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Bar Bulletin

August 10, 2022 • Volume 61, No. 15

Higher Self, by Natalie Christensen (see page 3) nataliechristensenphoto.com

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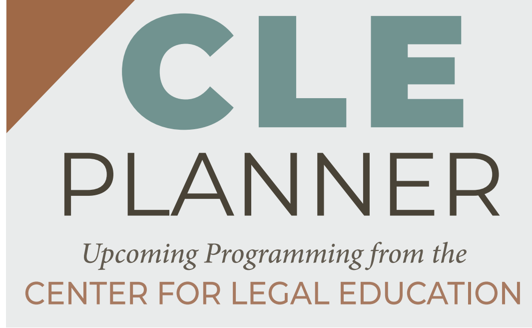

CUDDY & McCARTHY, LLP

Attorneys at Law

We are pleased to announce that as of August 1, 2022, the Hatcher Law Group has joined Cuddy & McCarthy, LLP. We are delighted to welcome Scott R. Hatcher, Robert A. Corchine, and Carl J. Waldhart to our group of talented and respected attorneys.

Scott R. Hatcher, Partner
shatcher@cuddymccarthy.com

Scott R. Hatcher will be joining us as a Partner at Cuddy & McCarthy, LLP. Mr. Hatcher will continue to bring his knowledge and experience in representing his clients in the many areas of insurance law and public sector litigation, including the defense of insureds in all types of third-party claims. Mr. Hatcher's practice also emphasizes the representation of insurers in policy coverage disputes and bad faith claims. He will also continue to be litigation counsel for various governmental agencies at all levels of local and state government.

Robert A. Corchine will be joining Cuddy & McCarthy, LLP as an Attorney. Mr. Corchine will continue to concentrate his practice in the areas of insurance defense, with an emphasis on the defense of personal injury, medical malpractice, products liability, premises liability, civil rights, wrongful death, trucking accidents, food-borne illness and construction defect claims.

Robert A. Corchine, Attorney
rcorchine@cuddymccarthy.com

Carl J. Waldhart, Associate
cwaldhart@cuddymccarthy.com

Carl J. Waldhart will be joining Cuddy & McCarthy, LLP as our newest associate. Mr. Waldhart will work primarily in the areas of public sector litigation and insurance defense, while expanding his knowledge into the areas of Cuddy & McCarthy's practice.

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www.sbnm.org

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Meetings

August

11
Children's Law Section
noon, virtual

12
Prosecutors Section
noon, virtual

16
Solo and Small Firm Section
noon, virtual/SBNM

19
Family Law Section
9 a.m., virtual

September

2
Elder Law Section
noon, virtual

8
Committee on Women Section
noon, virtual

13
Appellate Section
noon, virtual

15
Public Law Section
noon, virtual

23
Immigration Law Section
noon, virtual

Workshops and Legal Clinics

August

24
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

September

7
Divorce Options Workshop
6-8 p.m., virtual

28
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

October

5
Divorce Options Workshop
6-8 p.m., virtual

26
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

December

7
Divorce Options Workshop
6-8 p.m., virtual

14
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

About Cover Image and Artist: Santa Fe, New Mexico photographer Natalie Christensen's enchanting focus is on banal peripheral settings. Influenced by 25 years as a psychotherapist, her photos favor psychological metaphors. She deconstructs to color fields, geometry and shadow. "Sometimes I get a glimpse of the sublime in these ordinary places." Christensen has exhibited in the U.S. and internationally, and recently was a guest of the United Arab Emirates Embassy on a UAE cultural tour. She led photography workshops at The Royal Photographic Society, London and Meow Wolf, Santa Fe and participated in site-specific projects in the U.S and U.K. The recipient of several prestigious photography awards, Christensen's work is in the permanent collections of the Fort Wayne Museum of Art, Indiana and the University of Texas, Tyler. Her photography has been featured in noted fine art publications.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov/. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do..

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. Library Hours: Monday-Friday 8 a.m.-noon and 1-5 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

Bernalillo County Metropolitan Court

New Assignment for Judge Linda S. Rogers

With the appointment of Metropolitan Court Judge David A. Murphy to the Second Judicial District Court, effective July 23, Judge Linda S. Rogers, Division XIX, will be assigned the misdemeanor criminal docket previously assigned to Judge Murphy, Division XVI.

New Assignment for Judge Nina Safier

Upon the retirement of Metropolitan Court Judge Sandra Engel, effective Oct. 1, Judge Nina Safier, Division XVII, will be assigned the misdemeanor criminal docket previously assigned to Judge Engel, Division XI.

Bernalillo County Metropolitan Court Announcement of Vacancy

A vacancy on the Bernalillo County Metropolitan Court is now open due to the appointment of the Honorable Judge David Murphy to the Second Judicial District Court. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. Camille Carey, Chair of the Bernalillo County Metropolitan Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: https://lawschool.unm.edu/judsel/application.html, or emailed to you by contacting the Judicial Selection Office at akin@law.unm.edu. The deadline for applications has been set for Aug. 5 at 5 p.m. Applications received after that time will not be considered. The Bernalillo County Metropolitan Court Nominating Commission will meet beginning at 9:30 a.m. on Aug. 19 to interview applicants for the position at the Bernalillo Metropolitan Courthouse, located at 401 Lomas NE, Albuquerque, New Mexico. The Commission meeting is open to the public, and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard. All attendees of the meeting will be required to wear a face mask at all times while at the meeting regardless of their vaccination status.

Second Judicial District Court

Appointment to Second Judicial Disrict Court Bench

Gov. Michelle Lujan Grisham has announced the appointment of **David A. Murphy** to the Second Judicial District Court bench. Effective July 23, Judge Murphy has been assigned to fill Division XXX, the new judgeship created when Gov. Lujan Grisham recently signed into law House Bill 68. Judge Murphy will be assigned Criminal Court cases previously assigned to Judge Alisa Hart, Division XXI. Pursuant to New Mexico Supreme Court Order 22-8500-007, peremptory excusals have been temporarily suspended during the COVID-19 Public Health Emergency.

Second Judicial District Court Announcement of Vacancy and Nominating Commission Meeting

A vacancy on the Second Judicial District Court has existed as of Aug. 1 due to the retirement of Hon. Judge Alisa A. Hart. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. The deadline for applications was set for Aug. 9. Applications received after that time are not considered.The Second Judicial District Court Nominating Commission will meet beginning at 9:30 a.m. on Aug. 23 to interview applicants for the position at the State Bar Center, located at 5121 Masthead Street N.E., in their conference rooms, with no mask or social distancing requirements. However, any individual may elect to wear a mask. The Committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Fifth Judicial District Court Judicial Nominating Commission

Candidate Announcement

The Fifth Judicial District Court Judicial Nominating Commission convened on July 19 at the Fifth Judicial District Court Eddy County, located at 102 N Canal St, Carlsbad, NM 88220, and completed its evaluation of the two candidates for the one vacancy on the Fifth Judicial Court due to the creation of an additional Judgeship by the Legislature. The Commission recommends candidate **AnneMarie Cheroke Lewis** to Gov. Michelle Lujan Grisham.

U.S. District Court for the District of New Mexico

Open for Applications to Serve on Court Panel

Chief Judge William P. Johnson and the Article III District Judges for

Professionalism Tip

With respect to opposing parties and their counsel:

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

the District of New Mexico would like to solicit interest from Federal Bar members for service on the Magistrate Judge Merit Selection Panel. In the District of New Mexico, there are five full-time magistrate judges in Albuquerque, five full-time magistrate judges in Las Cruces and two part-time magistrate judges, with one in Farmington and the other in Roswell. Any member of the Federal Bar in good standing and interested in being selected by the District Judges to serve on the Magistrate Judge Merit Selection Panel should respond to this notice no later than Aug. 31 to the Clerk of Court, U. S. District Court, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102; or by email to clerkofcourt@nmd.uscourts.gov to be considered for appointment to the Panel. Appointment to the Panel will be effective Jan. 1, 2023. Members of the Panel typically are appointed for three-year terms and members of the Panel may seek reappointment.

State Bar News

Equity in Justice Program

Have Questions?

Do you have specific questions about equity and inclusion in your workplace or in general? Send in anonymous questions to our Equity in Justice Program Manager, Dr. Amanda Parker. Each month, Dr. Parker will choose one or two questions to answer for the *Bar Bulletin*. Visit www.sbnm.org/eij, click on the Ask Amanda link and submit your question. No question is too big or too small.

New Mexico Judges and Lawyers Assistance Program

The Judicial Wellness Program

The newly established Judicial Wellness Program aids in focusing on the short-term and long-term needs of the New Mexico Judicial Community. The New Mexico Judicial Wellness Program was created to promote health and wellness among New Mexico Judges by creating and facilitating programs (educational or otherwise) and practices that encourage a supportive environment for the restoration and maintenance of overall mental, emotional, physical and spiritual health of judges. Learn more about the program at www.sbnm.org/nmjwp.

NMJLAP Committee Meetings

The NMJLAP Committee will meet at 4 p.m. on Oct. 16 and Jan. 12, 2023. The NMJLAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. The NMJLAP Committee has expanded their scope to include issues of depression, anxiety, and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Judges and Lawyers Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

Free Well-Being Webinars

The State Bar of New Mexico contracts with The Solutions Group to provide a free employee assistance program to members, their staff and their families. Contact the Solutions Group for resources, education, and free counseling. Each month in 2022, The Solutions Group will unveil a new webinar on a different topic. Sign up for "Echopsychology: How Nature Heals" to learn about a growing body of research that points to the beneficial effects that exposure to the natural world has on health. The next webinar, "Pain and Our Brain" addresses why the brain links pain with emotions. Find out the answers to this and other questions related to the connection between pain and our brains. The final webinar, "Understanding Anxiety and Depression" explores the differentiation between clinical and "normal" depression, while discussing anxiety and the aftereffects of COVID-19 related to depression and anxiety. View all webinars at www. solutionsbiz.com or call 505-254-3555.

Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam Moore at pmoore@sbnm.org or Briggs Cheney at bcheney@dsc-law.com for the Zoom link.

— Featured —

Member Benefits

Clio's groundbreaking suite combines legal practice management software (Clio Manage) with client intake and legal CRM software (Clio Grow) to help legal professionals run their practices more successfully. Use Clio for client intake, case management, document management, time tracking, invoicing and online payments and a whole lot more. Clio also provides industry-leading security, 24 hours a day, 5 days a week customer support and more than 125 integrations with legal professionals' favorite apps and platforms, including Fastcase, Dropbox, Quickbooks and Google apps. Clio is the legal technology solution approved by the State Bar of New Mexico. Members of SBNM receive a 10 percent discount on Clio products.

Learn more at landing.clio.com/nmbar.

The New Mexico Well-Being Committee

The N.M. Well-Being Committee was established in 2020 by the State Bar of New Mexico's Board of Bar Commissioners. The N.M. Well-Being Committee is a standing committee of key stakeholders that encompass different areas of the legal community and cover state-wide locations. All members have a well-being focus and concern with respect to the N.M. legal community. It is this committee's goal to examine and create initiatives centered on wellness.

Young Lawyers Division

Help New Mexico Wildfire Victims

In partnership with the Federal Emergency Management Agency and the American Bar Association's Disaster Legal Services Program, the State Bar of New Mexico Young Lawyers Division is providing legal resources and assistance for survivors of the New Mexico wildfires. The free legal aid hotline opened on June 6 and we need more volunteers. Fire survivors can call the hotline toll free at 888-985-5141 Monday through Friday, 9 a.m. to 1 p.m. MST. Individuals who qualify for assistance will be matched with New Mexico Lawyers to provide free, limited legal help in areas like securing FEMA benefits, assistance with insurance claims, help with home repair contracts, replacement of legal documents, landlord/tenant issues and mortgage/foreclosure issues. Volunteers do not need extensive experience in any of the areas listed below. FEMA will provide basic training for frequently asked questions. This training will be required for all volunteers. We hope volunteers will be able to commit approximately one hour per week. Visit www.sbnm.org/wildfirehelp for more information and to sign up. You can also contact Lauren E. Riley, ABA YLD District 23, at 505-246-0500 or lauren@batleyfamilylaw.com.

UNM School of Law

Law Library Hours

The UNM Law Library facility is currently closed to guests. Reference services are available remotely Monday through Friday, from 9 a.m.-6 p.m. via email at lawlibrary@unm.edu or phone at 505-277-0935.

Other Bars

Colorado Bar Association

The Annual Rocky Mountain Regional Elder Law Retreat

The Colorado Bar Association will be hosting the 14th Annual Rocky Mountain Regional Elder Law Retreat, co-sponsored by the Colorado Bar Association Elder Law Section. The retreat will include both in-person and online formats and will offer up-to-date information and recent developments in the Elder Law industry. The annual event will take place Aug. 25-27 at the Grand Hyatt Vail at 1300 Westhaven Dr., Vail, CO 81657. The deadline to R.S.V.P. for a room at the hotel is Aug. 8. Otherwise, people may register up to the day of the event. For more information, visit cle.cobar.org.

FREE SERVICE FOR MEMBERS!

Employee Assistance Program

Get help and support for yourself, your family and your employees.

FREE *service offered by NMJLAP.*

Services include up to four **FREE** counseling sessions/issue/year for ANY mental health, addiction, relationship conflict, anxiety and/or depression issue. Counseling sessions are with a professionally licensed therapist. Other **FREE** services include management consultation, stress management education, critical incident stress debriefing, video counseling, and 24X7 call center. Providers are located throughout the state.

To access this service call 855-231-7737 and identify with NMJLAP. All calls are **CONFIDENTIAL.**

Brought to you by the New Mexico Judges and Lawyers Assistance Program

www.sbnm.org

Legal Education

August

11 **Multi-Track Federal Criminal Defense Seminar - Hybrid**
14.2 G, 2.0 EP
Web Cast (Live Credits), Live Program
Administrative Office of the U.S. Courts
www.uscourts.gov

17 **Elder Law Summer Series: Community Property and Debt Considerations**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

18 **How to Avoid Making the Techno-Ethical Mistakes That Put You on the Front Page**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

18 **Overview of Prosecutorial Discretion in Immigration Court: Current Guidance & Strategies**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

19 **The Ethics of Delegation**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

23 **LLC/Partnerships Interests: Collateral, Pledges, and Security Interests**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

23 **Political Landscape: In and Out of New Mexico**
1.0 EP, 4.0 G
Live
Capital Counsel and Consulting
www.nm-ccc.com

25-27 **14th Annual Rocky Mountain Regional Elder Law Retreat**
14.0 G, 1.7 EP, 1.2 EDI
In-Person
Colorado Bar Association (CBA-CLE)
www.cobar.org

25-Dec. 1
Spanish for Lawyers I
20.0 G
Live Webinar
UNM School of Law
lawschool.unm.edu

30 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

31 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

September

1 **Parking: Special Issues in Commercial Leases**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

9-11
23-25 **Taking and Defending Depositions**
31.0 G, 4.5 EP
In-Person
UNM School of Law
lawschool.unm.edu

13 **Mandatory Succession Planning: It Has To Happen, But It Doesn't Have To Be That Difficult**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

13 **Special Lease Issues for Medical/Dentist Offices**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

14 **Ethics for Business Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

15 **2022 Employment and Labor Law Institute - Day 1**
2.8 G, 1.0 EP
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

16 **2022 Employment and Labor Law Institute - Day 2**
2.8 G, 1.0 EP
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

20 **Overview of Workers' Compensation Issues**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

20 **Basic Financial Literacy for Lawyers**
2.0 G
In-Person and Webcast
Center for Legal Education of NMSBF
www.sbnm.org

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@sbnm.org. Include course title, credits, location/course type, course provider and registration instructions.

September (cont'd)

21 **Elder Law Summer Series: Client Capacity, Diminished Capacity, and Declining Capacity. Ethical Representation and Tools for Attorneys**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

27 **Selling to Consumers: Sales, Finance, Warranty, & Collection Law, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

28 **Selling to Consumers: Sales, Finance, Warranty, & Collection Law, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.sbnm.org

29 **2022 Family Law Fall Institute - Day 1**
4.5 G, 1.0 EP
In-Person or Webcast
Center for Legal Education of NMSBF
www.sbnm.org

30 **2022 Family Law Fall Institute - Day 2**
6.0 G
In-Person or Webcast
Center for Legal Education of NMSBF
www.sbnm.org

October

5 **Basics of Trust Accounting**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

6 **Communication Breakdown: It's Always The Same (But It's Avoidable)**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

7 **2022 Health Law Symposium**
3.5 G, 2.0 EP
In-Person or Webcast
Center for Legal Education of NMSBF
www.sbnm.org

12 **Mandatory Succession Planning: It Has To Happen, But It Doesn't Have To Be That Difficult**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

19 **Essential Law Firm Technology: The Best Of What's Out There**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

20 **2022 Solo & Small Firm Institute**
2.0 G, 4.0 EP
In-Person or Webcast
Center for Legal Education of NMSBF
www.sbnm.org

21-23, 28-30 **Taking and Defending Depositions**
20.0 G, 2.0 EP
In-Person
UNM School of Law
lawschool.unm.edu

24 **Social Media as Investigative Research and Evidence**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

25 **Identifying and Combating Gender Bias: Examining the Roles of Women Attorneys in Movies and TV**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

26 **Ethics of Social Media Research**
1.5 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

27 **Law Practice Management For New Lawyers**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

November

9 **Wait, My Parents Were Wrong? It's Not All About Me?**
3.0 EP
In-Person or Webinar
Center for Legal Education of NMSBF
www.sbnm.org

9 **Learn by Doing: An Afternoon of Legal Writing Exercises**
3.0 G
In-Person or Webinar
Center for Legal Education of NMSBF
www.sbnm.org

10 **The Paperless Law Firm: A Digital Dream**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

21 **Adobe Acrobat DC: The Basics for Lawyers and Legal Professionals**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

Opinions

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

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

Effective July 15, 2022

PUBLISHED OPINIONS

A-1-CA-37878	M Soon v. J Kammann	Reverse/Remand	07/11/2022

UNPUBLISHED OPINIONS

A-1-CA-38084	State v. O Zamora	Affirm/Reverse	07/11/2022
A-1-CA-38376	D Romero Jr. v. T Gurule-Giron	Affirm	07/11/2022
A-1-CA-38395	State v. D Hyams	Affirm	07/11/2022
A-1-CA-38706	G Lang v. Cielo Azul	Affirm	07/11/2022
A-1-CA-38972	State v. S Samuels	Reverse/Remand	07/11/2022
A-1-CA-39347	Century Bank v. L Cisneros	Affirm	07/11/2022
A-1-CA-39993	In the Matter of R Jones	Affirm	07/11/2022
A-1-CA-38851	State v. M Camden	Affirm	07/12/2022
A-1-CA-38212	E Akhadov v. V Dushdurova	Affirm	07/13/2022
A-1-CA-39458	E Akhadov v. V Dushdurova	Affirm	07/13/2022
A-1-CA-39954	CYFD v. Jennifer K.	Reverse/Remand	07/13/2022
A-1-CA-38974	M Galloway v. NM Office of the Superintendent of Insurance	Affirm	07/14/2022
A-1-CA-39003	State v. R Stewart	Affirm	07/14/2022
A-1-CA-40254	R Montoya v. NM Taxation & Revenue	Reverse	07/14/2022

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

DID YOU KNOW?

Pursuant to Rule 16-119 NMRA, effective October 1, 2022, every lawyer practicing law in the State of New Mexico must have a written succession plan, either alone or as part of a law firm plan.

As part of your annual registration statement beginning in the Fall of 2022, you will have to certify compliance with the Rule.

Beginning July 27, 2022 listen to a Succession Planning podcast on SBNM is Hear, and look for Succession Planning CLEs at the State Bar Annual Meeting in August 2022, and by webinar on September 13, 2022 and October 12, 2022.

For more information, please contact the State Bar Professional Development Program at 505-797-6079 or the State Bar Regulatory Programs at 505-797-6059.

This is how it is done.

By Sean FitzPatrick

In the practice of law, there will always be a type of law, a specific case or a specific fact that goes overlooked, simply because that is how it has always been done. I have seen it throughout my time as a young attorney. I haven't been practicing 30 years; only 10. But, in those ten years, it has been astonishing how many times I have been told, "this is how it's done."

As a law student when defending foreclosure cases during the housing crisis, and the bank didn't have the promissory note attached to the lending documents, I was told "this is how it's done." As a young lawyer questioning the practice of dismissing domestic violence cases when the victim did not want to testify, I was told, "this is how it's done." And every day since then, there are times when there is pressure to keep doing something just because "this is how it's done".

Standing up to question things decided, rather than by them, is a risky move in life and in law. It paints a target on your back and forces you to paddle upstream. The nail that sticks out gets pounded down after all. But what about the other saying, "the squeaky wheel gets the grease"? These sayings reflect the reality that preserving the status quo, not making waves, is more than just a legal phenomenon. Since 1988, it has been well documented that there is a strong bias for preserving the status quo. Samuelson, W., Zeckhauser, R. Status quo bias in decision making. *J Risk Uncertainty* 1, 7–59 (1988). https://doi.org/10.1007/BF00055564.

What is a healthy response to those times we are told to conform? Considering the unique pressures that come with establishing and maintaining a good reputation in the small legal community of New Mexico, that can be a stressful task. Fortunately, the Young Lawyer community in New Mexico has three distinct characteristics that help its individual members, young and old, respond to stresses in healthy ways:

1. **Mentorship**
2. **Diversity**
3. **Boundaries**

New Mexico has a mandatory Bridge the Gap mentorship program which connects young lawyers with more experienced ones. It was brand new when I graduated law school, and frankly, I thought it was superfluous. But mentorship is key to a healthy young lawyer. Not because every mentor is amazing, although that happened to be my experience. But because sometimes a mentor can teach you what you *don't* want to do.

Besides the substantive knowledge mentors can give, they can also be a safe sounding board. In a profession where there are not many absolutes, having a sounding board is essential and can be provided through mentorship. An old saying goes, you don't really understand something unless you can explain it to someone else. That goes both ways in the mentorship. See a recent ABA article on the subject: https://www.abajournal.com/voice/article/mentorship-its-not-all-about-the-mentee.

Peers can also be mentors. A term for this peer mentorship that gained popularity in 1991 is called "community of practice." The term was identified by Jean Lave and Etienne Wegner in the book Situated Learning. A general definition is, "a group of people who share a common concern, a set of problems or an interest in a topic and who come together to fulfill both individual and group goals." The Young Lawyers Division of the New Mexico State bar was that community of practice for me. Volunteer events, networking, public service, national and regional conferences and of course the Fit2Practice program all made me realize that not only *can* inexperienced lawyers put on great events that benefit Young

Lawyers and the public but that there is buy in from state and national institutions to get that important work done.

Diversity is the second critical component of a healthy legal community. Diversity brings different viewpoints and is a safeguard against groupthink. Groupthink is essentially a phenomenon where individuals go against their individual judgment in order to appease those in the group. Lots of research has been done on groupthink with most of it early on by Irvin Janis. The TLDR (too long didn't read) version is that, if there aren't enough varying perspectives, flaws in a course of action might be ignored.

Fortunately, New Mexico has been making improvements to its diversity. In 1988, there lawyers were 82% white and 72% male. In 2019, it is 66% white and 60 % male. https://www.sbnm.org/Leadership/Committees/Committee-on-Diversity-in-the-Legal-Profession/2019-Diversity-Survey-Recap. Making sure there are different backgrounds of people who practice law is one way to ensure diversity. Because the Young Lawyers division of New Mexico doesn't limit membership to practice area, the practice areas are also diverse.

I will never forget an American Bar Association conference in Boston where I attended a food safety litigation continuing legal education class. The presenters were: a Plaintiff's attorney and a Defense attorney. They frequently had cases against one another. It was one of the most engaging CLEs I have ever been to because of the divergent perspectives. Young lawyers in New Mexico have the opportunity to engage with members of their community in a non-adversarial environment through the state bar programs. That can serve to deescalate what has often been described as a too-adversarial system.

Boundaries are probably the most critical tool a young lawyer can use. Setting boundaries *before* becoming overwhelmed is the goal. It is hard to stop something from overflowing once it has already started to overflow. Here are a few that may help:

Don't read work email after work hours. Not only does this set a temporal boundary between work and home life but research shows that most poor decisions are made in the afternoon. In Daniel H Pink's book, *When, The Scientific Secrets Of Perfect Timing*, he points out countless examples of poor decision making that occur in the afternoon because most people are wired that way. Of course, know yourself and your deadlines when setting this rule. But keep in mind the anxiety that comes with work may cause an inability to sleep if you are unable to turn it off.

Wait to respond to particularly antagonistic messages. The old rule was to write a letter, stuff it in your desk and tear it up the next day. After you have had some time to think about it. That advice still has merit, although maybe you can save the ink. Putting your ideas down can help clarify your point but waiting at least a day if the issue is non-emergent can allow cooler heads to prevail.

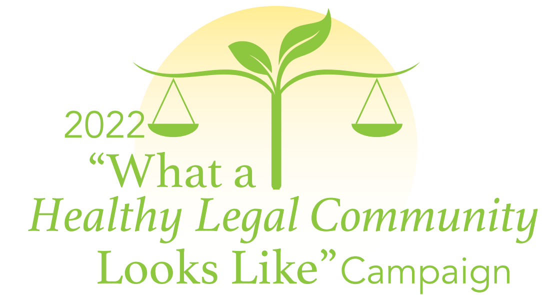
Say no. Some advice I received at an American Bar Association conference for young lawyers was to say "no." Doing so can prevent an overload of cases or commitments. The attorney who gave that advice passed on the advice that he received. Keep your head above water, but if you can't, close your mouth. Don't make something worse than it is if you control it. In this context, he meant not taking on additional work if you are already busy.

Express your boundaries to other people. People can't be expected to respect your choices if you don't communicate them. Setting the boundaries allows for self-determination, especially because you can decide when to cross them in exceptional circumstances.

Exercise your core. You have probably heard this one before. How it is a stress reducer, releases hormones and so on. But do you know who Peter Strick is? A good summary of his work in the Atlantic can be found here. https://www.theatlantic.com/science/archive/2016/08/cortical-adrenal-orchestra/496679/. The short version is there are real neural and physical processes that help humans be more resilient just by exercising their core muscles.

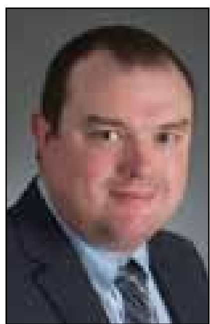
There are many more aspects that help create a healthy young lawyer community; too many for the purposes of this article. But in the context of this being how it is done, using the tools of diversity, mentorship and boundaries, young lawyers can challenge that assertion with this is how we do it. ■

Sean FitzPatrick is a graduate of UNM School of Law and is a sole practitioner at his firm FitzPatrick Law, LLC which he started in 2016. FitzPatrick's current practice area is civil litigation focusing on injury and insurance law in Albuquerque, N.M. FitzPatrick worked as a prosecutor in Farmington, NM litigating a variety of felony and misdemeanor cases for a few years after law school. Outside of work, you can find FitzPatrick running, biking, or participating in other 'type 2' fun activities with his wife Eva and their son Liam.

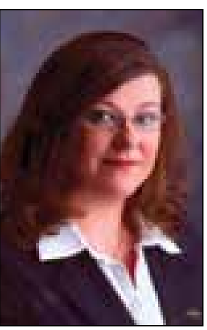


The New Mexico Criminal Defense Lawyers Association has selected **Kim Chavez Cook** for the 2022 Charles Driscoll Award. Chavez Cook, the chief Appellate Attorney for the state's Law Offices of the Public Defender, was selected by the 30 prior recipients of the Driscoll Award. Chavez Cook has prevailed on many significant legal rulings. and has served on the Sentencing Commission and Supreme Court Rules committees.

Chambers & Partners, publishers of Chambers USA, has ranked **Gallagher & Kennedy** as one of the best firms in Arizona and New Mexico. For 2022, Chambers USA recognized four practice areas and nine individual attorneys. The practice areas include Environment, Corporate/M&A, Litigation: General Commercial and Natural Resources & Environemt. The individual attorneys include **David P. Kimball III, Dalva L. Moellenberg, Anne Leary, Stanton Curry, Chris S. Leason, David Wallis, Lee Decker, Kevin E. O'Malley** and **Terence W. Thompson.**



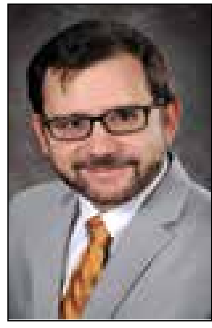
Charles J. Piechota has been re-appointed a Vice President at Sutin for a second term. He practices primarily in the areas of business and corporate law, mergers and acquisitions, intellectual property, liquor licensing and estate planning. He has lectured on subjects including mergers and acquisitions, business entity selection and estate planning. Piechota was named Top Corporate Attorney in the Albuquerque Journal's Readers' Choice Awards three years in a row.



Mariposa Padilla Sivage has been re-appointed as Secretary of Sutin, Thayer & Browne for a second term. She represents clients in a variety of civil and commercial litigation and has considerable experience in labor relations. She practices extensively in federal and state courts throughout New Mexico in complex litigation matters involving prison liability, construction claims, civil rights, and insurance and tort defense.

Holland & Hart announced that it earned 106 individual and 39 practice rankings in the 2022 edition of Chambers USA, an annual guide that ranks the leading lawyers and law firms across the USA. In New Mexico, the firm earned three individual and two practice rankings in Chambers USA 2022. For its individual rankings, Chambers USA selected Holland & Hart's **Michael Feldewert**, in Natural Resources & Environment law, **Larry Montaño**, in General Commercial law and **Adam Rankin**, practicing Natural Resources & Environment law. Holland & Hart's practice rankings in New Mexico include Litigation: General Commercial and Natural Resources & Environment.

Maria Montoya Chavez has been named a Vice President at Sutin. She joined Sutin in 2000, where she practices exclusively in the area of family law. Her expertise in Collaborative Divorce and serving as a mediator allows for parties to avoid court and remain in control of their process. Best Lawyers in America named her Albuquerque Lawyer of the Year in Family Law in 2020, and Albuquerque Lawyer of the Year in Family Law Mediation in both 2020 and 2022.



Eduardo A. "Eddie" Duffy has been named Treasurer. He has been in practice since 1995 and focuses his counsel in corporate and securities law, business transactions and public finance. He also advises companies and local governments in local economic development incentives. Duffy has been named Albuquerque Lawyer of the Year in Securities and Capital Markets Law in 2015, 2019, and 2021 by Best Lawyers in America.

Mathieu Cantou Clarke passed away in Santa Fe on March 18, 2022 at the age of 42. Matt was born on May 30, 1979 in Scottsdale to parents Cynthia D. Cantou Clarke and Charles L. Clarke. Matt graduated from Sandia Prep in Albuquerque in 1998, where he excelled in baseball and basketball and remained close to many special high school friends. He graduated from the George Washington University in Washington, DC in 2002 with a major in Political Science and a minor in History, enjoying the life that Washington, DC had to offer. While in Washington, Matt thrived on the political environment whether he was waiting tables or interning at City Hall. After returning to New Mexico in 2003, Matt graduated from the University of New Mexico School of Law and was admitted to the New Mexico State Bar in 2007. He practiced law as a district attorney, public defender, and in private practice. Matt was a passionate advocate for his clients and worked tirelessly to ensure they received fair treatment in the courts. In 2015, Matt founded his own business and enjoyed the challenges and rewards that came with being a business owner, which allowed his unique creativity and passion shine. Matt is preceded in death by his father, Chuck Clarke, his paternal grandparents June and Charlie Clarke of Los Angeles, and his maternal grandparents Emilio and Cecilia Cantou of Santa Fe. He is survived by his mother, Cynthia Cantou Clarke (Marvin Godner), aunts Yolanda Ogden (Ernie Padilla) and Meredith Moore (Greg), and by two incredible sons, Spencer Schardin Clarke and Duncan Schardin Clarke of Santa Fe. Spencer and Duncan were Matt's proudest achievement, and his love for them was unmistakable by anyone who saw them together or heard him talk about them. Matt's loyalty, humor and zest for life will never be forgotten by his family and large community of friends and colleagues.

We lost a devoted husband, wise father, gentle soul and champion of due process and constitutional rights on Monday, March 28, 2022, when **David Henderson** died unexpectedly on Lake Nicaragua near Ometepe Island in Central America. David was enjoying one of his favorite activities, paddleboarding, when he disappeared into the lake. He was a strong athlete and capable swimmer, making his inability to reach shore a painful mystery. David retired from the State of New Mexico, Public Defender's office in October of 2019 and joined his wife and soulmate, Catherine, at their home on Ometepe Island in Nicaragua. They assiduously planned for their retirement and had just begun their frolic and adventure when he was taken, much too soon. In Nicaragua, David and Catherine formed a charitable organization that develops farmers markets and distributes solar lights and books to remote families without electricity in the hopes of increasing literacy and building a new generation of leaders in Nicaragua. David attended The University of New Mexico School of Law where he met and fell in love with Catherine. After graduating, David was selected to serve as a law clerk to New Mexico Supreme Court Justice Richard Ransom. After his clerkship, David worked in private practice and as an appellate defender for the New Mexico Public Defender's office. He quickly distinguished himself as a brilliant attorney, keen analyst, and gifted writer who gave generously of his time and knowledge. He earned the respect and admiration of his colleagues and opponents for his intellect, legal acumen and acerbic wit. Through his advocacy David earned the "Fearless Defender Award" as New Mexico Chief Appellate Public Defender. His work produced groundbreaking law that guarantees all of us more civil rights and freedoms. Upon retirement David was looking forward to many adventures and bike rides with his sweetheart, Catherine (Cat). David was born in Lexington, Kentucky, lived in Missouri, Oregon and Hawaii before settling in New Mexico in 1985. He and Catherine graduated law school and moved to Santa Fe in 1988. They married in 1990 and together they have two sons, Lucas and Connor Henderson. David was the heart center of the family, always, patient, loving and wise. David is survived by his wife, Catherine Downing, his sons Lucas and Connor Henderson, his twin brother Dan Henderson, his older twin brothers, Mike Henderson and Mark Henderson, numerous adoring nieces and nephews, along with many, many more who loved him deeply. Everyone always wanted to spend more time with this man of great mind and heart. His family and friends are sad beyond measure. We will hold his spirit close forever. A celebration of David's life was held on April 23 at Meem Auditorium, New Mexico Museum of Indian Arts and Culture, 710 Camino Lejo, Santa Fe, NM.

Paul Anton Schweizer passed away unexpectedly on June 14, 2021. He was born on Dec. 12, 1966, to Fred and Connie Schweizer. He married Susan Kramer on August 4, 1990. Paul graduated from Lake Highlands High School in 1985. He attended The University of Texas in Austin, graduating in 1989. While at the university, he was a member of Phi Gamma Delta and active in student government. In his senior year, he was selected by the UT Parents' Association as The Most Outstanding Male Student. Paul graduated from The University of Texas School of Law in 1994. While there, he was an Associate Editor of the Texas Law Review. After graduating from law school, Paul joined a well-established firm before becoming a self-employed attorney. Although he had a long list of accomplishments and accolades, he felt the most important job he ever had was being a husband and dad. Family was of the utmost importance to Paul, and he made sure to let everyone know. Paul traveled extensively in Texas, the United States and various parts of the world. Favorite spots include Big Bend National Park, Alaska, Iceland, Hawaii, and most importantly, Santa Fe, New Mexico. However, his favorite part about traveling was simply spending time with family. When the boys were young, he regularly took them on what he called "Days Around Dallas". Taking his wife and mother out for impromptu drives and lunches was a frequent occurrence. Having been born and raised in Dallas, Paul had an immense love for White Rock Lake which was only a five-minute walk from his Lakewood home. He enjoyed watching his sons row, assisting with neighborhood projects, and spending time with his wife and dogs. Small gestures were also important to Paul, whether these gestures were reaching out to old friends while driving through their towns, sending small notes or gifts to let them know he was thinking of them or creating delicious meals for friends and family from whatever was in the fridge. He did each of these things with just as much thoughtfulness and care as the other, putting all other matters aside - even on the morning of his passing. Paul was a Christian man with a deeply rooted faith and an extremely strong moral compass. Surviving family members include his wife Susan, sons Will, Andrew, and Luke, mother Connie, sister Cindy, father-in-law Jerry, and mother-in-law Jane, sister-in-law Ann, brother-in-law Gary, niece Sarah, and dogs Roosevelt, Maverick and Sparky. He was predeceased by his father Fred. If desired, donations can be made to the Santa Fe Animal Shelter and Humane Society.

Graveside service for **Mr. Diwayne Irvin Gardner** was held Jan. 31, 2022, at Holy Rosary Cemetery with Father Bob Goodyear officiating. Visitation occurred on Jan. 30 at Tucker Gym. John E.

Stephens Chapel is in charge of arrangements. Mr. Gardner, 64, passed away Jan. 10 at his home in Albuquerque, N.M. He enjoyed golfing, traveling and visiting friends. He is preceded in death by his parents, Charles Elton Gardner and Allie Chickaway Cooke. Survivors include daughter, Jenilee C. Gardner; sister, Cynatta J. Gardner, Tanya D. Tullos, Shannon L. Cooke; brothers, Darrell P. Gardner, Faron Gardner, Reginald C. Gardner; 3 grandchildren, Mia Bagamaspad, Chloe Bagamaspad, Jaxon Vidal. Pallbearers include Leonard Jimmie, Carl D. Chickaway, Christopher Chickaway, Kendall Williams, Jalen D. Willis, Michael Tullos, Willard Bacon, Jr., Brandon Gardner.

Judge William W. Bivins died June 2, 2022 in Gilbert, Ariz., of complications from Covid-19. He was 91. William Wilder Bivins was born in Nashville, Tenn., on Jan. 15, 1931. He went to Davidson College and Vanderbilt Law School. He served as a Lieutenant in the U.S. Army, where he was a star player for the Army tennis team. In 1958, Bivins moved to Las Cruces, N.M. to practice law. In 1982, he was elected to the New Mexico Court of Appeals in Santa Fe. He served part of his tenure as Chief Judge and was named Outstanding Judge of the Year in 1990. After retirement, Judge Bivins returned to Nashville where he engaged in volunteer work: teaching remedial reading, English as a second language and public speaking. In 2017, he moved to Gilbert, Ariz., to be near his daughter and her family. He is author of the novella "I Am a Part of All that I Have Met." He was married twice: to Mary Stahmann, then to Linda Roether. Though he never remarried after his second marriage, he reconnected in Nashville with a childhood sweetheart, Mary Follin, with whom he enjoyed a loving relationship for many years. Mary Follin predeceased him. Judge Bivins is survived by his children: William Bivins, Jr., Dean Bivins, Jonathan Bivins and Alli Bongianni; and five grandchildren: Samuel Bivins, Zachary Bivins, Claire Bivins, Nicolas Bongianni and Olivia Bongianni.

Max H. Proctor, 72, beloved Husband, Father, Brother, and Grandfather, was called to his eternal resting place on March 3, 2022. He entered this world on June 30, 1949, in Denton, Texas, born to Billy and Alice Proctor. He is survived by his wife Tami Proctor; daughters Keely Smith and Haley Carr; son Zachary Proctor; brother Joel Proctor; grandchildren Dylan Smith, Jude Smith, Jacoby Carr, Crosby Carr, and Teagan Proctor, three loved step children Ashton Zembas, Kristen Stegemoeller, Kolin Zembas, and grandsons Landon Tanier Zembas and Harper Lee Stegemoeller (expected 04/22). Max was a proud former Hobbs Eagle. His fondest memories were of his time playing basketball for the Eagles from 1965-1967. Max went on to play basketball for Fort Lewis College and was inducted into the Fort Lewis College Athletic Hall of Fame in 1995. After coaching J.V. Basketball for Clovis H.S. from 1971-1973, he attended Texas Tech University Law School. Prior to the start of his law career, Max had a professional try-out with the San Antonio Spurs of the American Basketball League. Max began practicing law in Texas and New Mexico in 1976. Max practiced law for the last 40 years. In 2012, he co-authored the book, "The Hobbs Eagle Press", to honor his beloved former coach, Ralph Tasker. Max was preceded in death by his parents Billy and Alice Proctor; grandson Fitz Carr.

It is with sadness that we share that our good friend and former Bar Commissioner, **Tom Popejoy**, died peacefully in May at his home in Harpswell, Maine, from complications of Covid. He was surrounded by his wife and family and friends. Tom was born in 1943 and raised in Albuquerque. He attended the University of New Mexico where he was active on the student council, as well as various campus activities and from where he graduated in 1966. At graduation, he was accepted, and planned to attend, Cornell Law School. Fate stepped in as, at that time, the band he played in, "The Sidewinders", accepted offers to play in Denver, Colorado where it performed and made a record that sold several thousand copies. It was also at this time that Tom and the love of his life, Suzie, were married. When Tom determined the band was not going on to greater glory, and he was not going to be a "rock star", he returned to his interest in the law. He attended UNM College of Law where he graduated at the top of his class and was editor of the New Mexico Law Review and the Natural Resources Journal. Following graduation from law school, Tom first went to work for the law firm of Sutin, Thayer and Browne in Albuquerque. Tom subsequently formed his own firm and formed a long-time partnership with Ken Leach; he was a sole practitioner for a time, and eventually partnered with Greg Mackenzie. Throughout his legal practice, his work emphasized trusts, estates, and litigation. During this time, Tom was also very active in the law and the legal community where he served, among other organizations, as the President of the New Mexico Trial Lawyers, served as a Bar Commissioner and was a member of the Disciplinary Board. Tom also published a well-known legal newspaper and served on various community committees such as Share your Care, among many others. Tom also served as a Trustee of the Village of Los Ranchos where he and Suzie were a mainstay in the Village and where both worked tirelessly to preserve the rural culture of the Village. In addition to all of these legal and community activities, Tom found time to start "The Lawyers Club" the sole purpose of which was to improve relations among lawyers by having monthly meetings with speakers and discussions to improve the quality of lawyering in Albuquerque. During this time, Tom was awarded the "Ralph Nader Award" for his representation (along with Daymon Ely and Bill Walker) of clients in a significant "pro-bono" case. Tom also served on the National Board for the Restatement of Trust publication. Later in his career, Tom became the head of the Trust Department for New Mexico Bank and Trust and it was from that position that Tom retired at age 66. When Tom and Suzie's long awaited first grandchild was born, they began spending 2-3 months every summer in New York City where their children lived and worked. In December 2019, they bought a home in Harpswell, Maine to be closer to family. It was there that Tom contracted Covid and died. Tom is survived by his wife of 55 years, Suzanne Lowell Popejoy; his children: T.L. Popejoy (Thomas L. Popejoy lll) and his wife Margaret Staruszkiewicz of NYC; Stuart L. Popejoy and his wife, Sarah Bernstein, of NYC; two grandchildren: Phaedra Staruszkiewicz-Popejoy and Aldous Staruszkiewicz-Popejoy. It is hoped there will be a "Celebration of Tom's Life" in the fall, the exact date and time of this event will be shared once the arrangements are completed. The family extends their thanks and gratitude to all their friends in New Mexico who made Tom's life, and theirs, so fulfilled.

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Elizabeth A. Garcia, Chief Clerk of the New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Clerk's Certificate of Admission

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From the New Mexico Supreme Court

Opinion Number: 2022-NMSC-012
No: S-1-SC-37558 (filed February 9, 2022)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
HENRY HILDRETH JR.,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Robert A. Aragon, District Judge

Released for Publication March 29, 2022.

Bennett J. Baur, Chief Public Defender
Caitlin C. M. Smith, Assistant
Appellate Defender
Santa Fe, NM

for Petitioner

Hector H. Balderas, Attorney General
Emily C. Tyson-Jorgenson, Assistant
Attorney General
Santa Fe, NM

for Respondent

OPINION

VIGIL, Chief Justice.

{1} This case presents a question of first impression: whether judicial conduct at trial may result in a bar to retrial under the double jeopardy clause of the New Mexico Constitution, and if so, whether the district court judge's conduct in this case bars retrial. *See* N.M. Const. art. II, § 15 (prohibiting any person from being "twice put in jeopardy for the same offense"). We hold that judicial conduct may result in a bar to retrial under the New Mexico Constitution and that the judicial conduct in this case bars Defendant's retrial.

I. BACKGROUND

A. The District Court Proceedings

{2} A criminal complaint was filed in the district court on September 9, 2016, charging Defendant Henry Hildreth, Jr., with felony aggravated battery against a household member with great bodily harm, misdemeanor aggravated battery against a household member without great bodily harm, and unlawful taking of a motor vehicle. NMSA 1978, § 30-3-16(B), (C) (2008, amended 2018); NMSA 1978, § 30-16D-1 (2009). At the arraignment the following month, Defendant was found to be indigent, and Steven Seeger was appointed to represent him. Trial was set for March 14, 2017, on a trailing docket.

{3} The State belatedly filed its witness list on March 1, 2017, and eight days later, on March 9, 2017, filed an amended witness list to correct an address. That same day, nine days after the discovery deadline and five days before trial, the State provided Defendant with a CD containing audio recordings of statements made by the State's witnesses and Defendant in interviews with the police.

{4} The day after receiving the CD, on Friday, March 10, 2017, Seeger filed a motion to continue the jury trial. Seeger argued that he needed more time to review the CD in order to adequately prepare for trial and that, without more time to prepare, Defendant would be denied his right to effective assistance of counsel. That same day, the parties appeared before the judge for a pretrial conference.

{5} At the pretrial conference, the judge denied the motion for continuance without hearing any argument. From that point forward, Seeger remained determined to get a continuance, and the judge remained committed to proceed with trial as scheduled. Their intransigence forms the root of the issue in this case.

{6} In response to the judge's denial of his motion to continue, Seeger told the judge that he would not be ready for trial. He stated that he would "be present but not participate." The judge responded that "[i]f that is true, then [Defendant] would have . . . excellent grounds for appeal on incompetency of counsel." The judge told Seeger that if he objected to the State's untimely discovery, he could file a motion, and it would be heard before trial. Seeger did just that.

{7} Seeger filed a motion for sanctions on March 13, 2017, the day before trial, asking the judge to prevent any of the State's identified witnesses from testifying. In its written response, the State acknowledged that its discovery was late. With respect to the CD, the State asserted that it was not within the State's "control" until March 9, 2017, and it was made available to Seeger that same day. The State asserted that sanctions were not appropriate, but if the judge was inclined to grant any sanctions, the less punitive sanction of a continuance instead of preventing any of the State's witness from testifying was appropriate.

{8} At the motion hearing, held on March 14, 2017, the first day of the trial, Seeger argued that due to the untimely discovery disclosures, the State should be prohibited from calling any witnesses. With regard to the CD, Seeger asserted that it might contain a "prior statement of [a] witness, and [that he had] not had an opportunity to listen to it to see whether it ha[d] potential material for cross-examination" or exculpatory information. In response to a question from the judge regarding whether the State intended to actually use the CD during trial, the prosecutor said, "it's nothing that the State would have presented today." The State then again requested that if sanctions were imposed, the sanction be a continuance rather than exclusion of its witnesses. The judge denied the motion and imposed no sanctions. The trial then started.

{9} During the trial, Seeger refused to participate in voir dire, challenge any jurors, examine any witnesses, or participate in the selection of jury instructions. Seeger also declined to proffer an opening statement or a closing statement. However, he made three motions for mistrial—all based on assertions of ineffective assistance of counsel resulting from the State's late disclosures, and, consequently, his asserted inability to prepare for trial.

{10} Seeger first moved for a mistrial shortly after the jury was sworn in. The judge immediately denied the motion and the trial proceeded. The State then called two of its three witnesses before the lunch hour. These were the victim and an eyewitness to the alleged aggravated battery. Seeger did not cross-examine either one.

{11} After the lunch break, Seeger again moved for a continuance or mistrial based on the late discovery. Seeger told the judge that during lunch he reviewed the writing on the CD and discovered that it contained statements from the two witnesses who had testified that morning, another witness, and Defendant. Seeger argued that as a result of the State's late disclosures, he did not have a chance to listen to the CD or get the statements on the CD "transcribed to use [for] potential cross-examination." Seeger noted that he did not know what exculpatory information or prior inconsistent statements were on the CD and renewed his prior motion for a continuance or mistrial.

{12} The State's response was that the CD was handed over to Seeger on March 9, 2017, the day it was received at the district attorney's office. In response to questioning from the judge, however, the prosecutor confirmed that the police officer who investigated the case was in possession of the CD before he turned it in to the district attorney's office. Moreover, in a subsequent filing the prosecutor disclosed that the police officer's report describing the interviews and confirming that they were recorded was received by the district attorney's office seven days after the offense, on June 30, 2016.

{13} The judge then turned back to Seeger and asked why he had not reviewed the CD in the intervening days between his receipt of it and the trial. Seeger answered that on the following day, he was either in court or in the process of reviewing the public defender cases of a contract attorney who had suddenly passed away so those cases could be reassigned to new attorneys. On the weekend, he continued reviewing the files and attended the viewing of his deceased colleague, and he had "no time" to review the CD the following Monday, the day before the trial. The judge denied the motions, concluding that there had been "no showing of prejudice to the court." Based on the prosecutor's concession that the CD had been in a State agent's possession, the judge also admonished the prosecutor that "[t]here is no distinction made between the agents of the State. The State is the State."

{14} Despite Seeger's efforts, the judge allowed trial to proceed. Before closing arguments, Seeger again moved for mistrial. And again, the judge denied his motion. The jury found Defendant guilty of felony aggravated battery against a household member with great bodily harm, and Defendant appealed to the Court of Appeals.

B. The Court of Appeals' Opinion

{15} In the Court of Appeals, "Defendant argue[d], and the State concede[d], that Defendant was denied his constitutional right to assistance of counsel." *State v. Hildreth*, 2019-NMCA-047, ¶ 1, 448 P.3d 585. Defendant also argued that "the district court judge's conduct during trial should bar [Defendant's] retrial on double jeopardy grounds." *Id.*

{16} The Court of Appeals concluded that Defendant was denied his constitutional right to effective assistance of counsel and reversed Defendant's conviction. *Id.* The Court of Appeals reasoned that "Seeger's conduct rose to the level of a constructive denial of counsel sufficient to create a presumption of prejudice." *Id.* ¶ 14.

{17} Turning to Defendant's double jeopardy argument, the Court of Appeals acknowledged that "Seeger's adamant refusal to provide his client with a defense in a felony trial and the district judge's decision to proceed with such a trial in circumstances where some form of guilty verdict was not only a near certainty, but had no realistic chance of being upheld on appeal," created an "unusual and unseemly situation." *Id.* ¶ 16. Nevertheless, the Court of Appeals rejected Defendant's argument that retrial was barred under the three-part test set forth in *State v. Breit*, 1996-NMSC-067, ¶ 32, 122 N.M. 655, 930 P.2d 792. *Hildreth*, 2019-NMCA-047, ¶¶ 17, 20. The Court of Appeals determined that *Breit* had "no bearing" on the case and even if it did, "the district court judge . . . acted appropriately and appeared impartial throughout the proceedings." *Id.* ¶ 20. In analyzing whether the *Breit* test would be satisfied if it did apply, the Court of Appeals focused on the judge's demeanor, his tone of voice, and his efforts "to avoid interrupting Seeger." *Id.* Based on this analysis, the Court of Appeals held that the judge's conduct did not bar retrial, reversed Defendant's conviction based on ineffective assistance of counsel, and remanded the case for retrial. *Id.* ¶¶ 15, 20, 21.

{18} Defendant petitioned this Court for a writ of certiorari to review the Court of Appeals' conclusion that *Breit* does not apply, and even if it does, the judge's conduct did not meet *Breit*'s criteria to bar retrial.

II. DISCUSSION

A. Standard of Review

{19} At issue in this case is whether judicial conduct may result in a bar to retrial under the New Mexico Constitution. N.M. Const. art. II, § 15. "A double jeopardy claim is a question of law that we review de novo." *State v. Bernal,* 2006-NMSC-050, ¶ 6, 140 N.M. 644, 146 P.3d 289.

B. *Breit* Applies to Judicial Conduct

{20} The State contends that because the facts of *Breit* concerned prosecutorial misconduct, the *Breit* test was meant to be limited to prosecutors and does not apply to judicial conduct. We disagree. The language of the *Breit* test itself and its history support its application to judges.

{21} Breit directs that retrial is barred when (1) the "improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial," (2) "the official knows that the conduct is improper and prejudicial," and (3) "the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal." 1996-NMSC-067, ¶ 32. This language is not on its face limited to prosecutorial conduct. In fact, the reference to the "official" and "official misconduct" is certainly broad enough to include judicial conduct. This was no accident.

{22} Both New Mexico and federal precedent influenced the language of the *Breit* test. In *State v. Day*, although we held retrial was not barred under those facts, we noted that double jeopardy barred retrial when "the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials." 1980-NMSC-032, ¶ 15, 94 N.M. 753, 617 P.2d 142, *cert. denied*, 449 U.S. 860 (1980). "This standard was an amalgam of various pronouncements by the United States Supreme Court." *Breit*, 1996-NMSC-067, ¶ 26. For example, *Day* referred with approval to the standard in *United States v. Dinitz*:

> The Double Jeopardy Clause does protect a defendant against *governmental actions* intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where bad-faith conduct *by judge or prosecutor* threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant.

424 U.S. 600, 611 (1976) (alteration, internal quotation marks, and citation omitted) (emphasis added); *Day*, 1980-NMSC-032, ¶ 11. In fact, "[a]ll of the elements of the rule adopted by *Day* were included in [the] double-jeopardy standard set forth earlier" in *Dinitz*. *Breit*, 1996-NMSC-067, ¶ 26. *Day* also endorsed *United States v. Jorn*, which provided, "where a defendant's mistrial motion is necessitated by *judicial or prosecutorial* impropriety designed to avoid an acquittal, reprosecution might well be barred." 400 U.S. 470, 485 n.12 (1971) (emphasis added); *Day*, 1980-NMSC-032, ¶ 13.

{23} Following *Day*, the United States Supreme Court issued its opinion in *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982), which narrowed the federal double jeopardy rule. *See Breit*, 1996-NMSC-067, ¶ 26 ("[T]he federal cases upon which we based our double-jeopardy rule in *Day* were narrowly restricted by *Kennedy* to a rule based upon prosecutorial intent."). But in *Breit*, we rejected this narrow approach, concluding that "when this Court derives an interpretation of New Mexico law from a federal opinion, our decision remains the law of New Mexico even if federal doctrine should later change." 1996-NMSC-067, ¶¶ 26, 27. Instead, we adopted a test that was "implicit in *Day*." *Id.* ¶ 32. We utilized a "'willful disregard'" standard that "encompass[ed] and augment[ed] the circumstances implicated by the rule in *Day*." *Id.* ¶ 36. One such circumstance was judicial impropriety. *See id.* ¶ 26. Because of this, we used the language "improper *official* conduct," *id.* ¶ 32 (emphasis added), rather than "prosecutorial misconduct," as used in *Day* to accurately capture the scope of the double jeopardy bar. *Day*, 1980-NMSC-032, ¶¶ 2, 5.

{24} Thus, based on the language of *Breit* itself and the history behind its adoption, we conclude that *Breit* applies to judicial conduct.

C. The Judge's Conduct Satisfies the *Breit* Test

{25} Having determined that *Breit* applies to judges, we turn to whether the judge's conduct in this case satisfies the three prongs of the *Breit* test. We review each prong in turn.

1. The first *Breit* prong

{26} Under this prong, we are required to determine if the judge's conduct was "so unfairly prejudicial to [Defendant] that it [could not] be cured by means short of a mistrial or a motion for a new trial." *Breit*, 1996-NMSC-067, ¶ 32.

{27} In its analysis, the Court of Appeals focused on the tone and demeanor of the judge before the jury to conclude that the judge's conduct was not improper. *Hildreth*, 2019-NMCA-047, ¶ 20. The Court of Appeals "listened to the entire audio recording of the trial," focusing on the "judge's tone of voice" which "sounded" appropriate and proper. *Id.* The Court of Appeals noted that "[t]he judge did not raise his voice, . . . kept his commentary on Seeger's actions to a minimum in front of the jury[, and] . . . repeatedly gave Seeger the opportunity to change course and actively participate in the trial proceedings." *Id.* The Court of Appeals determined that because the judge did not sound dismissive or biased, the judge's conduct was not improper. *Id.* This is where the Court of Appeals erred in its analysis.

{28} While the tone and content of remarks may be considered when determining whether an official's conduct was improper, *see Breit*, 1996-NMSC-067, ¶¶ 41-44, these considerations are not dispositive. Rather, we must "carefully examine the [official's] conduct in light of the totality of the circumstances of the trial," *id.* ¶ 40, and assess "the *effect*" the official's conduct had on the defendant. *State v. McClaugherty*, 2008-NMSC-044, ¶ 26, 144 N.M. 483, 188 P.3d 1234.

{29} Looking to the totality of the circumstances of the trial, we repeat that this was a battle between Seeger and the judge over whether a continuance was warranted or trial should proceed as scheduled. The denial of Seeger's repeated requests for a continuance resulted in repeated motions for a mistrial. These procedural maneuvers between Seeger and the judge deprived Defendant of his constitutional right to the effective assistance of counsel, prompting us to consider the circumstances under which the denial of a continuance is an abuse of discretion because it causes undue prejudice to a defendant.

{30} In *State v. Salazar*, we concluded that "our case law requires the trial court to consider the *Torres* factors initially in evaluating a motion for a continuance." *State v. Salazar*, 2007-NMSC-004, ¶ 27, 141 N.M. 148, 152 P.3d 135 (citing *State v. Torres*, 1999-NMSC-010, 127 N.M. 20, 976 P.2d 20). As reiterated by the *Salazar* Court, the *Torres* factors include:

> the length of the requested delay, the likelihood that a delay would accomplish the movant's objectives, the existence of previous continuances in the same matter, the degree of inconvenience to the parties and to the court, legitimacy in motives in requesting the continuance, fault of the movant in causing a need for delay, and the prejudice to the movant in denying that motion.

Salazar, 2007-NMSC-004, ¶ 14 (citing *Torres*, 1999-NMSC-010, ¶ 10). "In addition to meeting the *Torres* factors, [the d] efendant must show that the denial of the continuance prejudiced him." *Salazar*, 2007-NMSC-004, ¶ 16.

{31} In *Salazar*, we noted the prejudice to the defendant by the late discovery of a videotape and the effect it had on defense counsel's cross-examination of a witness. *Id.* ¶¶ 7, 23. We determined "that the trial court abused its discretion in denying [the d]efendant's motion" for a continuance because "[t]here had been no previous continuances, . . . the State did not oppose [the] continuance," and "[the d]efendant was not at fault for causing the delay." *Id.* ¶¶ 1, 21. We concluded by stating that "if the motion for a continuance depends on a claim that, absent a continuance, the defendant will have been or will be denied effective assistance of counsel, *Brazeal* offers guidance on how that claim should be analyzed," but "that standard should play a subsequent, even subsidiary role to the *Torres* factors and analysis." *Id.* ¶¶ 27-28 (citing *State v. Brazeal*, 1990-NMCA-010, ¶ 15, 109 N.M. 752, 790 P.2d 1033).

{32} In *Brazeal*, our Court of Appeals set forth a two-prong analysis to determine whether the denial of the continuance amounts to ineffective assistance of counsel. 1990-NMCA-010, ¶ 15. The first consideration is whether "a per se violation of [the] defendant's constitutional rights" has occurred—"in other words, whether we can *presume* . . . that [the] defendant suffered from ineffective assistance of counsel because of the denial of a continuance." *Id.* The second consideration is the defendant's specific claims of ineffective assistance of counsel. *Id.* The circumstances in which prejudice to the defendant can be presumed include: "(1) denial of counsel altogether; (2) defense counsel's failure 'to subject the prosecution's case to meaningful adversarial testing'; and (3) when the accused is 'denied the right of effective cross-examination.'" *State v. Grogan*, 2007-NMSC-039, ¶ 12, 142 N.M. 107, 163 P.3d 494 (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)).

{33} With this background in mind, we begin with the judge's denial of Seeger's first motion for a continuance. Although there had been no previous continuances, we cannot say that the judge's conduct was improper in denying this motion. To be sure, the State provided late discovery of the CD, but in looking to the *Torres* factors, as mandated by *Salazar*, the degree of inconvenience to the parties, legitimacy of motives, and prejudice to Defendant were unknown at this time. *Salazar*, 2007-NMSC-004, ¶¶ 27-28. Seeger's comment that he would "not participate" at trial does not change this determination. The judge could not know whether Seeger would remain true to his word, as evinced by the judge's response, "*[i]f that is true*, then [Defendant] would have . . . excellent grounds for appeal." (Emphasis added.)

{34} At the motion hearing the morning of the trial, Seeger argued for sanctions because of the late discovery. Again, he argued that the CD *might* contain prior statements of a witness and that he had not had an opportunity to review it for exculpatory material. Apparently acting on the State's assurance that the CD was "nothing that the State would have presented today," the judge denied the motion for sanctions. Again, there was no abuse of discretion and the trial commenced.

{35} At trial, the judge watched as Seeger refused to participate in voir dire, juror challenges, opening statement, and witness examination. After the jury was sworn and Seeger made his first motion for mistrial, the judge asked Seeger to confirm "that [Seeger was] not going to defend this man," to which Seeger replied, "[c]orrect." The trial continued and the State called two of its three witnesses. Seeger did not cross-examine either witness.

{36} By this time Seeger's voluntary posture of determined inaction precluded any "meaningful adversarial testing" and denied Defendant "the right of effective cross-examination." *Grogan*, 2007-NMSC-039, ¶ 12 (internal quotation marks and citation omitted). Thus, "Seeger's conduct rose to the level of a constructive denial of counsel sufficient to create a presumption of prejudice." *Hildreth*, 2019-NMCA-047, ¶ 14. By now, it was clear that Defendant was being denied his right to effective assistance of counsel, but that is not the question before us. The question is whether the judge's conduct was "so prejudicial as to cause a mistrial or new trial." *Breit*, 1996-NMSC-067, ¶ 33.

{37} After lunch, Seeger renewed the motions for mistrial or continuance. At this moment in the trial, the judge's conduct became "so unfairly prejudicial to [Defendant] that it [could not] be cured by means short of a mistrial or a motion for a new trial." *Breit*, 1996-NMSC-067, ¶ 32. This time, Seeger told the judge what was on the CD: statements from Defendant and the State's two witnesses who testified that morning. At this time, the judge knew that there was no meaningful adversarial testing of the State's case, that Defendant was denied his right to effective cross-examination, that the State misled the court by declaring that it would not use the CD but then calling two witnesses whose prior statements were on the CD, and that Seeger had no role in the State's failure to provide the CD less than a week prior to trial. The judge's denial of a continuance under these circumstances was unfairly prejudicial to Defendant.

{38} These facts are similar to those in *Salazar*—there had been no previous continuances, the defense was not at fault for causing the delay, and the late discovery provided by the State prejudiced defense counsel's cross-examination of witnesses—but here we also have a headstrong attorney refusing to participate in a criminal trial. *Salazar*, 2007-NMSC-004, ¶¶ 7, 21-23. Yet, despite the *Torres* factors weighing in favor of granting a continuance and allowing Defendant to develop a defense, the judge—equally obstinate—remained resolute in maintaining the trial docket. It was at this point in the trial that the judge had an affirmative obligation to do something: grant a continuance, declare a mistrial, or impose sanctions. However, the judge failed to undertake any measures to protect the constitutional rights of Defendant and the integrity of the court. *See Grogan*, 2007-NMSC-039, ¶ 10 ("[I]n cases of obvious ineffective assistance of counsel, the trial judge has the duty to maintain the integrity of the court, and thus inquire into the representation."); *see also Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) ("The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court.").

{39} Returning to *Breit*, the judge's decision to allow the trial to proceed in light of the facts before him was conduct so unfairly prejudicial to Defendant that it could not be cured short of a mistrial or new trial. We conclude that the first prong of the *Breit* analysis is satisfied.

{40} Before turning to the second *Breit* prong, we take this opportunity to note that our determination that the judge's conduct was improper and unfairly prejudicial to Defendant should in no way be construed as a validation of Seeger's actions. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("[A] counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case."), *superseded on other grounds by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *see also Martin v. Rose*, 744 F.2d 1245, 1250-52 (6th Cir. 1984) (concluding that defense counsel's decision to "abandon all attempts to defend his client at trial" was a "bizarre and irresponsible stratagem" that amounted to constitutional error). "[A]ttorneys in New Mexico are not empowered with decisional autonomy regarding when trials commence and when they do not commence. District courts are." *Hildreth*, 2019-NMCA-047, ¶ 16. Seeger had an obligation to preserve the record with a focus on the specific facts in support of a continuance and to demonstrate how the denial of the continuance was prejudicial to Defendant, while not abdicating his role as Defendant's attorney. *See Salazar*, 2007-NMSC-004, ¶¶ 15-16 (factors to be considered when "evaluating a trial court decision granting or denying a motion for continuance").

{41} That said, we echo the guidance offered to our district courts by the Court of Appeals as to how to respond when an attorney is threatening to withdraw from participation in a criminal trial. "[T]he district court can order new counsel to represent the defendant," it can "impose a sanction on the culpable attorney while at the same time granting a continuance," or, should "the attorney still refuse[] to participate in the face of a clear order to do so, the court can invoke its contempt powers against the obstructionist attorney." *Hildreth*, 2019-NMCA-047, ¶ 16. Additionally, the court could "question the defendant to determine whether he [or she] understands the implications and consequences of the attorney's proposed tactic and agrees to waive his [or her] right to effective assistance of counsel at trial." *Martin*, 744 F.2d at 1251-52; *see State v. Chapman*, 1986-NMSC-037, ¶ 10, 104 N.M. 324, 721 P.2d 392 ("[T]he trial court must determine if a defendant is making a knowing and intelligent waiver of counsel and fully understands the dangers of self-representation.").

2. The second *Breit* prong

{42} The second prong of the *Breit* test focuses on the effect of the official's conduct on the defendant, "regardless of the [official's] intent," to determine whether the official knows that its conduct is improper. *McClaugherty*, 2008-NMSC-044, ¶ 26. As we stated in *McClaugherty*, "[w]e cannot overemphasize or overstate that this is an objective standard, not a subjective one: the belief of the [official] regarding his or her own conduct is irrelevant in this analysis." *Id.* ¶ 27. "[T]here must be a point at which lawyers [and judges] are conclusively presumed to know what is proper and what is not." *Id.* ¶ 49 (first alteration in original) (internal quotation marks and citation omitted). Or said another way, "*Breit*'s knowledge test [is] satisfied by presuming knowledge on the part of" the official if the rule is of the kind "that every legal professional, no matter how inexperienced, is charged with knowing." *Id.* ¶¶ 49-50 (internal quotation marks and citation omitted). Under this standard, the law presumes that the judge here knew "that [counsel's] conduct [was] improper and prejudicial." *Breit*, 1996-NMSC-067, ¶ 32.

{43} We again focus on the motion for mistrial or continuance following the lunch break. By this time, Seeger's inaction had created a "presumption of prejudice" against Defendant because there had been no meaningful adversarial testing of the prosecution's case or effective cross-examination. *Hildreth*, 2019-NMCA-047, ¶ 14. The concept that there is a "presumption of prejudice" to a defendant in such circumstances is not new to New Mexico. *See Grogan*, 2007-NMSC-039, ¶ 12 (including lack of meaningful adversarial testing of the prosecution's case and effective cross-examination as circumstances under which there is a presumption of prejudice to a defendant (citing *Cronic*, 466 U.S. at 659 (internal quotation marks and citation omitted))).

Further, this is no subtle point of law—effective assistance of counsel requires more than an attorney simply being present at trial. *See Cronic*, 466 U.S. at 659 ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then . . . the adversary process itself [is] presumptively unreliable."). Given the judge's knowledge of Seeger's inaction, coupled with the new information relayed to the judge that the CD contained statements from the State's two witnesses who had testified the morning of the trial as well as Defendant and our case law regarding when prejudice is presumed and when it is an abuse of discretion to deny a continuance, we know of no calculus by which to justify the judge's refusal to grant a continuance, mistrial, or sanctions—let alone allow the trial to proceed to its end.

{44} We conclude that the law clearly presumes that the judge knew it would be improper to proceed with trial under the circumstances. The second prong of *Breit* is met.

3. The third *Breit* prong

{45} We conclude that the judge acted "in willful disregard of the resulting mistrial, retrial, or reversal" by allowing the trial to proceed under the circumstances. *Breit*, 1996-NMSC-067, ¶ 32. When analyzing the third prong of *Breit*, the appellate court "will carefully examine the [official's] conduct in light of the totality of the circumstances of the trial," and determine whether the conduct amounts to "willful disregard of the resulting mistrial, retrial, or reversal." *Id.* ¶ 40. In *Breit*, we defined "willful disregard" as "a conscious and purposeful decision by the [official] to dismiss any concern that his or her conduct may lead to a mistrial or reversal," while "emphasizing that the [official] is actually aware, or is presumed to be aware, of the potential consequences of his or her actions." *Id.* ¶ 34 (internal quotation marks omitted).

{46} The State argues that the judge did not act in willful disregard of a possible reversal because he gave Seeger every opportunity to participate. The State contends that even if the judge knew of Seeger's intention to not participate at trial, he could not take Seeger's "threat to violate his client's constitutional rights at face value." The State asserts that after witnessing Seeger refuse to participate in jury selection, the judge "could have reasonably assumed that, once trial began in earnest, Seeger would fulfill his duty to represent Defendant." We are not persuaded.

{47} The totality of the trial demonstrates that the judge made a "conscious and purposeful decision" to proceed with trial despite any concern that his conduct may result in reversal. *Breit*, 1996-NMSC-067, ¶ 34. The State's argument that the judge did not know whether Seeger would represent his client "once trial began in earnest," neglects the fact that the judge had witnessed Seeger fail to participate in voir dire, juror challenges, opening statement, and witness examination by the time Seeger made his second motion for mistrial.

{48} Additionally, the judge acknowledged the likelihood of a reversal on appeal when he stated that Defendant "would have . . . excellent grounds for appeal on incompetency of counsel," if Seeger did not participate. And after lunch, it became clear that it was not just that Defendant had been denied effective assistance of counsel, but that Defendant had also been prejudiced by the State's late disclosures. The judge is presumed to be aware that by continuing with a trial where Defendant was not represented and where Defendant was prejudiced by the State's late disclosures, the result "may lead to a mistrial or reversal." *Breit*, 1996-NMSC-067, ¶ 34. Again, this is no "subtle point of law, and one we can presume any . . . attorney [or judge] to know." *McClaugherty*, 2008-NMSC-044, ¶ 65 (internal quotation marks and citation omitted).

{49} Accordingly, we conclude that under the narrow facts of this case, the judge acted in willful disregard of the resulting reversal thus satisfying the third prong of *Breit*. Retrial is barred.

III. CONCLUSION

{50} We affirm the Court of Appeals' reversal of Defendant's conviction, reverse the Court of Appeals' determination and application of *Breit*, and remand to the district court for further proceedings in accordance with this opinion.

{51} IT IS SO ORDERED.

MICHAEL E. VIGIL, Chief Justice

WE CONCUR:

C. SHANNON BACON, Justice

DAVID K. THOMSON, Justice

JULIE J. VARGAS, Justice

From the New Mexico Supreme Court

Opinion Number: 2022-NMSC-013

No: S-1-SC-36918 (filed May 19, 2022)

ALFREDO MORGA, Individually and on behalf of the Estate of YLAIRAM MORGA, Deceased, and as Next Friend of YAHIR MORGA, Minor Child; and RENE VENEGAS LOPEZ, Individually and as the Administrator of the Estate of MARIALY RUBY VENEGAS MORGA, Deceased, and GEORGINA LETICIA VENEGAS, Individually,

Plaintiffs-Respondents,

v.

FEDEX GROUND PACKAGE SYSTEM, INC., RUBEN'S TRUCKING, LLC a/k/a RUBEN REYES a/k/a SHOOTER'S EXPRESS TRUCKING, INC., the Estate of ELIZABETH SENA QUINTANA, and M&K'S TRUCKING, INC.,

Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI

Francis J. Matthew, District Judge

Released for Publication July 12, 2022.

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OPINION

VARGAS, Justice.

{1} This case highlights the respective roles that the district court judge and the jury each serve in the inherently difficult task of awarding monetary damages for nonmonetary injuries. The jury awarded four Plaintiffs a total of more than $165 million in damages to compensate them for a tragic accident that claimed half of a young family in a single instant and left surviving family members physically and emotionally injured. Defendants appealed the verdict as excessive, contending it was not supported by substantial evidence and was tainted by passion or prejudice. The Court of Appeals affirmed the verdict. *Morga v. FedEx Ground Package Sys., Inc.*, 2018-NMCA-039, ¶ 1, 420 P.3d 586. We granted certiorari to consider whether the Court of Appeals erred by (1) applying an abuse of discretion standard to review the district court's denial of Defendants' motion for a new trial because the ruling was made by a successor judge who did not oversee the trial, and (2) affirming the district court's denial of Defendants' motion for a new trial on grounds that the verdict was excessive. We conclude that the Court of Appeals did not err in either respect. First, because we review claims of excessive verdicts de novo, we need not adopt a new standard of review for decisions of successor judges assigned under the circumstances of this case, as requested by Defendants, and we decline to do so. Next, we conclude under our current law that substantial evidence supported the verdict and the record does not reflect that the verdict was tainted by passion or prejudice. We therefore affirm the Court of Appeals.

I. BACKGROUND

{2} The facts of this case are nothing short of tragic. In the predawn hours of June 22, 2011, a semi-truck hauling double trailers crashed at high-speed into the back of a small pickup truck driven by Marialy Morga. The semi-truck was operated by FedEx Ground Package System, Inc. (FedEx) and driven by Elizabeth Quintana, who was employed by independent contractors of FedEx (collectively, Defendants).

{3} At the time of the accident, Marialy had her flashers on and was either stopped or moving very slowly traveling west in the right-hand lane. A witness to the accident testified that he watched as the FedEx semi-truck came upon Marialy's pickup truck without slowing down or taking any evasive action. He explained that

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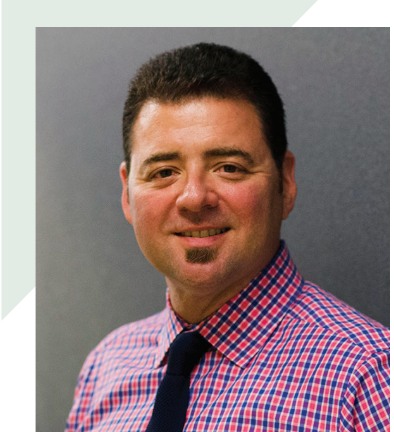

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NOVEMBER

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2022 Business Law Institute

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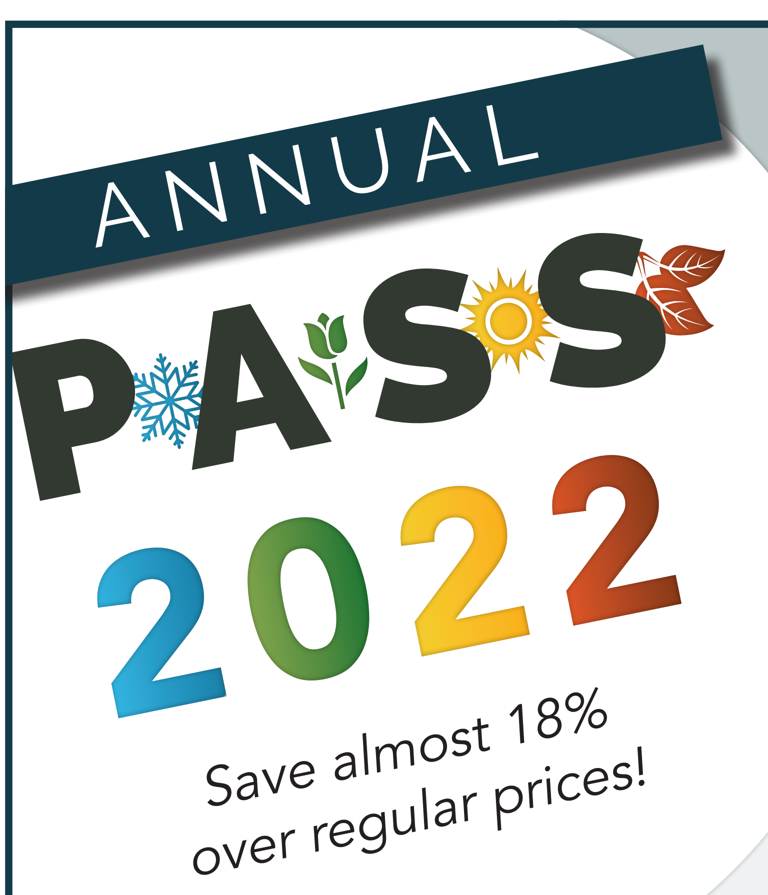

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> [i]t seemed that the driver of the FedEx truck never saw the [pick-up] truck. It just overtook it. On impact . . . the double trailers in the back, the back trailer bucked, moved up, and they buckled and folded forward. The cab of the FedEx truck collapsed in on itself on top of the small truck,

demolishing the pickup truck and creating a black cloud that enveloped the entire scene. The FedEx semi-truck was traveling at sixty-five-miles per hour when it hit the pickup truck. The record indicates Elizabeth Quintana was distracted when she hit the pickup truck, did not attempt to brake prior to the collision, and simply ran right over the pickup truck, causing an "extremely severe impact" that "absolutely destroyed" it.

{4} The impact claimed the lives of Elizabeth Quintana, twenty-two-year-old Marialy, and her four-year-old daughter Ylairam. Marialy's toddler son Yahir survived but was critically injured.

A. District Court Proceedings

{5} Alfredo Morga, individually, as personal representative of Ylairam, and as next friend of Yahir, filed suit against Defendants seeking damages including those for Ylairam's wrongful death, Yahir's physical injuries, and Mr. Morga's own emotional and physical injuries and loss of consortium of his wife and daughter. Marialy's father, Rene Venegas Lopez, brought suit for Marialy's wrongful death as personal representative of her estate.[1] Plaintiffs sought compensatory damages, including noneconomic damages, and punitive damages for their injuries and Marialy's and Ylairam's wrongful deaths.

{6} At the close of the evidence, the jury was instructed to consider economic damages in the form of funeral and burial costs, lost value of household services and earning capacity considering their respective "health, habits, and life expectanc[ies]" for the loss of Ylarim and Marialy, as well as noneconomic damages for the value of their lives "apart from . . . earning capacity" and the loss of parental guidance and counseling from Marialy to her son, Yahir. With respect to damages to Alfredo and Yahir, the jury was instructed to consider economic damages for "medical care, treatment and services received and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future[, t]he nature, extent and duration of the injury," and any exacerbation of a prior injury. In awarding noneconomic damages, the jury was also instructed to consider the past and future pain and suffering,[2] loss of enjoyment of life, and emotional distress suffered as a result of the accident.

{7} The district court directed the jury that in determining the amount awarded, there was no fixed method of valuing noneconomic damages including pain and suffering or loss of enjoyment of life, and that jurors were to use "the enlightened conscience of impartial jurors acting under the sanctity of [their] oath to compensate the beneficiaries with fairness to all parties to this action." The jury was further cautioned in multiple instructions that the verdict must be based on the evidence presented and that "sympathy or prejudice for or against a party should not affect [the] verdict and [was] not a proper basis for determining damages."

{8} The jury entered its verdict, awarding damages totaling $61,000,000 for the wrongful death of Ylairam Morga, $32,000,000 for the wrongful death of Marialy Morga, $32,000,000 for the personal injury to Yahir Morga, $40,125,000 for the personal injury to Alfredo Morga, $208,000 for the damages suffered by Rene Venegas, and $200,000 for the damages suffered by Georgina Venegas.[3]

{9} Following the entry of the verdict, the district court judge recused herself after participating in an ex-parte communication with Plaintiffs' counsel. A successor judge was appointed pursuant to Rule 1-063 NMRA.

{10} Defendants timely filed a motion for a new trial or remittitur[4] on the ground that the verdict was excessive, arguing that it was not supported by substantial evidence and was tainted by passion or prejudice. The successor judge heard argument on this motion and ultimately denied the motion, finding that substantial evidence supported the verdict and that the verdict was not tainted by passion or prejudice. Defendants appealed to the Court of Appeals.

B. The Decision of the Court of Appeals

{11} Applying an abuse of discretion standard, the Court of Appeals affirmed the verdict and the successor judge's denial of a new trial or remittitur, concluding that the verdict was supported by substantial evidence and was not tainted by passion or prejudice. *Morga*, 2018-NMCA-039, ¶¶ 1, 25, 37, 52. The Court of Appeals rejected Defendants' invitation to apply a de novo standard of review to the successor judge's decision and emphasized the value New Mexico's judiciary places on juries and district courts to determine the value of human life. *See id.* ¶¶ 10, 25. While the Court of Appeals applied an abuse of discretion standard of review to the successor judge's decision to deny Defendants' motion for a new trial or remittitur, it acknowledged that "even when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo." *Id.* ¶ 8.

{12} The Court of Appeals set forth all of the compensatory damage evidence individually for each Plaintiff and held that substantial evidence supported the verdict, *id.* ¶¶ 14-23, concluding that Defendants did not "identif[y] any of Plaintiffs' evidence deemed insufficient to support the jury's award of non-economic damages" or explain the "type of additional evidence . . . necessary to support such an award." *Id.* ¶ 29. The Court of Appeals also found that Defendants failed to meet their burden to show that passion, prejudice, sympathy, or mistake affected the verdict, concluding that none of the instances Defendants pointed to were sufficient to make such an inference. *Id.* ¶¶ 32, 46. Upon petition by Defendants, this Court granted certiorari.

II. DISCUSSION

A. Defendants Are Not Entitled To a De Novo Standard of Review on Their Motion for a New Trial

{13} Under the circumstances of this case, Defendants encourage us to deviate from our long-standing practice of reviewing denials of motions for a new trial under an abuse of discretion standard.

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[1] Alfredo Morga and Rene Venegas Lopez are referred to collectively as "Plaintiffs."

[2] Pain and suffering as an element of noneconomic damages was limited to the claims raised by Alfredo and Yahir. Because Defendants' expert testified that death for both Marialy and Ylairam was instantaneous and Plaintiffs did not present evidence that there was a period of pain and suffering between the time of impact and death, the district court dismissed Plaintiffs' claims for pain and suffering for Marialy and Ylairam.

[3] The claims of Mr. Venegas and Ms. Venegas, the parents of Marialy Morga, were settled while this case was pending before the Court of Appeals and are not at issue here.

[4] Defendants did not request the relief of remittitur on appeal, nor did they rebut Plaintiffs' claim of abandonment in their reply brief or request it of this Court at oral argument. Therefore, we conclude that Defendants' remittitur argument has been abandoned, and we will not address it. City of Sunland Park v. Santa Teresa Servs. Co., 2003-NMCA-106, ¶ 81, 134 N.M. 243, 75 P.3d 843 (explaining that arguments raised below but not on appeal are deemed abandoned); State v. Aragon, 1990-NMCA-001, ¶ 2, 109 N.M. 632, 788 P.2d 932 (providing that issues not briefed on appeal are deemed abandoned).

Defendants instead contend that because the successor judge did not oversee the trial, his denial of their motion for a new trial should be reviewed de novo. Defendants argue that the decision of a successor judge is not entitled to the deference incorporated into a review for an abuse of discretion. Rather, Defendants reason, such deference should be reserved for the judge who participated in the trial and had the opportunity to observe the witnesses and the jury. Defendants ask us to instead adopt a de novo standard of review for decisions of a successor judge, and contend that under this standard the verdict here is excessive. We disagree, and decline to adopt a different standard of review here.

{14} Defendants' standard of review argument misunderstands the application of the existing standards to this case. "The district court has broad discretion in granting or denying a motion for new trial, and such an order will not be reversed absent clear and manifest abuse of that discretion." *Saenz v. Ranack Constructors, Inc.*, 2018-NMSC-032, ¶ 19, 420 P.3d 576 (internal quotation marks and citation omitted); *see also Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 13, 146 N.M. 853, 215 P.3d 791 ("[T]he denial of a motion for a new trial or remittitur is [reviewed for an] abuse of discretion."). An abuse of discretion occurs when the lower court's decision is contrary to law, logic, or reason. *See Perkins v. Dep't of Hum. Servs.*, 1987-NMCA-148, ¶ 19, 106 N.M. 651, 748 P.2d 24 (providing that the district court abuses its discretion if its decision "has not proceeded in the manner required by law" or "is contrary to logic and reason") (internal quotation marks and citation omitted). And, in the context of a motion for a new trial based on an excessive verdict, a district court abuses its discretion when it fails to exercise its discretion in the first instance "despite the predicate findings and the court's conviction that the award should be reduced," *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 12, 125 N.M. 292, 960 P.2d 834, or when it "misapprehends the law or if the decision is not supported by substantial evidence." *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39. "[W]here it is shown . . . that the verdict of the jury on the question of damages is clearly not supported by substantial evidence adduced at the trial of the case, a motion for a new trial should be granted, and not to do so is an abuse of discretion." *Jones v. Pollock*, 1963-NMSC-116, ¶ 12, 72 N.M. 315, 383 P.2d 271. In other words, it is an abuse of discretion to deny a motion for a new trial when the district court finds that substantial evidence does not support the verdict. *See Chrysler Corp.*, 1998-NMCA-085, ¶¶ 1, 11-12 (holding that the district court "abused its discretion in failing to act upon its findings regarding an excessive verdict" when the judge "repeatedly stated that the jury's award of damages shocked the conscious of the court" but denied a motion for remittitur or new trial).

{15} While we review the denial of a motion for a new trial for an abuse of discretion, whether a verdict is excessive is reviewed as a matter of law, *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 49, 127 N.M. 47, 976 P.2d 999, and we review matters of law de novo, "without deference to the district court's legal conclusions." *Primetime Hosp., Inc. v. City of Albuquerque*, 2009-NMSC-011, ¶ 10, 146 N.M. 1, 206 P.3d 112. Only after we have conducted our de novo review and determined whether the jury's verdict was excessive do we consider whether the district court abused its discretion by denying Defendants' motion for a new trial. *See Chrysler Corp.*, 1998-NMCA-085, ¶¶ 11-12 (holding that the district court abused its discretion when it concluded that insufficient evidence supported the damage award but denied the defendant's motion for a new trial). Under the circumstances, we see no reason to deviate from our traditional standard of review for a denial of a motion for a new trial, as our review of the size of the jury's verdict to determine whether it was excessive is de novo.

B. The Verdict Is Not Excessive As a Matter of Law

{16} Defendants do not contest liability or the economic damages awarded to Plaintiffs in this case. Rather, they claim it is the award of noneconomic damages—those most difficult to assess—that render the verdict excessive and mandate a new trial. *See Chrysler Corp.*, 1998-NMCA-085, ¶ 13 (noting the difficulty in calculating noneconomic damages).

{17} A new trial is appropriate when "the jury's award of damages is so grossly out of proportion to the injury received as to shock the conscience." *Id.* ¶ 9 (brackets, internal quotation marks, and citation omitted). As we review whether an award shocks the conscience, we do not weigh the evidence but determine whether the verdict is excessive as a matter of law. *See Coates*, 1999-NMSC-013, ¶ 49. The jury's award is excessive if (1) "the evidence, viewed in the light most favorable to [the] plaintiff, [does not] substantially support[] the award," or (2) "there is an indication of passion, prejudice, partiality, sympathy, undue influence[,] or a mistaken measure of damages on the part of the fact finder."[5] *Gonzales v. Gen. Motors Corp.*, 1976-NMCA-065, ¶ 30, 89 N.M. 474, 553 P.2d 1281; *see also Chrysler Corp.*, 1998-NMCA-085, ¶ 9 (same).

{18} As we conduct our de novo review to determine whether the verdict was excessive, we remain mindful of both the inherently difficult task of assigning monetary value to nonmonetary losses and the proper roles that the jury and the district court judge play in making this determination. The valuation of noneconomic damages is an "inexact undertaking at best," and "there can be no standard fixed by law for measuring the value of [noneconomic damages]." *Chrysler Corp.*, 1998-NMCA-085, ¶ 13 (internal quotation marks and citation omitted). Given the difficulty, as well as the lack of a fixed standard, in assessing noneconomic loss, it is well settled that this valuation is left to the jury. *See* Herbert M. Kritzer et al., *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 Wm. & Mary L. Rev. 971, 980 (2014) (explaining that placing monetary value on noneconomic harm "requires human judgment to convert the injury into a monetary sum, typically determined by a jury"); *Baxter v. Gannaway*, 1991-NMCA-120, ¶ 15, 113 N.M. 45, 822 P.2d 1128 (acknowledging that given the lack of a fixed standard the amount awarded "is left to the fact finder's judgment"); *Dimick v. Shiedt*, 293 U.S. 474, 480 (1935) ("[I]n cases where the amount of damages [is] uncertain their assessment [is] a matter so peculiarly within the province of the jury that the Court should not alter it." (internal quotation marks and citation omitted)).

{19} While it is the jury's role to determine the amount of damages, our case law makes clear that the district court judge and the jury each serve a distinct role in trial proceedings. "It is a fundamental function of a jury to determine damages," and "its verdict is presumed to be correct." *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 16, 127 N.M. 1, 976 P.2d 1 (internal quotation marks and citation omitted). At the same time, a district court judge "is empowered to, with discretion, provide stability and order during the proceedings," keeping in mind that "the judge is a very potent figure, who must not use the position to exert power or influence over the jury." *Id.* The district court judge's "experience with juries in the community provides an indispensable safeguard built into our American civil jury system." *Chrysler Corp.*, 1998-NMCA-085, ¶ 14.

> [T]he best way to arrive at a reasonable award of damages is for the [district court] judge and the jury to work together, each diligently performing its respective duty to arrive at a decision that is as fair as humanly possible under the facts and circumstances of a given case.

5 For brevity, we refer to this second test simply as "passion or prejudice."

Id. ¶ 16. "When the jury makes a determination and the [district] court approves, the amount awarded in dollars stands in the strongest position known in the law." *Id.* ¶ 14 (internal quotation marks and citation omitted). "The jury must be the exclusive evaluator of the evidence and the credibility of witnesses, with the [district] court only intervening when the jury's verdict is so against the weight of evidence that it would be a grave injustice to allow the verdict to stand." *Rhein v. ADT Auto., Inc.*, 1996-NMSC-066, ¶ 24, 122 N.M. 646, 930 P.2d 783. Taking the respective roles of the judge and jury into consideration, this Court will not disturb a jury's verdict except "in extreme cases." *Martinez v. Teague*, 1981-NMCA-043, ¶ 14, 96 N.M. 446, 631 P.2d 1314.

{20} We recognize that under the circumstances of this case, the collaborative relationship between the district court judge and jury was disrupted by the recusal of the district court judge after the verdict was entered, preventing her from considering Defendants' motion for a new trial. However, Defendants received a thorough review of the record by the successor judge pursuant to Rule 1-063, which allows a successor judge to proceed "upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties." Here, the record reflects the successor judge took more than five months to review the extensive record in this matter. The successor judge explained at the hearing and certified in his order denying Defendants' motion for a new trial, that he had reviewed the pleadings, testimony, and the record. His review was evident from his extensive knowledge of the record and is reflected in his reasoned discussion of the close relationship Marialy shared with her parents, familiarity with objections sustained at trial, and the jurors' responses on the special verdict form. Defendants also received the benefit of the successor judge's experience with juries in the community, *see Chrysler Corp.*, 1998-NMCA-085, ¶ 14 (recognizing a judge's experience with juries in the community as an "indispensable safeguard"), allowing for a complete review of Defendants' motion.

1. The verdict is supported by substantial evidence

{21} To determine if a verdict is supported by substantial evidence, "[t]he proper approach is to examine [the p]laintiff's evidence related to damages and determine whether that evidence could justify the amount of the verdict." *Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 22. We compare the amount awarded to the injury received and consider whether "the amount awarded is so grossly out of proportion . . . as to shock the conscience." *Lujan v. Reed*, 1967-NMSC-262, ¶ 32, 78 N.M. 556, 434 P.2d 378 (internal quotation marks and citation omitted). We will not disturb the jury's verdict unless "[t]he weight of evidence [is] clearly and palpably contrary to the verdict, and a new trial will only be granted where it is manifest to a reasonable certainty that justice has not been done." *Ruhe v. Abren*, 1857-NMSC-013, ¶ 10, 1 N.M. 247.

{22} Defendants contend that the $165 million verdict "far exceeds the sum the evidence can support," directing our attention to two circumstances of the verdict to prove their point. First, Defendants claim that the verdict is excessive in comparison to other verdicts, exceeding any prior wrongful death verdict. Second, Defendants argue that the excessive nature of the verdict is evident from the significant disparity between Plaintiffs' proven economic damages and the total award. We are not persuaded.

a. We are skeptical of the value of comparing verdicts and reject Defendants' comparisons

{23} Arguing that "none of the relevant testimony revealed the existence of non-economic injuries that would be out of the ordinary for a case of this type," Defendants contend that the verdict's "excessiveness is confirmed by the fact that the award exceeds any prior wrongful-death verdict in this state." To support their point, Defendants invite us to compare the jury's award to other verdicts, contending that comparison is helpful to analyze whether a verdict is "supported by the evidence."

{24} To be sure, this Court has previously acknowledged that because "value[s] of all things are arrived at on a relative basis," a comparison of verdicts along with the facts and circumstances of a case is sometimes helpful. *Vivian v. Atchison, Topeka & Santa Fe Ry. Co.*, 1961-NMSC-093, ¶ 11, 69 N.M. 6, 363 P.2d 620. However, our Court of Appeals has cautioned about the usefulness of such comparisons, noting that they "are not a proper basis for determining either excessiveness or inadequacy of damages . . . because the propriety of the amount of the damages awarded must be determined from the evidence in the case under consideration." *Schrib v. Seidenberg*, 1969-NMCA-078, ¶ 20, 80 N.M. 573, 458 P.2d 825. Indeed, as we noted in *Hanberry v. Fitzgerald*, "there can be no true comparison drawn between this and any other case which has been brought to our attention." 1963-NMSC-100, ¶ 35, 72 N.M. 383, 384 P.2d 256; *see also Maisel v. Wholesome Dairy, Inc.*, 1968-NMCA-038, ¶ 9, 79 N.M. 310, 442 P.2d 800 ("What this court may have done in other cases, or what courts of other jurisdictions may have decided in cases involving similar injuries, is of no consequence." (internal quotation marks and citation omitted)). Because each case must be decided on its own facts and circumstances, judges are not bound by those comparisons. *Vivian*, 1961-NMSC-093, ¶ 11.

{25} In this case, Defendants did not provide the district court or the Court of Appeals with any comparable verdicts and instead relied solely on their assertion that the verdict was the largest in the history of the State "for wrongful death or comparable loss." However, on appeal to this Court, Defendants did provide some verdicts for comparison and at oral argument urged us to compare the verdict in this case to that of *Wachocki v. Bernalillo Cnty. Sheriff's Dep't*, 2010-NMCA-021, 147 N.M. 720, 228 P.3d 504. A comparison of this case to the *Wachocki* case only highlights why we hesitate to make such comparisons and why each case must be decided on its own facts and circumstances. *See Vivian*, 1961-NMSC-093, ¶ 11 (explaining each case must be decided on its own facts and circumstances). *Wachocki* was not decided by a jury, and the only similarity between this case and the *Wachocki* case is the fact that the decedent there and Marialy Morga were both twenty-two years old at the time of their deaths. *Wachocki*, 2010-NMCA-021, ¶ 3. The *Wachocki* decedent was a single man who lived with his brother and had no dependents. *Id.* ¶ 14. The district court in that case assessed the decedent's damages at $3.7 million, *id.* ¶ 13, as compared to $32 million awarded to the estate of Marialy Morga for her wrongful death. The difficulty in comparing the two cases becomes obvious when one considers that the award to Marialy Morga's estate for her wrongful death included, among other things, the loss of her opportunity to provide parental guidance and counseling to her children and build the life she had planned with her husband, damages that the *Wachocki* decedent did not appear to suffer. This is not to say that the *Wachocki* decedent's life was any less important or valuable. Instead, these differences serve to show the difficulty of comparing verdicts in cases where plaintiffs come to the court in very different circumstances, despite some similarities. The comparison becomes even more problematic when it is extended to the damages awarded to additional Plaintiffs in this case who each suffered their own independent injuries and who share no apparent similarities with the *Wachocki* decedent.

{26} While the combined verdict for the four Plaintiffs in this case may exceed other wrongful death verdicts rendered by New Mexico Courts, we note that at least one New Mexico jury has issued a verdict comparable to the individual verdicts rendered for Plaintiffs. *Hein v. Utility Trailer Mfg. Co.*, D-101-CV-2016-01541, is a wrongful

death case involving the death of sixteen-year-old Riley Hein, who, like Marialy and Ylairam Morga, was killed in a trucking accident. *Id.*, Complaint for Wrongful Death and Loss of Consortium (1st Jud. Dist. Ct. June 22, 2016). The *Hein* jury concluded that the damages for Riley's death were $38 million.[6] *Id.*, Special Verdict Form (1st Jud. Dist. Ct. Aug. 23, 2019). That award was more than this jury awarded for the death of Marialy but less than it awarded for the death of Ylairam.[7] Taking all of this into account, we are not convinced that any of the cases Defendants point to offer a meaningful comparison to the case at hand. And Defendants' comparison of the award in this case with the award in *Wachocki* illustrates why we remain "skeptical about the usefulness of comparing awards for [noneconomic damages] in other cases." *Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 18. Rather, the "amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and in the final analysis, each case must be decided on its own facts and circumstances." *Id.* (brackets, internal quotation marks, and citation omitted).

b. We reject Defendants' invitation to compare economic and noneconomic damages to determine whether the verdict is excessive

{27} Defendants also point to the disparity between the economic and noneconomic damages awarded to support their claim that the jury's award was excessive. The Court of Appeals rejected Defendants' argument to establish excessive jury verdicts by comparing economic and noneconomic damages, referring to such a comparison as a "fixed mathematical formula[]" which is not "the proper basis for reversing a jury's non-economic damage award." *Morga*, 2018-NMCA-039, ¶ 31. Because there is frequently no readily identifiable relationship between economic damages and noneconomic damages, we agree with the Court of Appeals that placing noneconomic damages in a ratio with economic damages is not a proper method for determining whether the verdict is supported by substantial evidence. Doing so fails to account for severe harm that results even absent pecuniary loss.

{28} "Noneconomic damages include pain and suffering, future pain and discomfort, disfigurement, loss of enjoyment of life, mental anguish, and loss of consortium." 63B Am. Jur. 2d *Products Liability* § 1754 (2010) (footnotes omitted). Noneconomic damages also include the value of life itself. *See Romero v. Byers*, 1994-NMSC-031, ¶¶ 4, 25, 117 N.M. 422, 872 P.2d 840 (holding that the value of life itself is a compensable element of noneconomic damages). "By their very nature noneconomic damages are conceptually a contradiction in terms: they provide monetary compensation for an injury that is intangible in monetary terms." Kritzer et al., *supra*, at 975. A person can suffer severe injuries and even lose his or her own life without incurring significant economic loss. *Id.* at 980. "[T]he important substantive and methodological consequence of this observation is that using economic loss as the denominator for assessing noneconomic losses can be very misleading because economic loss does not always capture the severity of the injury in terms of the noneconomic consequences of that injury." *Id.*

{29} Defendants acknowledged that "[t] here is no way to calculate [noneconomic] damage. This should be left up to the trier of fact." Defense counsel stated to the jury in closing argument, "I am not going to submit to you a number, because I agree the value of life—I don't want to insult anybody about the value of life in this case. But you have to rely on your own consciousness [sic] when you're looking at value of life," and "I have a lot of faith in the [j]ury system. I recommend to clients to go to a [j]ury, rely on a [j]ury. And I trust that all of you will look at this evidence and do the right thing."

{30} We recognize that some elements of a plaintiff's economic damages may bear a relationship to a plaintiff's noneconomic harm, but most do not. An award of significant past and future medical expenses to treat a plaintiff's severe injuries may support an equally significant award of noneconomic damages for the plaintiff's pain and suffering. However, in a case such as this one where Marialy Morga and Ylairim Morga did not survive the impact of the accident and therefore did not incur any medical expenses but were deprived of life itself, including all the joys and benefits that accompany it, the relationship becomes more difficult to quantify. The correlation becomes even more problematic when evaluating noneconomic damages for a plaintiff with significant future earning capacity versus one with limited earning capacity. To allow such a relationship would unfairly benefit wealthier plaintiffs and place less value on the pain and suffering, and even on the lives, of those of less wealth. Tethering noneconomic harm to economic damages places a thumb on the scale for wealthier plaintiffs when pecuniary loss is merely one aspect of total injury and does not account for severe nonmonetary harm a plaintiff may suffer.

{31} Indeed, this Court has long held that "recovery [for wrongful death] may be had even though there is no pecuniary injury." *Stang v. Hertz Corp.*, 1970-NMSC-048, ¶ 7, 81 N.M. 348, 467 P.2d 14. While some courts have held that the existence or lack of pecuniary damages is a factor to be considered in placing a dollar amount on a human life, *see Martinez v. Cont'l Tire Americas, LLC*, 476 F. Supp. 3d 1137, 1142 (D.N.M. 2020) ("The presence or absence of pecuniary damages is a factor to be considered in arriving at a monetary figure for the value of the deceased's life." (internal quotation marks and citation omitted)), this Court made clear that "the [Wrongful Death] Act goes beyond the loss of decedent's wages, and encompasses all damages that are fair and just." *Romero*, 1994-NMSC-031, ¶ 19. Thus, "the jury in a wrongful death action [must] determine fair and just compensation for the reasonably expected nonpecuniary rewards the deceased would have reaped from life as demonstrated by his or her health and habits." *Id.* ¶ 17.

{32} New Mexico law specifically instructs juries to consider noneconomic damages apart from economic losses. *See* UJI 13-1830(4) NMRA (providing a separate line for a jury to award damages "apart from . . . decedent['s] earning capacity"); *see also Gutierrez v. Kent Nowlin Const. Co.*, 1981-NMCA-107, ¶ 16, 99 N.M. 394, 658 P.2d 1121 (citing the jury instruction listing earning capacity as a separate element of damages as support for upholding an award greater than the proven economic damages), *rev'd on other grounds*, *Kent Nowlin Const. Co. v. Gutierrez*, 1982-NMSC-123, ¶ 2, 99 N.M. 389, 658 P.2d 1116. And, "[i]rrespective of exemplary damages," *Folz v. State*, 1990-NMSC-075, ¶ 26, 110 N.M. 457, 797 P.2d 246, "substantial" noneconomic damages are permissible under our Wrongful Death Act (Act) because, in addition to compensation, the Act is also intended "to promote safety of life and limb by making negligence that causes death costly to the wrongdoer." *Stang*, 1970-NMSC-048, ¶¶ 9, 11. In sum, to tie an award of noneconomic damages to Plaintiffs' economic damages, as Defendants propose, is contrary to our existing law and would establish a dangerous policy of, in part, valuing human life based on a person's net worth.

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[6] The jury then apportioned fault between the defendant and a third party.

[7] Following the entry of the verdict but before a judgment was entered in the Hein matter, the parties resolved all disputes and claims between them and dismissed the case. Id., Stipulated Order of Dismissal with Prejudice (1st Jud. Dist. Ct. Mar. 23, 2020).

{33} Reviewing this verdict for excessiveness de novo, as we must, we conclude that substantial evidence supports the verdict. Considering all of the evidence in the light most favorable to the verdict, our deference to juries, and our hesitancy to make comparisons between verdicts and between economic and noneconomic damages, this Court cannot say that the weight of the evidence is clearly and palpably against the verdict and that it would be an injustice to let the verdict stand. *See Ruhe*, 1857-NMSC-013, ¶ 10 ("The weight of evidence must be clearly and palpably contrary to the verdict, and a new trial will only be granted where it is manifest to a reasonable certainty that justice has not been done.").

{34} To support their damages claim, Plaintiffs presented evidence of the deaths of Marialy and Ylairam Morga, as well as the physical and psychological injuries suffered by Alfredo and Yahir Morga resulting from the accident. The evidence showed that Alfredo's epilepsy, which had previously been controlled with medication, was exacerbated and that since the accident he has suffered from PTSD and major depressive disorder and would require psychiatric care. Alfredo testified that after the accident, he could not work for a period of three months and when he did return to work, the effects of the accident interfered with his ability to do his job properly such that he had to leave his job and find another occupation. The evidence presented also showed that Yahir suffered damage to his lungs, a head injury, a lacerated liver, multiple abrasions and contusions, and a broken leg, all requiring future medical treatment.

{35} In addition to these losses, Plaintiffs also presented evidence of noneconomic losses through photographs and the testimony of Marialy's parents and sister and Alfredo, each of whom described Marialy and Ylairam, the close relationships Alfredo and Yahir had with them, the life they had together, their plans for the future, and the personal loss suffered as a result of their deaths. Alfredo testified about the night of the accident, explaining that when he arrived on the scene, he was warned against approaching the pickup truck where his wife and daughter remained. He testified about going to the hospital in El Paso where his son had been taken after the accident and staying there with his son for several days. Alfredo recounted how he was unable to participate in the planning of Marialy's and Ylairam's funeral services because he was with his son at the hospital.

{36} Regarding Yahir's mental state, Plaintiffs presented testimony that Yahir may suffer "increased risk for psychological difficulties" in the future as a result of the early loss of his mother and sister. Plaintiffs also presented testimony that Yahir stopped talking after the accident and began waking at night crying for his mother and father.

{37} Of note, Defendants do not attempt to explain why the award for each of the individual Plaintiffs is excessive, but instead argue that the cumulative verdict is excessive. To be sure, the cumulative verdict in favor of the four Plaintiffs is large. However, we cannot say that, viewing the evidence in the light most favorable to Plaintiffs, the individual damages awarded for the deaths of Marialy and Ylairam and the injuries incurred by Alfredo and Yahir are so excessive that "it is manifest to a reasonable certainty that justice has not been done." *Ruhe*, 1857-NMSC-013, ¶ 10. Accordingly, the conscience of this Court is not shocked by the jury's award of damages for the lives of these four Plaintiffs. However, a verdict can be excessive notwithstanding a finding of substantial evidence if it was tainted by passion or prejudice.

2. Defendants have not shown that the verdict is a product of passion or prejudice

{38} Defendants also argue that the verdict was tainted by passion or prejudice, entitling them to a new trial. While Defendants argue that it is "the plaintiffs' burden to submit record evidence sufficient to sustain a verdict," our law is clear that a party appealing the denial of a motion for new trial or remittitur "bears the burden of showing that the record supports its contention that there was error in the verdict." *Coates*, 1999-NMSC-013, ¶ 51. That is to say, it is Defendants who "must show that the verdict (i.e., damage awards) was infected with passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive." *Id.* (internal quotation marks and citation omitted).

{39} Defendants raise four issues to support their claim that the jury's verdict was infected with passion or prejudice. Defendants first point to the size of the verdict as an indication that passion or prejudice tainted the jury's award. Defendants also point to three aspects of the trial to support their claim. Specifically, they contend that the emotional testimony of Alfredo Morga, an unredacted photograph of the accident scene, and allegedly inflammatory statements made by Plaintiffs' counsel during closing argument "explain the prejudice that motivated the jury's verdict." After reviewing Defendants' claims, we conclude Defendants did not meet their burden to show that the verdict was tainted by passion or prejudice, as we explain next.

a. The size of the verdict alone is insufficient to infer passion or prejudice

{40} Initially we note that, while the verdict here is undeniably large, the size of a verdict alone is insufficient to infer it was affected by passion or prejudice unless it is "outrageously excessive and beyond all reason." *Henderson v. Dreyfus*, 1919-NMSC-023, ¶ 36, 26 N.M. 541, 191 P. 442; *see also Bodimer v. Ryan's Fam. Steakhouses, Inc.*, 978 S.W.2d 4, 9 (Mo. Ct. App. 1998) ("[T]he amount of verdict by itself is not enough to establish that verdict was result of bias, passion and prejudice."); *Mather v. Griffin Hosp.*, 540 A.2d 666, 673 (Conn. 1988) ("The size of the verdict alone does not determine whether it is excessive."). In *Henderson*, this Court declined to infer passion and prejudice where the only circumstances relied upon by the defendant were "the size of the verdict" and the fact that in many other similar cases "much smaller verdicts have been returned." 1919-NMSC-023, ¶¶ 49-50. That the court may have awarded a smaller amount than the jury awarded is also insufficient to support disturbing the jury's verdict. *See Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 17 ("[T]he mere fact that a jury's award is possibly larger than the court would have given is not sufficient to disturb a verdict." (internal quotation marks and citation omitted)). "In the absence of an unmistakable indication of passion or prejudice, a reviewing court will not set aside a jury's award of damages unless the amount of the verdict in light of the evidence indicates the jury was influenced by prejudice, passion, or other improper considerations." *Id.* ¶ 20 (internal quotation marks and citation omitted).

{41} Defendants also contend that we should infer that passion or prejudice affected the jury's award because its verdict was greater than the combined amount of punitive and compensatory damages Plaintiffs' counsel suggested during closing argument. In support of its argument, Defendants first assert that because the combined total compensatory damages awarded to all four Plaintiffs, $165 million, exceeds the $140 million in punitive damages suggested by Plaintiffs[8] we can infer that the award was based on a desire to punish Defendants.

{42} Defendants rely on *Jackson v. Southwestern Public Service Co.* for the proposition that counsel's suggested amount of damages "might have contributed" to a mistaken award when the verdict "was so

[8] The jury declined to award punitive damages to Plaintiffs.

close to that figure." 1960-NMSC-027, ¶ 69, 66 N.M. 458, 349 P.2d 1029. In *Jackson*, after counsel for the plaintiff suggested the plaintiff's damages for the loss of his leg was $100,000, the jury returned a verdict for $95,000. *Id.* ¶¶ 68-69. To the extent Defendants have argued, quoting *Jackson*, that the verdict here "was so close to" Plaintiffs' suggested punitive award evidencing a mistaken award, we note that here the difference in the suggested punitive damage award and the amount awarded is $25 million, not $5,000. As Plaintiffs pointed out to the successor judge at the post-trial motions hearing, this would have required a $25 million mathematical mistake by the jury.

{43} In concluding that the verdict was not "returned as a result of passion, sympathy, or prejudice on the part of the verdict—or the jury," the successor judge reasoned, "[t]he special verdict form indicates clearly the jur[ors] understood that they were returning a verdict for compensatory damages." Indeed, the special verdict form makes clear that the jury considered the claims of each Plaintiff individually and awarded each Plaintiff a distinct amount ranging from $200,000 to Marialy Morga's mother Georgina Venegas for her loss of consortium claim to $61 million for the wrongful death claim of the Estate of Ylairam Morga. Additionally, after the jury returned its verdict the district court judge carefully polled the jury to ensure its award was correct. Considering the disparity between the amount of suggested punitive damages and the amount awarded, the clear explanation of the individual amounts awarded to each Plaintiff on the jury's special verdict forms, and the poll of the jury confirming its award was for compensatory damages, we conclude that Defendants have failed to carry their burden to show an unmistakable indication of passion or prejudice, and we decline to infer passion or prejudice affected the verdict based on Plaintiffs' suggested punitive damage award. *See Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 20 (requiring "an unmistakable indication of passion or prejudice" to infer that passion or prejudice affected the verdict (internal quotation marks and citation omitted)).

{44} Defendants next assert that the amount awarded shows prejudice and sympathy because it is greater than what Plaintiffs' counsel suggested for compensatory damages. Defendants contend that Plaintiffs' suggested metric for valuing human life, $500 a day, calculated to about $12 million as Plaintiffs' requested amount of damages for the Estate of Marialy Morga. The Court of Appeals called this a "hypothetical suggestion" offered as "guidance to the jury" and not "a specific amount of monetary damages" requested by Plaintiffs. *Morga*, 2018-NMCA-039, ¶ 33. Even if Plaintiffs' suggested valuation method was their requested amount of damages, our case law is clear that this type of request does not place a limit on the amount of damages a jury may award. *See Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 18, 136 N.M. 647, 103 P.3d 571 (explaining that a plaintiff's requested damages is not "a ceiling on a jury's award").

{45} Defendants concede that a plaintiff's request of damages does not act as a legal estoppel or place a cap on the jury's award. However, Defendants assert that it is "a relevant consideration" in determining whether passion or prejudice tainted the verdict. Defendants rely on *Nava*, *id.*, for the proposition that a jury's award of damages in an amount exceeding the sum requested by a plaintiff "indicates that passion or prejudice affected the verdict." *Nava* recognizes that the plaintiff is "in the best position to evaluate the true extent of his or her damages" but also acknowledges that "a plaintiff's request for damages certainly does not create a ceiling on a jury's award." *Id.* We do not find *Nava* particularly helpful, as it was a sexual harassment case involving nonphysical injury to a single plaintiff; it did not ask a jury to calculate noneconomic damages for multiple deaths and serious bodily injury within a single family. *See id.* ¶ 2 (describing plaintiff's allegations of sexual harassment by supervisor and jury's award of $285,000 in damages). While the *Nava* Court held that the amount of the "award in th[at] case was so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice," *id.* ¶ 20 (internal quotation marks and citation omitted), here it is difficult to say the same in light of the deaths of Marialy and Ylairam Morga, the serious injuries to Yahir Morga, and the impact the accident had on the lives of Yahir and Alfredo Morga.

{46} In *Rhein*, this Court explained that a new trial may be granted "only when there is evidence of jury tampering or other contamination of the process . . . or when the weight of evidence is clearly and palpably contrary to the jury's verdict." 1996-NMSC-066, ¶ 23. The fact that the jury awarded a greater amount than Plaintiffs requested is a far cry from jury tampering or other contamination of the process. Considering the special verdict forms indicating the jurors' understanding of the allocation of the award and considering the lack of any evidence of tampering with the process, the fact that the jury chose to award more than what Plaintiffs may have suggested is insufficient to infer passion or prejudice.

b. None of the three aspects of trial Defendants point to support their claim that the verdict was affected by passion or prejudice

{47} Defendants also point to three aspects of the trial that they argue invoked passion or prejudice in the jury. Defendants assert that the testimony of Alfredo Morga, an unredacted photograph of the accident shown to the jury, and purportedly improper statements made by Plaintiffs' counsel during closing argument "inflamed the jury and produced an excessive damages award." Plaintiffs counter that Defendants did not preserve these arguments. Assuming without deciding that the arguments were preserved, we conclude that these three incidents, whether considered on their own or cumulatively, are insufficient to show that the jury's award was the result of passion or prejudice.

i. The testimony of Alfredo Morga did not invoke passion or prejudice in the jury that affected the verdict

{48} Defendants contend that Alfredo Morga's emotional testimony—crying when looking at photographs of his wife and daughter, discussing his bond with them and the loss he felt—"even if an unavoidable aspect of the trial, would naturally have affected any person with a sense of compassion." A witness's genuine emotional testimony, alone, however, is insufficient to show passion or prejudice in the jury. *See Caldwell v. Ohio Power Co.*, 710 F. Supp. 194, 199-200 (N.D. Ohio 1989) (noting that involuntary manifestation of emotion is not uncommon in personal injury cases and holding that mother's genuine emotional testimony was not prejudicial). Generally,

> [an] involuntary manifestation of seemingly genuine emotion by weeping, crying, or similar conduct, during a civil trial, is not ground for a mistrial, reversal, or new trial, in the absence of a resulting prejudicial effect upon the jury, and the decision of the [district] court denying a mistrial or new trial on such grounds will not be disturbed by the appellate court in the absence of an abuse of discretion on the part of the [district] judge.

L. S. Tellier, *Manifestation of Emotion by Party During Civil Trial as Ground for Mistrial, Reversal, or New Trial*, 69 A.L.R.2d 954, § 3[a] (1960).

{49} The record does indicate that Alfredo Morga became tearful multiple times during his testimony on direct examination including while looking at photographs of his family, discussing their close relationship and their plans for a third child, describing arriving at the scene of

the accident, and learning his wife and daughter had died and his son had been transported to a hospital in El Paso. The record also reflects that the district court called for two breaks during this testimony and called a bench conference to direct counsel to lead Alfredo Morga through testimony concerning the accident scene to facilitate that examination.

{50} Defendants contend that after the second break, "Mr. Morga was so emotional that he could not continue." However, the record reflects that after the second break, Alfredo Morga retook the stand, and while not devoid of emotion, he was able to complete his testimony, including cross-examination and redirect, without further incident.

{51} While the record indicates Alfredo Morga cried during his testimony, there is no indication here, and Defendants point this Court to none, of a resulting prejudicial impact on the jury. The record does not reflect that his testimony moved anyone else in the courtroom to tears. Furthermore, the district court acted to curtail the emotional testimony by calling for breaks and directing Plaintiffs' counsel to lead Alfredo Morga through his testimony. Importantly, there is no explanation of the jury's reaction to Alfredo Morga's testimony from which we can conclude undue emotion and sympathy affected its decision. Nothing in the record indicates that Alfredo Morga's testimony tainted the jury's verdict with passion or prejudice. As Defendants admit, this testimony was "honest," "sincere," and necessary. It is difficult to imagine another way for Alfredo Morga to establish his damages outside of offering his testimony as to how he was injured. Likewise, it is predictable and reasonable that a person who lost his wife and young daughter and whose son suffered critical injury all in one accident would be emotional. Alfredo Morga's testimony was the result of genuine emotional response, and nothing in the record indicates any prejudicial reaction from the jury. The testimony appears to fall squarely within the general rule that such genuine emotion is not grounds for a new trial. *See* Tellier, 69 A.L.R.2d 954, § 3[a] (explaining that a display of genuine emotion during a trial is not grounds for a new trial absent "a resulting prejudicial effect upon the jury").

{52} Defendants concede that there was nothing improper about Alfredo Morga's testimony and rather assert that it was just the emotional nature of his testimony that invoked passion or prejudice in the jury. Defendants rely on *Hanberry*, 1963-NMSC-100, ¶ 33, to support this proposition. *Hanberry*, however, is distinguishable. The *Hanberry* Court did hold that properly admitted evidence may have "the principal effect of unduly stressing the pain and suffering endured by the plaintiff." *Id.* However, the Court was referring to cumulative evidence, specifically pointing to twenty-one photographs of the same injury and reasoning that "[s]uch over-emphasis in proving relatively minor details could very possibly have resulted in causing the jury to ignore the proper measure of damages." *Id.* ¶¶ 12, 33. The *Hanberry* Court did not address the impact of necessary emotional testimony, and we note that Defendants cite no authority that this type of emotional testimony entitles them to a new trial, so we assume none exists. *See State v. Garnenez*, 2015-NMCA-022, ¶¶ 25-26, 344 P.3d 1054 (declining to find that an emotional outburst by a member of the audience in the courtroom tainted the verdict where defendants cited no authority that the emotional outburst required a mistrial); *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (providing that where no authority is cited we may assume none exists).

{53} On the other hand, there is authority rejecting the argument that necessary emotional testimony entitles Defendants to a new trial. Our Court of Appeals rejected similar arguments made by the defendants in *Maisel*, 1968-NMCA-038, ¶ 11. The *Maisel* defendants argued that passion and prejudice were "obvious" because the plaintiff was divorced and disabled and cared for her disabled daughter. *Id.* The Court reasoned that "[i]nstead of being 'obvious,' there is no indication that these facts caused a verdict based on sympathy" and noted that "the jury was specifically instructed (a) that sympathy for an injured person was not a proper basis for determining damages and (b) that neither sympathy nor prejudice should influence the jury's verdict." *Id.*

{54} Similarly here, the nature of the case does not make it obvious that passion or prejudice affected the jury's verdict. Furthermore, as in *Maisel*, the jury here was specifically instructed with regard to each Plaintiff that it must not allow "sympathy or prejudice" to influence its verdict. Each instruction delineated that "your verdict must be based upon proof and not upon speculation, guess or conjecture." Concerning the Estates of Ylairam and Marialy Morga, the jury was instructed for each that "[y]ou must not permit the amount of damages to be influenced by sympathy or prejudice, or by the grief or sorrow of the family, or the loss of the deceased's society to family"; that "the property or wealth of the beneficiaries or of . . . [D]efendant[s] is not a legitimate factor for your consideration"; and that "the guide for you to follow in determining fair and just damages is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the beneficiaries with fairness to all parties to this action." Defendants acknowledged the significance of these instructions during closing argument, stating that the "instruction is so important, it shows up seven times in the packet of instructions. What it says is that sympathy cannot affect your decision in this case." We assume the jury followed these instructions. *Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 59 ("[W]e presume jurors abide by the court's instructions.").

{55} Moreover, if this Court were to adopt Defendants' suggested inference of passion or prejudice, then in all wrongful death and personal injury claims in New Mexico where a plaintiff exhibiting genuine emotion testifies as to the injury suffered, passion or prejudice would always be inferred in the jury's verdict. Considering the ubiquity and frequently the necessity of this type of testimony, adopting Defendants' proposed inference here would create an unwanted, consistent invasion of the province of the jury in New Mexico. Therefore, we decline to hold that Alfredo Morga's emotional testimony tainted the verdict.

ii. The unredacted photograph was not so graphic as to arouse the prejudice or passion of the jury

{56} The district court entered an order excluding "any graphic photographs of the bodies of Marialy Morga, Ylairam Morga, and Elizabeth Quintana." During closing arguments, Plaintiffs' counsel displayed a photograph to the jury showing the wreckage. The image is clearly of a badly wrecked vehicle. A severely damaged seat and car door are identifiable. Upon close examination, some orange fabric and what appears to be an arm from the shoulder to just below the elbow is visible between the car door and seat. Several scratches and bruises are visible on the arm. The district court ruled that Plaintiffs were permitted to use the photograph but that the portion of the photograph showing the arm should be masked. The masking, however, apparently fell off prior to the presentation of the photograph to the jury. Defendants contend that the photograph likely invoked passion or prejudice and that "[t]his graphic view of [Marialy's] body in the mangled remains of her vehicle likely colored the jury's deliberations" and that we "should conclude . . . that Plaintiffs' use of th[e] prohibited image . . . contributed to the passion and prejudice that invalidate the jury's verdict."

{57} When Defendants first raised the matter on the last day of the trial following the completion of Plaintiffs' closing argument, the district court acknowledged that the photograph should have been redacted and ordered that the photograph be withheld from the jury for deliberations.

At the same time, the district court judge stated that she "seriously doubt[ed]" the jury would recognize the image in the photograph as an arm and that she would not have recognized it as such had it not been pointed out to her. Defendants acknowledge that the district court considered the photograph harmless.

{58} We agree with the district court's assessment. In reviewing the photograph at issue, we see nothing obviously graphic about the image. The photograph focuses on an extremely damaged vehicle and predominately depicts bent and mangled metal, broken glass, a torn car seat, and damaged plastic from the interior of the vehicle. The portion of the photograph showing the arm is small in comparison to the rest of the photograph, and there is nothing gruesome about that section of the photograph. While, upon close examination, some bruises and scrapes are visible, the photograph does not show blood or other physical damage to the arm.

{59} "The [district] court ought to exclude photographs which are calculated to arouse the prejudices and passions of the jury and which are not reasonably relevant to the issues of the case." *State v. Boeglin*, 1987-NMSC-002, ¶ 21, 105 N.M. 247, 731 P.2d 943. However, the photograph that is the subject of Defendants' argument is not so graphic as to fit into the category of photographs that should be excluded as contemplated by this Court's decision in *Boeglin*. Indeed, while Defendants cite no case law supporting their claim that a photograph of the nature of the one at issue invokes the jury's passion or prejudice, we note that we have affirmed the admissibility of photographs significantly more graphic than the photograph at issue here. *See State v. Galindo*, 2018-NMSC-021, ¶ 39, 415 P.3d 494 (upholding the district court's admission of photographs of a deceased infant, notwithstanding that they were "graphic, heartbreaking, and difficult to view"); *State v. Saiz*, 2008-NMSC-048, ¶¶ 52, 54, 144 N.M. 663, 191 P.3d 521 (affirming the admission of graphic photographs of the victim's decomposed body), *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 n.1, 146 N.M. 357, 210 P.3d 783; *State v. Mora*, 1997-NMSC-060, ¶¶ 54-55, 124 N.M. 346, 950 P.2d 789 (affirming admission of autopsy photographs of a child victim), *abrogated on other grounds by State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1. Because the photograph here was not obviously graphic and the district court limited the jury's ability to review it, we conclude upon de novo review that the jury's limited viewing of the photograph is insufficient to infer that the jury's verdict was the result of passion or prejudice.

iii. Statements in closing argument were not so flagrant as to leave all bounds of ethical conduct and any potential prejudice was rectified by the jury instructions

{60} During closing argument, Plaintiffs' counsel argued that Defendant FedEx placed blame on its contractors and "took no responsibility, just like they haven't in this entire trial." Defendants contend that Plaintiffs' counsel's statements in closing arguments suggesting FedEx was trying to pass responsibility to its contractors were "inaccurate and irrelevant." These purportedly improper statements, Defendants contend, prejudiced the jury such that a new trial is required. Defendants concede that they "did not object to Plaintiffs' improper argument" but contend that objection was not necessary because the conduct of Plaintiffs' counsel was egregious. *See Griego v. Conwell*, 1950-NMSC-047, ¶ 17, 54 N.M. 287, 222 P.2d 606 (providing an exception for unpreserved objections to conduct of opposing counsel where counsel goes "outside the record, or . . . attempt[s] to inflame the minds of the jurors against the opposing litigant"). We do not find Plaintiffs' counsel's statements sufficiently egregious to infer that passion or prejudice affected the jury's verdict under the heightened standard of egregiousness set out in *Griego*.

{61} Defendants contend Plaintiffs' argument was improper because Defendant FedEx had agreed to accept responsibility collectively for all Defendants for all damages awarded, including punitive damages. Plaintiffs respond that it was not clear that Defendant FedEx agreed to accept liability, including punitive damages, for all Defendants prior to trial because Defendants' only support for this contention occurred after trial began.

{62} Prior to trial, the district court did grant partial summary judgment for Plaintiffs, finding that Defendant FedEx was liable for the actions of its subcontractor driver, Elizabeth Quintana, under the statutory employee doctrine. Although the record reflects some confusion around when Defendant FedEx stipulated to its responsibility for all damages awarded against any Defendants, including punitive damages, the record indicates that on the second day of trial Defendant FedEx agreed to accept this responsibility. While it is not clear why Plaintiffs brought this up again in closing, Defendants themselves brought this issue up again after Plaintiffs rested, asking the district court to find no vicarious liability for punitive damages:

> THE COURT: I'm sorry, but Ms. Saiz already agreed. If punitive damages are awarded, [FedEx] would be liable. You're not getting out of that one. You're not going to be allowed to go back on it.
> MR. CROASDELL: I was—I was referring to punitive damages for the conduct—the alleged conduct of Elizabeth Quintana.
> THE COURT: I don't care who it's of. She already agreed that—
> MR. CROASDELL: I understand.

{63} Plaintiffs also point to the special verdict form that required the jury to allocate fault to each Defendant. Defense counsel argued, "when you get to the Special Verdict Form . . . you're going to be asked to decide whether or not FedEx, [its contractors], or Ms. Quintana was negligent in this collision." Plaintiffs' counsel in rebuttal stated, "[p]ut it on the little guy. Do you think they have anything? No. 'Put it on them. It's not our fault. It's just our name, just looks like us.' But that's what they're used to, that's been their whole strategy in this case." Clearly, both parties lacked certainty throughout the trial about the degree of liability Defendant FedEx agreed to assume, and this uncertainty supports a conclusion that the statements made by Plaintiffs' counsel were neither inflammatory nor so egregious as to "leave the bounds of ethical conduct." *Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 57 (internal quotation marks and citation omitted).

{64} Generally, absent objection at trial, we will not grant a new trial based on improper statements of counsel "unless we are satisfied that the argument presented to the jury was so flagrant and glaring in fault and wrongdoing as to leave the bounds of ethical conduct, such as going outside the record." *Id.* (internal quotation marks and citation omitted).

{65} Here, the statements made, while unnecessary given the stipulation from Defendants, were not "so flagrant and glaring" as to leave all bounds of ethical conduct. *Id.* We conclude that the statements here were not inflammatory and that any potential prejudicial effect the closing argument here may have had on the jury was offset by the district court's instruction to the jury that closing arguments of counsel are not evidence. *See* UJI 13-2007 NMRA (providing that neither closing arguments "nor any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence"); *Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 59 ("[W]e presume jurors abide by the court's instructions."). Therefore, we decline to hold that Plaintiffs' closing argument affected the verdict by inflaming the passion or prejudice of the jury.

iv. The cumulative impact of the three aspects of trial did not taint the jury's verdict

{66} In reviewing the cumulative effect of these three aspects of trial, we conclude the effect is insufficient to infer that passion or prejudice tainted the jury's verdict. Before the district court, Defendants conceded, "[o]n the big picture, we can't find an error that would justify in its own terms a new trial." The district court maintained tight control of these proceedings. The district court limited evidence offered by Plaintiffs, including certain hospital bills and portions of Alfredo and Yahir Morga's life plans. It also carefully controlled emotional testimony by removing from the jury's view photographs that provoked emotional responses from witnesses, taking breaks during emotional testimony, instructing Plaintiffs' counsel to lead Alfredo Morga through his direct examination, and directing counsel to move on from emotion-provoking testimony. The jury was repeatedly instructed not to allow sympathy to play a part in the determination of its award, and we presume that a jury follows the instructions given by the district court. *Id*. Indeed, the jury's careful allocation of fault to each Defendant, as well as its allocation of five percent fault to Marialy Morga, after Plaintiffs' closing argument urging the jury to allocate no fault to her, indicates a deliberate, thoughtful, and even-keeled verdict.

{67} We conclude that the careful manner in which the district court judge conducted the trial, in addition to the jury instructions, alleviated any cumulative prejudicial impact of Alfredo Morga's emotional testimony, the inadvertently disclosed photograph, and Plaintiffs' counsel's statements about Defendants' intent to shift the blame. *See United States v. Evans*, 542 F.2d 805, 816 (10th Cir. 1976) (refusing to conclude that three disruptive aspects of trial warranted mistrial when "the [district] court did all that was possible to see that these outside matters did not influence the jury"); *Allsup's Convenience Stores, Inc.*, 1999-NMSC-006, ¶ 16 ("The [district court] judge . . . is empowered to, with discretion, provide stability and order during the proceedings."); *Chrysler Corp.*, 1998-NMCA-085, ¶ 16 ("[T]he best way to arrive at a reasonable award of damages is for the [district court] judge and the jury to work together, each diligently performing its respective duty to arrive at a decision that is as fair as humanly possible under the facts and circumstances of a given case."); *cf. Archuleta v. N.M. State Police*, 1989-NMCA-012, ¶¶ 3-4, 108 N.M. 543, 775 P.2d 745 (finding that passion or prejudice tainted the jury's verdict—where a juror overheard that the judge tentatively granted the defendants' motion for a directed verdict, after which the judge reconsidered allowing trial to proceed, and the jury then ruled for the defendants—reasoning that the jury may have found it futile to carefully consider the plaintiff's case).

III. CONCLUSION

{68} Reviewing excessiveness of the verdict de novo, as we must, we conclude that substantial evidence supported the verdict and that the jury's award was not the result of passion or prejudice. Therefore, it was not an abuse of discretion for the successor judge to deny Defendants' motion for a new trial. Where there is no error below, we will not substitute our judgment for that of the jury. *Lujan*, 1967-NMSC-262, ¶¶ 25, 32. Accordingly, we affirm the Court of Appeals.

{69} IT IS SO ORDERED.

JULIE J. VARGAS, Justice

WE CONCUR:

C. SHANNON BACON, Chief Justice

DAVID K. THOMSON, Justice

ERIN B. O'CONNELL, Judge

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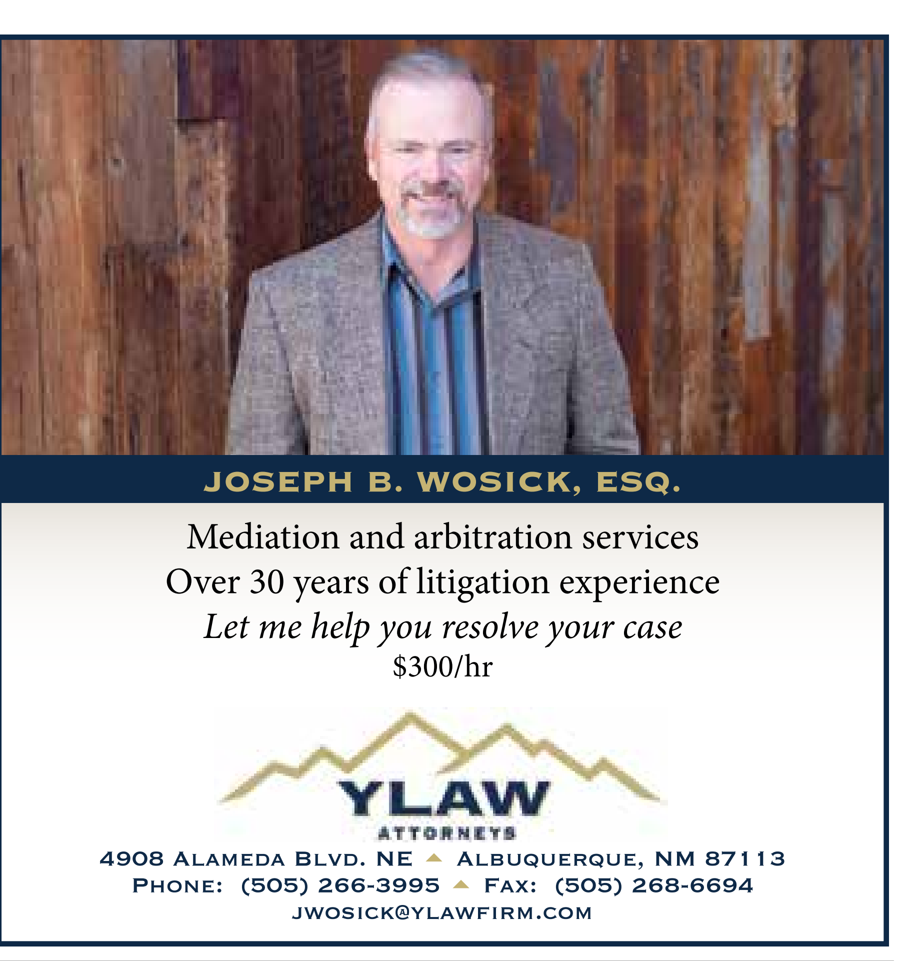

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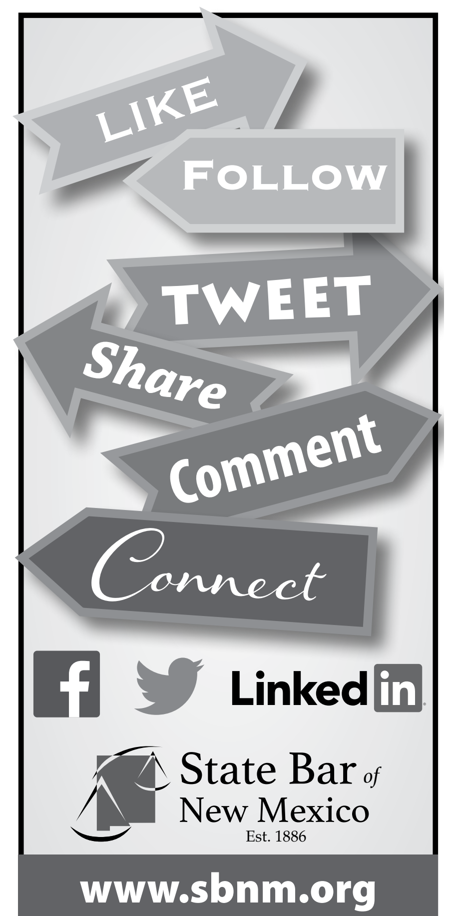

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The Children, Youth and Families Department is seeking to fill multiple vacancies in the Legal Department. We are currently filling Children's Court Attorney Master for Cibola/McKinley County Office, a Children's Court Attorney Senior for the Las Vegas NM Office (Attorney may be housed at the Santa Fe Office), the Taos NM Office, and the Albuquerque NM Office, and a Children's Court Attorney I position housed in Las Cruces NM Office. Annual salary range for Attorney Master is $71,061 to $ 113,698. Annual salary range for Attorney Senior is $65,062 to $104,099 and Annual salary for Attorney I is $60,031 to $96,050. The salary range for each position listed is dependent on experience and qualifications. Incumbents will provide professional le-gal services for protective services cases (Abuse and neglect matters under the NM Children's Code and child welfare cases) in litigation, counsel, interpretation of law, do research, analysis, and mediation. Minimum qualifications for Attorney I: Juris Doctorate from an accredited school of law, currently licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for limited practice license, in addition an Attorney Senior must have at least two (2) years of experience in the practice of law and for an Attorney Master they must have (4) years' experience in the practice of law. Executive Order 2021-066 requires all employees with the State of New Mexico to provide either proof of COVID-19 vaccination or proof of a COVID -19 Viral test every week. Benefits include medical, dental, vision, paid vacation, and a retirement package. For information, please contact: Marisa Salazar (505) 659-8952 or email marisa.salazar@state.nm.us To apply for these positions, go to www.spo.state.nm.us The State of New Mexico is an EOE.

Associate Litigation Attorney

Hinkle Shanor LLP is seeking associate attorneys to join their Albuquerque office in 2022! The Albuquerque office of Hinkle Shanor is heavily specialized in medical malpractice defense litigation. Ideal candidates will demonstrate strong academic achievement, polished writing skills, and have 4-5 years of experience. While significant consideration will be given to candidates with prior medical malpractice litigation experience, attorneys with prior litigation experience in any area are encouraged to apply. Interested candidates should submit a resume and cover letter. Highly competitive salary and benefits. All inquiries will be kept confidential. Please email resumes and cover letters to nanderson@hinklelawfirm.com.

Legal Secretary

The City of Albuquerque Legal Department (Litigation Division) is seeking a Legal Secretary to assist assigned attorneys in performing a variety of legal secretarial/administrative duties, which include but are not limited to: preparing and reviewing legal documents; creating and maintaining case files; calendaring; provide information and assistance, within an area of assignment, to the general public, other departments and governmental agencies. Please apply at https://www.governmentjobs.com/careers/cabq.

Legal Assistant/Paralegal

Are you interested in working to help your community? Do you have interest in housing issues? The Fair Lending Center at United South Broadway Corporation is looking for a driven, dedicated and detail-oriented Legal Assistant/Paralegal to assist our attorneys with defending against mortgage foreclosures. Experience in foreclosures is a huge plus, Spanish fluency is strongly preferred. Please send all applications to sparker@unitedsouthbroadway.org.

Full-Time Paralegal

Egolf + Ferlic + Martinez + Harwood LLC is hiring a full-time paralegal position. The Firm is based in downtown Santa Fe but represents clients throughout the state. Ideal candidate will show initiative, demonstrate attention to detail and organization, and work well under pressure. They must be able to communicate well with others, while also being able to work independently. Litigation experience a plus! For the right candidate, the Firm is willing to train individuals with related experience or education. The Firm offers a competitive salary and benefits package that includes healthcare, life insurance & retirement match. Interested candidates should submit a resume to Annette@EgolfLaw.com

Legal Assistant

Rodey's Santa Fe office is accepting resumes for a legal assistant position. Candidate must have excellent organizational skills; demonstrate initiative, resourcefulness, and flexibility, be detail-oriented and able to work in a fast-paced, multi-task legal environment with ability to assess priorities. Responsible for calendaring all deadlines. Must have a high school diploma, or equivalent, and a minimum of three (3) years' experience as a legal assistant, proficient with Microsoft Office products and have excellent typing skills. Paralegal skills a plus. Firm offers comprehensive benefits package and competitive salary. Please send resume to jobs@rodey.com with "Legal Assistant – Santa Fe" in the subject line, or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87103.

Legal Assistant

Legal Assistant with minimum of 3- 5 years' experience for established commercial civil litigation firm. Requirements include current working knowledge of State and Federal District Court rules and filing procedures, calendaring, trial preparation, document and case management; ability to monitor, organize and distribute large volumes of information; proficient in MS Office, AdobePro, Powerpoint and adept at learning and use of electronic databases and legal-use software; has excellent clerical, computer, and word processing skills. Competitive Benefits. If you are highly skilled, pay attention to detail & enjoy working with a team, email resume to e_info@abrfirm.com or Fax to 505-764-8374.

Legal Assistant/Paralegal

Santa Fe law firm, whose attorneys primarily practice in medical malpractice and personal injury, is accepting resumes for a legal assistant/paralegal position. Candidate must possess excellent organizational skills, demonstrate initiative, resourcefulness and flexibility. The ability to work in a fast-paced environment, multi task and assess priorities is a must. Responsible for calendaring. High school diploma or equivalent and a minimum of three years' experience as a legal assistant or paralegal in litigation is preferred. Proficiency in Microsoft Office products and electronic filing. Paralegal skills a plus. Competitive salary dependent on experience. Send resume to lee@huntlaw.com and cynthia@huntlaw.com.

Paralegal

Peifer, Hanson, Mullins & Baker, P.A., is seeking an experienced commercial litigation paralegal. The successful candidate must be a detail-oriented, team player with strong organizational and writing skills. Experience in database and document management preferred. Please send resume, references and salary requirements via email to Shannon Hidalgo at shidalgo@peiferlaw.com.

Paralegal

Robles, Rael & Anaya, P.C. is seeking an experienced paralegal for its civil defense and local government practice. Firm primarily represents governmental entities. Practice involves complex litigation, civil rights defense, and general civil representation. Ideal candidate will have 1-4 years litigation experience. Competitive salary and benefits. inquiries will be kept confidential. Please e-mail a letter of interest and resume to chelsea@roblesrael.com.

Paralegal
Jackson Law, a personal injury law firm, is looking for an experienced paralegal, who will be a shared employee with two other firms. The ideal candidate has paralegal experience and excellent references. Qualified candidates should email their resume and references to wes@legalactionnm.com with the subject line "paralegal position."

Paralegal
Personal Injury/Civil litigation firm in the Journal Center area is seeking a Paralegal with minimum of 5+ years' experience, including current working knowledge of State and Federal District Court rules and filing procedures, trial preparation, document and case management, calendaring, and online research, is technologically adept and familiar with use of electronic databases and legal-use software. Qualified candidates must be organized and detail-oriented, with excellent computer and word processing skills and the ability to multi-task and work independently. Experience in summarizing medical records is a plus. Salary commensurate with experience. Please send resume with references and a writing sample to paralegal3.bleuslaw@gmail.com

Office Space

Office Suites-ALL INCLUSIVE-
virtual mail, virtual telephone reception service, hourly offices and conference rooms available. Witness and notary services. Office Alternatives provides the infrastructure for attorney practices so you can lower your overhead and appear more professional. 505-796-9600/ officealternatives.com.

Santa Fe Office Space
Single office in professional suite with conference rooms. Share with three other attorneys. Quiet setting in converted residential structure. Walking distance to the Plaza. $380/month + utilities. info@tierralaw.com

All Inclusive Office-Move in Ready Suites
Conveniently located in the North Valley with easy access to I-25, Paseo Del Norte, and Montano. Quick access to Downtown Courthouses. Our all-inclusive, move-in ready executive suites provide simplicity with short term and long-term lease options. Our fully furnished suites offer the best in class amenities, ideal for a small law firm. Visit our website www.sunvalleyabq.com for more details or call Jaclyn Armijo at 505-343-2016.

Miscellaneous

Office Furniture For Sale in Santa Fe
Workstations, conference table and chairs, desks and more. Call 505-989-9090 ex. 102 for pictures and information.

2022 *Bar Bulletin* Publishing and Submission Schedule

The *Bar Bulletin* publishes twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

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

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

The publication schedule can be found at **www.sbnm.org.**

Help New Mexico Wildfire Victims

In partnership with the **Federal Emergency Management Agency** and the **American Bar Association's Disaster Legal Services Program**, the **State Bar of New Mexico Young Lawyers Division** is preparing legal resources and assistance for survivors of the New Mexico wildfires.

A free legal aid hotline is available and we need volunteers!
Individuals who qualify for assistance will be matched with New Mexico Lawyers to provide free, limited legal help.

- Assistance with securing FEMA and other benefits available to disaster survivors
- Assistance with life, medical, and property insurance claims
- Help with home repair contracts and contractors
- Replacement of important legal documents destroyed in the disaster
- Assistance with consumer protection matters, remedies, and procedures
- Counseling on landlord/tenant and mortgage/foreclosure problems

Volunteer Expectations
Volunteers do not need extensive experience in any of the areas listed below. FEMA will provide basic training for frequently asked questions. This training will be required for all volunteers. We hope volunteers will be able to commit approximately one hour per week.

Visit **www.sbnm.org/wildfirehelp** to sign up.
You can also contact Lauren E. Riley, ABA YLD District 23,
at 505-246-0500 or lauren@batleyfamilylaw.com.

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