damron's written report. Vaughan left the Hospital without being told that he had a possible neoplasm in his colon.

{4} Despite Dr. Voltura's instructions, Vaughan did not follow up with Dr. Voltura. In September 2002, he visited the Veterans Administration hospital in Albuquerque, New Mexico, complaining of foul-smelling, cloudy, burning urination, but he declined an x-ray. He visited the Veterans Administration hospital again in November 2002 to establish a primary care provider, on which visit a colonoscopy was recommended but apparently not performed.

{5} In April 2003, Vaughan presented at the Hospital's emergency department with complaints of brown, foul-smelling, gritty material in his urine and with symptoms similar to those he had in October 2002, including burning with urination. While at the emergency room in April 2003, he was advised to follow up with a urologist, but he did not do so. In May 2003, the Veterans Administration sent Vaughan a letter advising him that additional tests were recommended for his continuing urinary tract infections, including a cystoscopy. No evidence indicates that Vaughan went in for those tests at that time.

{6} In August 2003, Vaughan returned to the Hospital's emergency room, complaining again of painful urination and also complaining of abdominal pain at which time he underwent a cystoscopy that revealed a colovesical fistula. Vaughan was ultimately diagnosed in October 2003 with colon cancer in the sigmoid colon at the location of the abscess. Vaughan died in 2010 of a metastatic lesion, with colon cancer listed as the "[d]isease or injury that initiated events resulting in death[.]"

The Lawsuit

{7} Years before his death, in January 2006, Vaughan sued the Hospital pursuant to a complaint for medical negligence, averring the Hospital's negligent failure "through an administrative inadequacy to forward [a] radiology report[,]" indicating the existence of a neoplasm, on to his physician.

{8} The case was first before this Court in *Vaughan v. St. Vincent Hospital, Inc.*, No. A-1-CA-30395, 2012 WL 1720346, mem. op. (N.M. Ct. App. Apr. 16, 2012) (non-

precedential). In *Vaughan*, we affirmed the district court's summary judgment dismissal of Vaughan's complaint on the ground that he failed to give sufficient notice under Rule 1-008 NMRA of assertion of a claim of apparent agency giving rise to vicarious liability of the Hospital. *Id*. at *1, *8. After Vaughan passed away in 2010, Diego Zamora, as personal representative of Vaughan's estate, was substituted as the plaintiff. Our Supreme Court reversed the *Vaughan* decision in *Zamora v. St. Vincent Hospital*, 2014-NMSC-035, ¶ 1, 335 P.3d 1243, holding that "Vaughan's complaint adequately notified [the Hospital] that one or more of its employees or agents was negligent[.]"

{9} More specifically, in *Zamora*, our Supreme Court stated that "Vaughan's pleading was sufficiently detailed to put [the Hospital] on notice of a claim of apparent agency or vicarious liability related to the failure to communicate his cancer diagnosis," *id*. ¶ 8, and that nothing in our rules or statutes "require[d] a civil complaint to specifically recite reliance on theories of vicarious liability or apparent agency in order to provide fair notice of a cause of action." *Id*. ¶ 14. Our Supreme Court concluded its opinion stating that the "complaint adequately notified [the Hospital] that it was liable for the negligence of one or more of its agents" and that disputed issues of fact existed "concerning the negligence of [the Hospital's] agents in failing to communicate [a] cancer diagnosis to Vaughan or his treating doctor." *Id.* ¶ 34. Our Supreme Court remanded for trial on the merits. *Id.*

The District Court Proceedings on Remand

{10} On remand, and re-captioned with a substituted personal representative, Wanda Collins, Plaintiff changed course as to the nature of the claim—she was no longer claiming or asserting any negligence on the part of any of the physician providers involved, Drs. Wilt, Damron, and Voltura. Plaintiff chose not to pursue vicarious liability against the Hospital, but chose instead to pursue a direct liability claim based solely on negligence of the Hospital stemming from alleged communication, operational, and systemic failures.

{11} Plaintiff's direct liability theory was expressed in different ways at different intervals. But as stated in the district court's pretrial order, Plaintiff did not contend that Drs. Voltura, Wilt, or Damron were negligent, but only the Hospital was negligent by its failure to deliver the report of Vaughan's CT scan results to Vaughan, Dr. Wilt, and Dr. Voltura. At trial, Plaintiff contended that she did not allege "that any of the physicians did anything wrong" but that the Hospital was liable based on a number of systemic and communication failures. The Hospital's defense to Plaintiff's contention was that Vaughan's cancer did not progress from August 2002 to October 2003, and any delay in treatment was caused by Vaughan's repeated failures to heed medical advice.

{12} Although many of the jury instructions were settled prior to trial, at a mid-trial jury instruction conference, the district court considered whether to give an apparent agency instruction based on UJI 13-1120B NMRA and *Houghland v. Grant*, 1995-NMCA-005, 119 N.M. 422, 891 P.2d 563, that "[a] hospital is responsible for the actions of health care providers who are not hospital employees[.]" According to Plaintiff, it was a "general proposition" that a hospital is "on the hook" because the physician providers are apparent agents, and that the hospital is on the hook for their actions. The court rejected Plaintiff's position because Plaintiff was not claiming that the providers made "any bad medical decisions." Plaintiff disagreed, stating that the Hospital was "broadly" responsible for the failures of the apparent agent providers who are part of the failed system, including bad medical decisions not constituting negligence. The district court ultimately determined that it was going to give the apparent agency instruction only if it was limited for the purposes of considering whether to award punitive damages and limited to "consideration of the cumulative conduct of its employees or apparent agent[.]"[1]

{13} In closing arguments, Plaintiff again focused on her theory that the Hospital negligently failed to deliver Dr. Damron's final report to Vaughan's treating physicians and to Vaughan. In its closing argument, the Hospital argued that it was not negligent because its system for delivering reports complied with the industry standards, was sufficient, and worked in practice. The Hospital noted the stipulation that Dr. Damron was not negligent, but indicated nevertheless that Dr. Damron was the cause of Vaughan not getting the information about a possible neoplasm. In Plaintiff's closing rebuttal, Plaintiff again stressed the failure to deliver the report and argued, "[i]t wasn't Dr. Damron's job to take that report and walk it down the hall. [The] Hospital set up the system."

{14} After closing arguments, the jury was given the following relevant instructions, beginning with Instruction No. 2:

> In this case, [Plaintiff] . . . seeks damages from the [Hospital] for damages that [P]laintiff says were caused by the negligence of [the] Hospital.
>
> To establish [the Hospital's] negligence, [Plaintiff] has the burden of proving that [the Hospital] negligently did not deliver Dr. . . . Damron's final written report of the August 8 CT examination of . . . Vaughan identifying a pelvic abscess the result of either diverticulosis or a neoplasm to at least one of the following:
>
> > To Vaughan's ER physician Dr. Wilt for Dr. Wilt's use in diagnosing and treating Vaughan, or
> >
> > To Vaughan's surgeon Dr. Voltura for use in diagnosing and treating Vaughan, or
> >
> > Alternatively, [Plaintiff] has the burden to prove that because of [the Hospital's] negligence there was a failure to communicate the information contained in Dr. Damron's final written report about a possible neoplasm to Vaughan for his own use in deciding what kind of care he should obtain to address the possibility that his abscess was the result of a neoplasm or cancer.
>
> [Plaintiff] has the burden of

[1]This limitation was based on this Court's opinion in *Grassie v. Roswell Hospital Corp.*, 2011-NMCA-024, ¶¶ 30-32, 150 N.M. 283, 258 P.3d 1075. In *Grassie*, we held that the cumulative conduct theory, which "provides that an award of punitive damages against a corporation may be based on the actions of the employees viewed in the aggregate in order to determine whether the employer corporation had the requisite culpable mental state because of the cumulative conduct of the employees[,]" was supported by New Mexico law. *Id.* ¶ 30 (alterations, internal quotation marks, and citation omitted). On appeal, Plaintiff does not argue that *Grassie* is incorrect or that it would not apply in this case, but rather that a general apparent agency instruction should have been given.

proving [the Hospital's] negligence was a cause of his death, his injuries[,] and damages.

The [Hospital] denies . . . [P]laintiff's allegations regarding negligence. [The Hospital] asserts that it exercised the knowledge, skill, and care of a reasonably well[-]qualified hospital in its care and treatment of . . . Vaughan. [The Hospital] denies that it failed to deliver the August 8, 2002 CT report to Dr. Wilt and further denies that it failed to deliver a copy of the August 8, 2002 CT report to Dr. Voltura. [The Hospital] denies that it was obligated to deliver a copy of the report to Dr. Voltura without express indication from Dr. Damron. [The Hospital] denies that it failed to deliver a copy of the report to . . . Vaughan and states that . . . Vaughan would have received a copy of his records if he had asked for them. [The Hospital] also denies that it created the appearance that Drs. Wilt or Damron were its employees or apparent agents and denies that [it] is responsible for their conduct. [The Hospital] denies . [P]laintiff's claims that it caused or contributed to . . . Vaughan's death, injuries[,] and damages.

[The Hospital] affirmatively states that . . . Vaughan was negligent and that his negligence was a cause of his death, injuries[,] and damages. The [Hospital] has the burden of proving that . . . Vaughan failed to exercise a duty of ordinary care and that his negligence caused his injuries and damages. To establish that . . . Vaughan was negligent, [the Hospital] has the burden of proving at least one of the following:

a. . . . Vaughan unreasonably declined admission to [the Hospital] for further work-up and treatment on August 8, 2002;

b. . . . Vaughan unreasonably failed to follow the discharge instructions provided to him by [the] Hospital and Dr. Voltura on August 8, 2002;

c. . . . Vaughan unreasonably failed to obtain recommended medical care by his health care providers at the Veteran[s] Administration;

d. . . . Vaughan unreasonably failed to obtain recommended medical care by his health[]care providers at [the] Hospital after August 8, 2002.

The [Hospital] also has the burden of proving that such negligence by . . . Vaughan was a cause of his death, injuries[,] and damages.

The district court also gave a causation instruction, Instruction No. 5, that read:

An act or omission is a "cause" of injury if it contributes to bringing about the injury, and if injury would not have occurred without it. It need not be the only explanation for the injury, nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause[,"] the act or omission, nonetheless, must be reasonably connected as a significant link to the injury.

{15} The court also gave the following punitive damages instruction, Instruction No. 12, as discussed during the mid-trial jury instruction conference, relating to a hospital's responsibility for non-employee cumulative conduct.

For purposes of considering whether to award punitive damages against [the] Hospital, a hospital is responsible for the cumulative conduct of health care providers who are not [H]ospital employees, such as Dr. . . . Wilt and Dr. . . . Damron, if the [H]ospital, through its conduct, created the appearance that it was the provider of these services to the public.

{16} Although the application of apparent agency principles had been discussed by the parties prior to jury deliberations, the issues giving rise to this appeal truly began after the jury was instructed. During its deliberations, the jury submitted the following handwritten question, entitled "Jury instruction 14 [and] 17 vs. 19."

[Instruction No.] 14=refers to doctors
[Instruction No.] 17=refers to physicians
[Instruction No.] 19=officers [and] employees
Are the physicians/doctors considered employees or officers of St. Vincent Hospital?

Instruction No. 14 stated, "The [H]ospital is not liable when following the orders of the doctor unless the [H]ospital knew or in the exercise of ordinary care should have known that the orders of the doctor were in error and failed to call the error to the doctor's attention." Instruction No. 17 stated, "Where [there] is more than one medically accepted method of diagnosis and treatment, it is not negligent for a physician or a hospital to select any of the accepted methods." Instruction No. 19 stated, "[The Hospital] can only act through its officers and employees. Any act or omission of an officer or an employee of a corporation within the scope or course of his employment is the act or omission of the corporation."

{17} After receiving the jury's question, the following discussion between the court and counsel occurred:

[Plaintiff's counsel]: That's what [*Houghland*] was for. In the [court's *Houghland*] instruction [2], though, it was limited to cumulative conduct under punitives. So we raised the issue when this was coming up that there could be other instances again where they would question the liability of the hospitals for these people. So under [*Houghland*] again, I think that they are—that's the whole purpose of [*Houghland*].

[The Court]: Well, wouldn't I have to tell them, if you find the physicians or doctors are either employees or apparent agents of [the Hospital], then they are considered employees or officers?

[Plaintiff's counsel]: Yes.

[Defendant's counsel]: Well, first of all, there is a difference between physicians slash doctors and officers, but on this issue, the—

[2]The "*Houghland* instruction" is Plaintiff's wording for UJI 13-1120B. *See* UJI 13-1120B comm. cmt. (indicating that the instruction's language is derived from *Houghland*).

> [The Court]: I guess it would only be—they could only possibly be considered employees. They are not officers.
> [Defendant's counsel]: And you gave the [*Houghland*] instruction only as to punitive damages, not as to negligence.
> [The Court]: Right.
> [Defendant's counsel]: So I think they need to be told that.
> [The Court]: Okay. All right. Okay. So it seems then I should say that all the parties have stipulated that no doctor was negligent. For purposes of punitive damages, if you consider the doctors to be—if you find the doctors to be employees or the apparent agents of [the] Hospital, then you may consider them employees of [the] Hospital.
> [Plaintiff's counsel]: No.
> [The Court]: Why not?
> [Plaintiff's counsel]: Why not? Because of the fact that what [*Houghland*] says is [*Houghland*] says that a hospital is responsible for the actions of its apparent agent, and it is not limited to negligent actions, it's all of their actions.
> So the way you stated it initially, that's the way you have to instruct it, Your Honor. It isn't limited to negligent actions . . . .

The court reminded Plaintiff that she had stipulated that the doctors were not negligent and thus could not "rely on the doctor's negligence to form the basic compensable damage claim." According to the court, "[t]here has never been a case which says [that a hospital is] responsible for compensatory damages on account of non-negligent acts of . . . physicians who are not [hospital] employees." Therefore, the court responded to the jury's question as follows:

> Only for purposes of considering whether to award punitive damages may you determine whether the doctors/physicians are employees or apparent agents of [the Hospital]. See Instruction 12.

The following morning, Plaintiff opened with a request that the court give another instruction.

> Judge, I'm sorry, if we might there is one issue I would like to raise to the [c]ourt briefly. I know it's a busy morning and all that, but as this case has gone on what we—and in particular what raised this issue was the question yesterday about agency and about employees and those issues. I mean, certainly as we have thought about it our request is the [c]ourt submit a separate answer to that question which is essentially the [13-1120B] instruction on when a hospital is responsible for the conduct of apparent agents.
> And I know that the [c]ourt did not originally give the instruction as it is in the UJI based on [P]laintiff's stipulation, and that was the reason that the [c]ourt didn't do that, and certainly that was understood. But the case has been presented in such a way that [the Hospital has] raised that issue clearly and soundly throughout the trial and certainly throughout closing argument, and clearly that is an issue that the jury is grappling with.
> So apart from what we said, the issue has been presented to them and I think squarely the appropriate instruction for them is the instruction from [13-1120B] and I think the way it would be presented now is as an answer to the question that was submitted. And so we would like to tender that and request that the . . . [c]ourt give that as an answer to [the jury's question] or as a supplemental instruction, [h]owever the [c]ourt views that most appropriate.

Plaintiff requested that the following written instruction be given to the jury:

> A hospital is responsible for injuries proximately resulting from the conduct of health care providers who are not [H]ospital employees, such as . . . Dr. Damron and Dr. Wilt, if the [H]ospital, through its conduct, created the appearance that it was the provider of these services to the public.

This was the first time Plaintiff tendered such an instruction. It was tendered as a UJI 13-1120B instruction, substituting "conduct" for "negligence" to set out "when a hospital is responsible for the conduct of apparent agents."

{18} The district court refused Plaintiff's tendered instruction, stating:

> You could have tried the case where you took the position that either [Dr.] Damron or the ER doctor was negligent and an apparent agent of the [H]ospital. You chose not to do that. You have decided for strategic reasons that you didn't want to raise that issue, you didn't ask for [an 1120B] on the whole case at the time we were doing instructions. It's too late now to change in mid stream when the jury already has the case as you presented it. Your request is denied.
> The court described the proposed instruction as "too little, too late."

{19} The special verdict form given to the jury asked whether the Hospital was negligent, to which the jury answered, "Yes." The form further asked, "Was any negligence of [the] Hospital a cause of . . . Vaughn's injuries and damages[,]" to which the jury answered, "No." Based on the jury's lack of causation determination, the district court entered judgment in favor of the Hospital and against Plaintiff. This appeal followed.

DISCUSSION

{20} Plaintiff asserts that the "appeal raises a single fundamental substantive issue. Is a hospital's direct liability for the conduct of its apparent agents limited to only their 'negligent' conduct?" (Footnote omitted.) Plaintiff argues that (1) she preserved her claim of error as to the apparent agency instruction; (2) the district court erred in not giving a broad apparent-agency instruction because all conduct of a hospital's apparent agents, acting within the scope of their authority, including non-negligent conduct, is attributable to a hospital in determining a hospital's direct liability; and (3) the record provides evidence that the jury was confused and wrongly concluded that the Hospital did

[3]Although we address the merits of Plaintiff's arguments on appeal, we are concerned with counsel's failure to specifically object to the instructions at the time the instructions were being settled, and with the late proffer of Plaintiff's modified UJI 13-1120B instruction in response to the jury's question. That said, because the applicability of apparent-agency principles was discussed generally, we reach the issue.

not cause Vaughan's injuries. The Hospital does not address Plaintiff's preemptive preservation argument, and because we ultimately hold that the district court did not err and affirm the verdict, we also choose not to address any preservation issues.[3] We therefore focus on whether the district court erred in refusing the instruction and whether the instruction led to an erroneous jury verdict.

{21} "We review a district court's refusal to give a proffered instruction de novo to determine whether the instruction correctly stated the law and was supported by the evidence presented at trial." *Holcomb v. Rodriguez*, 2016-NMCA-075, ¶ 16, 387 P.3d 286 (internal quotation marks and citation omitted). "If instructions, considered as a whole, fairly present the issues and the law applicable thereto, they are sufficient. Denial of a requested instruction is not error where the instructions given adequately cover the issue." *Sonntag v. Shaw*, 2001-NMSC-015, ¶ 15, 130 N.M. 238, 22 P.3d 1188 (internal quotation marks and citation omitted). "A trial court's refusal to submit a jury instruction is not error if the submission of the instruction would mislead the jury by promoting a misstatement of the law." *State v. Nieto*, 2000-NMSC-031, ¶ 17, 129 N.M. 688, 12 P.3d 442.

{22} *Houghland*, involving the issue of a hospital's vicarious liability for the negligent actions in its emergency room, 1995-NMCA-005, ¶¶ 2-3, addresses apparent agency and hospital vicarious liability. *Houghland* was an interlocutory appeal involving the issue of a hospital's vicarious liability for the negligent actions in that hospital's emergency room. The doctor, Dr. Grant, was employed by a separate company that had a contract with the hospital to staff its emergency room. *Id.* ¶ 4. Dr. Grant had no contract with the hospital. *Id.* ¶¶ 4, 7. The plaintiff argued that the district court erred in granting summary judgment in favor of the hospital on the issue of vicarious liability, because a genuine issue of material fact existed as to whether Dr. Grant was an agent or apparent agent of that hospital. *Id.* ¶¶ 6-7. The plaintiff contended that the doctrine of apparent authority applied to establish liability under respondeat superior. *Id.* ¶ 13. This Court determined that "the district court erred in granting summary judgment in [the hospital's] favor." *Id.* ¶ 25.

{23} A few years after *Houghland* was decided, UJI 13-1120B entitled "Hospital Vicarious Liability; Non-Employees" was adopted. It reads:

> A hospital is responsible for injuries proximately resulting from the negligence of health care providers who are not hospital employees, such as [emergency room physicians, if they are the hospital's apparent or ostensible agents], if the hospital, through its conduct, created the appearance that it was the provider of these services to the public.

UJI 13-1120B (bracketed material out of committee commentary). The committee commentary relating to UJI 13-1120B reads:

> A hospital is liable for the negligence of independent contractors who provide patient care in the hospital, such as emergency room physicians, if they are the hospital's apparent or ostensible agents. *See Houghland*[, 1995-NMCA-005, ¶¶ 22-24] (discussing factors from which jury could conclude that hospital created reasonable belief that emergency room physician was hospital's employee or agent including the use of non-employee doctors to further the hospital's business of providing services directly to the public and the choice of the doctor being controlled by the hospital and not the patient.) Although *Houghland* arose in the context of a full service emergency room, the instruction could be applicable to other services provided by the hospital.

{24} On appeal, Plaintiff's point is that the district court erred in failing to present the theory of her case to the jury through a modified UJI 13-1120B that was offered by Plaintiff during jury deliberations, which would have changed "negligence" to "conduct."

{25} Plaintiff asserts that her tendered instruction was necessary because the court allowed the Hospital to argue to the jury that Dr. Damron's failure to expressly "cc" his radiology report to Dr. Voltura was the cause of Vaughan's death. Plaintiff further argues that UJI 13-1120B as it reads "is simply incorrect" because the "[negligence] limitation" does not exist in the law. Plaintiff not only rejects any provider negligence limitation in the instruction itself, she also rejects as incorrect the committee commentary that, under *Houghland*, "[a] hospital is liable for the negligence of independent contractors who provide patient care in the hospital, such as emergency room physicians, if they are the hospital's apparent or ostensible agents." UJI 13-1120B comm. cmt.

{26} In support of this position, Plaintiff relies on *Zamora*'s "law of the case," quoting the statement in *Zamora* that "[u]nder *Houghland*, a malpractice claim arising from care in a hospital emergency room implicates the hospital in the actions of any employees or agents—known or unknown to the plaintiff—who took part in that care." *Zamora*, 2014-NMSC-035, ¶ 18. Plaintiff weaves into the analysis an "attribution" argument through theories of apparent authority and agency that she contends made Dr. Damron's conduct attributable to the Hospital. Plaintiff first draws on UJI 13-408 NMRA, which Plaintiff did not request be given to the jury, and which reads:

> The defendant . . . may, if there has been no actual employment, with right to control, nonetheless be liable for the acts or omissions of [an apparent employee.]

Plaintiff argues that this instruction "demonstrates that a principal's responsibility for apparent agency includes non-negligent conduct because it does not limit a principal's liability to the negligent conduct of its apparent agents." Plaintiff then draws on the Restatement (Third) Agency as supporting UJI 13-408. According to Plaintiff, "[w]hen the principal is an organization that can act only through its agents, the result is that '[a]n organization's tortious conduct consists of conduct by agents of the organization that is attributable to it.' " (Quoting Restatement (Third) of Agency § 7.03 cmt. c (2006).) "[A]n organization would breach its duty of reasonable care through the action or inaction of its employees and other agents, including the prescription and enforcement by managerial agents of directives and guidelines to be followed by other agents." Restatement, *supra*. Based on these authorities, Plaintiff argues that

> [Dr.] Damron, while acting as an apparent agent of [the Hospital], might not have been personally negligent in the manner in which he dictated his report, yet his uninstructed conduct in not expressly noting for the transcriptionist specifically who the report was to be delivered to was nevertheless the immediate cause of Vaughan's death—conduct New Mexico law attributes

to [the Hospital].

Further, Plaintiff argues that the attribution of an apparent agent's conduct to the principal is an integral part of New Mexico law as evidenced by holdings in cases addressing apparent agency outside of the medical negligence arena. *See, e.g.*, *Tabet v. Campbell*, 1984-NMSC-059, ¶ 9, 101 N.M. 334, 681 P.2d 1111 (addressing a tax collection issue and holding that "[a] principal is bound by the actions taken under the apparent authority of its agent if the agent is in a position which would lead a reasonably prudent person to believe that the agent possessed such apparent authority"); *Fryar v. Emp'rs Ins. of Wausau*, 1980-NMSC-026, ¶ 6, 94 N.M. 77, 607 P.2d 615 (addressing a broker's modification to an insurance contract); *Ronald A. Coco, Inc. v. St. Paul's Methodist Church of Las Cruces, N.M., Inc.*, 1967-NMSC-138, ¶¶ 1, 4, 78 N.M. 97, 428 P.2d 636 (addressing an action to foreclose a materialman's lien).

{27} Plaintiff also relies on the Restatement (Second) of Agency Section 213 (1958) that reads in part:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent . . . :
>
> (a) in giving improper or ambiguous orders or in failing to make proper regulations[.]

{28} Plaintiff concludes her apparent authority/attribution arguments asserting that the district court "fail[ed] to perceive the difference between vicarious and direct liability" and thereby "failed to comprehend that [Dr.] Damron's conduct, whether or not rising to the level of negligence, was nonetheless attributable to [the Hospital] for [the] purpose of determining whether [the Hospital's] direct negligence in failing to supervise or control [Dr.] Damron's dictating convention was a cause of Vaughan's death." And Plaintiff states,

> The bottom line is this. New Mexico law is that an apparent agent's actions, such as [Dr.] Damron, in carrying out the principal's duties, without limitation are deemed to be the acts of [the Hospital]. [The Hospital] insists that [Dr.] Damron's acts were the cause of Vaughan's death. The law of logic and the law of agency combine to close the syllogism: Because [the Hospital] conceded that [Dr.] Damron's acts were the cause of Vaughan's death, and because [Dr.] Damron's actions in [the Hospital's] ER system are in legal contemplation the acts of [the Hospital], [the Hospital] was the cause of Vaughan's death.

{29} We are not persuaded by any of Plaintiff's arguments that her proffered instruction was appropriate in this case. Plaintiff's main point is that an overall broader apparent agency instruction, without limitation, was needed. Plaintiff relies on *Houghland* and *Zamora*. *Houghland* does not assist Plaintiff. *Houghland* was a vicarious liability case that evaluated the appropriateness of summary judgment on the issue of a hospital's vicarious liability for an apparent agent-doctor's alleged negligence. 1995-NMCA-005, ¶ 2. In *Houghland*, in contrast to the case here, there was no stipulation by the parties that the doctor, whose conduct was at issue, was not negligent. Because the issue in *Houghland* was apparent agency for a vicarious liability claim based on the doctor's negligence, it has no application here where the issue is apparent agency liability for non-negligent conduct. *See Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 ("[C]ases are not authority for propositions not considered." (internal quotation marks and citation omitted)).

{30} We are also not persuaded by Plaintiff's interpretation of *Zamora*. Although *Zamora* states that under *Houghland* "a malpractice claim arising from care in a hospital emergency room implicates the hospital in the actions of any employees or agents—known or unknown to the plaintiff—who took part in [the] care[,]" we remind Plaintiff that the issue being addressed in *Zamora* was whether there was sufficient information in the complaint to notify the hospital "that one or more of its employees or agents was negligent[.]" 2014-NMSC-035, ¶¶ 1, 18. Thus, as in *Houghland*, the Court in *Zamora* was considering the viability of a vicarious liability claim based on the doctor's negligence, not a direct liability claim based on apparent agency principles and based on the non-negligent conduct of the apparent agent. The passage in *Zamora* cited by Plaintiff is impermissibly taken out of context. *Zamora* is not in any sense about the issue Plaintiff raises. The passage does not, as Plaintiff exaggerates, state clearly or plainly that "negligence" is to be replaced by "conduct."

{31} We also reject Plaintiff's attempt to expand a hospital's medical negligence liability through tying in UJI 13-408, the Restatement (Third) of Agency Section 7.03 principal's responsibility for an apparent agent's conduct, and the case law on apparent agency in non-medical negligence contexts. Those provisions are nowhere in New Mexico law given or intended to be given transformative powers to create new law and liability in the body of medical malpractice, much less as to direct hospital liability for the non-negligent acts of a non-employee. This case was not tried on Plaintiff's apparent agency and attribution theory, and the authorities Plaintiff now, for the first time, cites and argues for support of her late-developed theory, were never brought to the attention of the district court either by way of offered instructions or argument against the court's instructions. We agree with the district court's assessment that "[t]here has never been a case which says [that a hospital is] responsible for compensatory damages on account of non-negligent acts of the physicians who are not [that hospital's] employees[,]" and any expansion of law and liability as desired by Plaintiff must come, if at all, from a public policy-based decision of our Supreme Court.

{32} Even were we to assume that a direct liability medical negligence claim against a hospital based on the conduct of an apparent agent might be viable under some circumstances in New Mexico law, we nevertheless agree with the district court's decision not to give the instruction in this case because such an instruction was not supported by the case presented. The case presented to the jury couched liability in terms of system failures, not based on Dr. Damron's alleged failures. Plaintiff argued at trial that the Hospital was at fault for failing to deliver the report and argued "[i]t wasn't Dr. Damron's job to take that report and walk it down the hall." Plaintiff's case was tried based on her strategy of admitting that Dr. Damron was not negligent. Given this approach by Plaintiff at trial, the district court did not err in refusing to give the instruction. *State ex rel. State Highway Dep't v. Strosnider*, 1987-NMCA-136, ¶ 14, 106 N.M. 608, 747 P.2d 254 ("A party is entitled to have the jury instructed upon all correct legal theories of his case when the instruction comes within the ambit of the pleadings and there is evidence to support it. A proffered instruction, however, must be in accord with the evidence and

constitute a correct statement of the law." (citations omitted)).

{33} Plaintiff nevertheless argues the record indicates that, as a result of the refusal to give the instruction, the jury was confused about causation and erroneously concluded that the conduct of Dr. Damron was the sole cause of Vaughan's death. Plaintiff looks to the lack of an instruction on apparent agency in Instruction Nos. 2, 12, and 19, coupled with alleged confusion expressed in the jury question. Plaintiff's causation position hangs on her assertion that the "court allowed [the Hospital] to assert that [Dr.] Damron was the sole 'cause' of Vaughan's injuries and death[.]" And Plaintiff complains that the court "then forbade the jury from finding that the [H]ospital was responsible for [Dr.] Damron's immediate actions in doing so[.]" Thus, according to Plaintiff, forbidding the jury from considering Dr. Damron as the Hospital's apparent agent compelled the jury to reach a "no causation" verdict, and as the "last word" on apparent agency given to the jury during its deliberations, affected the jury's ultimate decision and "functionally amounted to the grant of a directed verdict for [the Hospital]."

{34} Plaintiff essentially hangs her hat on what she believes was "[t]he powerfully persuasive impact of [the] supplementary instruction" given by the district court in response to the jury's question that led the jury to an allegedly erroneous conclusion. In support of her position, Plaintiff cites *Arroyo v. Jones*, 685 F.2d 35, 39 (2d Cir. 1982), that stated:

> A supplemental charge must be viewed in a special light. It will enjoy special prominence in the minds of the jurors for several reasons. First, it will have been the most recent, or among the most recent, bit of instruction they will have heard, and will thus be freshest in their minds. Moreover, it will have been isolated from the other instructions they have heard, thus bringing it into the foreground of their thoughts. Because supplemental instructions are generally brief and are given during a break in the jury's deliberations, they will be received by the jurors with heightened alertness rather than with the normal attentiveness which may well flag from time to time during a lengthy initial charge. And most importantly, the supplemental charge will normally be accorded special emphasis by the jury because it will generally have been given in response to a question from the jury.

{35} We are not persuaded. Neither the jury's question, nor the refusal to give Plaintiff's tendered instruction, nor the court's instruction given in answer to the question, can reasonably be considered a persuasive directive to the jury to find that the Hospital's negligence did not cause Vaughan's death. As stated throughout this opinion, the theory of Plaintiff's case was based on the Hospital's direct negligence from administrative failure as causing Vaughan's death. Plaintiff had and took every opportunity to argue to the jury that it was the Hospital's systemic failure that affected Dr. Damron's actions or failures to act with respect to his report. There exists substantial evidence in the record from which the jury could have reasonably concluded that Vaughan's death was fully caused by conduct other than the Hospital's administrative failure to have the protocols Plaintiff argued were necessary.

{36} This case was fully and fairly tried by skilled, competent counsel, based on their claims, defenses, and trial strategies. Again, Plaintiff had every opportunity to argue the Hospital's negligent failure to establish protocols for Dr. Damron, as well as every opportunity to attempt to build a case or argument that the Hospital's negligence was a cause of Vaughan's death. We will not attempt to second-guess the jury's view of the evidence as to causation and will not attempt to speculate on the effect on the jury of the court's supplemental instruction.

CONCLUSION

{37} We affirm the jury's verdict of lack of causation and the district court's judgment entered on the verdict in favor of the Hospital.

{38} IT IS SO ORDERED.
JONATHAN B. SUTIN, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
HENRY M. BOHNHOFF, Judge

Classified

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Three (3) Blocks from the courthouse in revitalizing downtown near Mountain Road. Great visibility and exposure on 5th Street. Excellent office space boasting off street parking. Surrounded by law offices the property is a natural fit for the legal or other service professionals. Approximately 1230 square feet with two offices/bedrooms, one full bath, full kitchen, refinished hardwood floors, reception/living area with fireplace and conference/dining area. Property features CFA, 150sf basement and a single detached garage. Run your practice from here! Sale price is $265,000. Lease option and owner financing offered. Contact Joe Olmi @ 505-620-8864.

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 Trust
Urgently seeking the NM attorney who created a trust for: Anastasio V. Duarte. Place of residence: Las Cruces, NM. If located, please contact: Esther Duarte (daughter), esthervduarte@aol.com

-State Bar of New Mexico-

2018 Annual Meeting

Hyatt Regency
TAMAYA RESORT
Santa Ana Pueblo

Aug. 9-11

Registration is now open!

Visit **www.nmbar.org/AnnualMeeting** to reserve your spot today.

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