Official Publication of the State Bar of New Mexico

Bar Bulletin

April 25, 2018 • Volume 57, No. 17

Contemplating Universe, by Kat Livengood Dark Bird Studio, Santa Fe

Inside This Issue

UNM School of Law Alumni/ae Association

7:30 AM BREAKFAST

8:00 AM TEE OFF

THE 16TH ANNUAL

LAW SCHOLARSHIPS CLASSIC

FRIDAY, JUNE 8, 2018

UNM CHAMPIONSHIP GOLF COURSE

PRESENTED BY USEagle FEDERAL CREDIT UNION

7:30 AM: Breakfast

8:00 AM: Shotgun start (18 holes)

POST PLAY: Catered 19th Hole Reception

REGISTER @

GOTO.UNM.EDU/GOLF

OR CALL 505.277.1457

THIS PREMIER TOURNAMENT SELLS OUT EACH YEAR. DON'T DELAY!

&

DISTINGUISHED ACHIEVEMENT

Awards Dinner

2018

SUBMIT YOUR NOMINATIONS FOR 2 AWARDS

1 DISTINGUISHED ACHIEVEMENT AWARD

Help the UNM Law Alumni/ae Association recognize accomplished members of our legal community.

2 ALUMNI PROMISE AWARD

Recognize an alumnus/a who graduated from the Law School within the last ten years and has contributed innovative or substantial service to the Law School, its students, or its community.

DEADLINE FOR ALL NOMINATIONS:

WEDNESDAY, MAY 16, 2018

SEE CRITERIA AND NOMINATION FORM:

GOTO.UNM.EDU/DAAD

For more information, call 505.277.1457

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

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8
Appellate Practice Section
Noon, teleconference

9
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Noon, State Bar Center

9
Children's Law Section
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2
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2
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10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

11
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10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

16
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10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

About Cover Image and Artist: Photographer Kat Livengood lives and works in the high desert of Santa Fe. When she's not at her Canyon Road studio, she's traveling all over the west with her partner, artist Kelly Moore, looking for wild horses and capturing images of wildlife and southwestern landscapes. Livengood is known for sensitively conveying spirit and soul in her work. To view more of her work, visit www.katlivengood.com.

Notices

Court News

New Mexico Supreme Court

Gov. Susana Martinez Appoints Justice Gary L. Clingman

On April 6, Gov. Susana Martinez appointed Fifth Judicial District Justice Gary L. Clingman to the New Mexico Supreme Court, filling the vacancy created by the retirement of Justice Edward L. Chávez. Judge Clingman brings over 30 years of legal experience.

Judicial Standards Commission

Seeking Commentary on Proposed Amended Rules

The Commission has completed a comprehensive review and revision of its procedural rules. Commentary on the proposed amendments is requested from the bench, bar and public. The deadline for public commentary has been extended to May 18. To be fully considered by the Commission, comments must be received by that date and may be sent either by email to rules@nmjsc.org or by mail to Judicial Standards Commission, PO Box 27248, Albuquerque, NM 87125-7248. To download a copy of the proposed amended rules, visit nmjsc.org/recent-news/.

First Judicial District Court

Gov. Susana Martinez Appoints Judge Jason Lidyard

On March 30, Gov. Susana Martinez appointed Jason Lidyard to fill the vacant position in Division V of the First Judicial District. On April 14, a mass reassignment of all cases previously assigned to Judge Jennifer L. Attrep will be assigned to Judge Jason Lidyard pursuant to NMSC Rule 23-109, the Chief Judge Rule. Parties who have not previously exercised their right to challenge or excuse will have ten 10 days from May 2, to challenge or excuse Judge Jason Lidyard pursuant to Rule 1-088.1

Tenth Judicial District Court

Destruction of Exhibits

The Tenth Judicial District Court County of Quay will destroy exhibits in domestic relations cases for years 1979-2013. Exhibits may be retrieved through April 30 by calling 575-461-4422.

Professionalism Tip

With respect to my clients:

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

State Bar News

Attorney Support Groups

- May 7, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- May 14, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- May 21, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

ADR Committee

Reframing Presentation

Reframing, like mediation, is an art unto itself. As an art, and as one of the most valuable tools we have as mediators, reframing takes practice and ongoing refinement. Join the ADR Committee at noon on April 26 at the State Bar Center in Albuquerque where Diane Grover and Kathleen Oweegon will explore the adventure of "Wrangling With Reframes". This highly interactive 1-hour learning and practice session is a great opportunity to have some fun and get some practice in this challenging and vital skill. Lunch will be provided during the presentation. R.S.V.P. to Breanna Henley at bhenley@nmbar.org. The Committee will meet from 11:30 a.m.-noon in advance of the presentation.

Animal Law Section

Animal Talk: Tethering

During the 2007 Legislative Session, the New Mexico House of Representatives issued House Memorial 19 which requested that the Department of Public Safety study the public safety and humane implications of persistently tethering dogs. Join Alan Edmonds, the high-energy force behind Animal Protection of New Mexico's animal cruelty hotline at noon, April 27, at the State Bar Center for an Animal Talk covering an overview of a 2008 report that was produced by DPS to the Consumer and Public Affairs Committee as a result of House Memorial 19, current statutes and ordinances in N.M. addressing tethering and a comparison of N.M. laws to other states, and efforts in community education on dog behavior, outreach and alternatives to tethering. R.S.V.P. to bhenley@nmbar.org

Board of Bar Commissioners

ABA House of Delegates

The Board of Bar Commissioners will make one appointment to the American Bar Association House of Delegates for a two-year term, which will expire at the conclusion of the 2020 ABA Annual Meeting. The delegate must be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar. However, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members who want to serve on the board must be a current ABA member in good standing and should send a letter of interest and brief résumé by May 4 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Judicial Standards Commission

The Board of Bar Commissioners will make one appointment to the Judicial Standards Commission for a four-year term. The time commitment for service on this Commission is substantial and the workload is voluminous. Receiving, reviewing and analyzing substantial quantities of electronic documents are necessary to prepare for Commission matters. Strict

adherence to constitutional, statutory and regulatory authority governing the Commission is mandatory, expressly including but not limited to confidentiality. Commissioners meet at least six times per year for approximately three hours per meeting. A substantial amount of reading and preparation is required for every meeting. In addition to regular meetings, the Commission schedules at least three weeklong trailing dockets of trials. Additional trials, hearings or other events may be scheduled on special settings. Additionally, mandatory in-house training sessions may periodically take place. Unless properly recused or excused from a matter, all Commissioners are required to faithfully attend all meetings and participate in all trials and hearings. Appointees should come to the Commission with limited conflicts of interest and must continually avoid, limit, or eliminate conflicts of interest with the Commission's cases, Commission members, Commission staff, and with all others involved in Commission matters. Members who want to serve on the Commission should send a letter of interest and brief résume by May 4 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Paralegal Division

Law Day CLE

Join the Paralegal Division from 9 a.m.-12:15 p.m., April 28, at the State Bar Center for Law Day CLE. This program will cover slip and fall accidents, personal injury claims and patent prosecution. Open to all attorneys and paralegals, $35 for paralegals division members, $50 paralegal non-members and $55 for attorneys. R.S.V.P. to Yolanda Hernandez at hyolanda6427@gmail.com to reserve a spot. Registration and payment will take place at the event. More information can be found at www.nmbar.org/ParalegalDivision under the "CLE Programs" tab.

UNM School of Law

Law Library Hours

Through May 12

Building and Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.

UNM Law Scholarship Classic presented by U.S. Eagle

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

Other Bars

The Albuquerque Bar Association

Trevor Potter is the Law Day Luncheon Keynote Speaker

The Albuquerque Bar Association Annual Law Day Luncheon registration is now open. Join the Albuquerque Bar from 11:30 a.m.-1 p.m. on May 1, at the Embassy Suites Hotel located at 1000 Woodward Pl NE in Albuquerque. With generous support from the Thornburg Foundation, this year speaker is Trevor Potter, one of the country's most prominent and experienced campaign and election lawyers and a senior adviser to the reform group Issue One, as well as head of the political law practice at the Washington firm of Caplin & Drysdale. To many, he is perhaps best known for his appearances on the Colbert Report as the lawyer for Stephen Colbert's Super PAC, Americans for a Better Tomorrow, Tomorrow, during the 2012 election. Visit https://form.jotform.com/sbnm/LawDayLuncheonRegistration to register online or contact bhenley@nmbar.org to register by check.

Albuquerque Lawyers Club

Monthly Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its May meeting. Daymon Ely is the featured speaker. The title of his presentation is "The New Mexico Legislature." The lunch meeting will be held at noon on Wednesday, May 2, at Seasons Restaurant, located at 2031 Mountain Road, NW, Albuquerque.The luncheon is free to members/ $30 non-members in advance/$35 at the door For more information,email ydennig@yahoo.com or call 505-844-3558

New Mexico Christian Legal Aid

Training Seminar

New Mexico Christian Legal Aid invites new members to join them as they work together to secure justice for the poor and uphold the cause of the needy. They will be hosting a training seminar on Friday, April 27, from noon-5 p.m. at 4700 Lincoln Road NE Albuquerque, NM 87109. Join them for free lunch, free CLE credits, and training as they update skills on how to provide legal aid. For more information or to register, contact Jim Roach at 505-243-4419 or Jen Meisner at 505-610-8800 christianlegalaid@hotmail.com.

New Mexico Defense Lawyers Association

Save the Date - Women in the Courtroom VII CLE Seminar

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

New Mexico Women's Bar Association

2018 Henrietta Pettijohn Reception

The New Mexico Women's Bar Association invites members of the legal profession to attend its annual Henrietta Pettijohn Reception Honoring the Honorable Sharon Walton. The 2018 Supporting Women in the Law Award will be presented to Little, Gilman-Tepper & Batley, PA. The Exemplary Service Award will be presented to Sarita Nair and the Outstanding Young Attorney Award will be presented to Emma O'Sullivan. The reception will be 6–9:30 p.m., May 10, Hyatt Regency Albuquerque. Tickets are $25 for law students, $50 for members, $60 for non-members. Contact Libby Radosevich, eradosevich@peiferlaw.com to purchase tickets and sponsorships.

The Southwest Women's Law Center

Legal Issues Affecting the Rights of Pregnant and Parenting Students in 2018

This live webinar will discuss the common obstacles that pregnant and parenting students face in accessing vital resources such as education and affordable child care. Attendees will learn about laws that can be used to help pregnant and parenting students protect and advocate for their rights. $50 course registration. CLE is open to attorneys and other professionals. Attorneys will receive 1.0 CLE credit upon completion. The CLE presented by the Southwest Women's Law Center will take place April 27. For more information or to R.S.V.P., please contact Elena Rubinfeld at 505-244-0502 or erubinfeld@swwomenslaw.org.

Submit announcements

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

Law Day Call-in Program

NEEDED:

Volunteer attorneys who can answer questions about many areas of law including:

- Family law
- Landlord/tenant disputes
- Consumer law
- Personal injury
- Collections
- General practice

Saturday, April 28 • 9 a.m. to noon

(volunteers should arrive at 8 a.m. for breakfast and orientation)

Albuquerque and Roswell

Volunteer attorneys will provide very brief legal advice to callers from around the state in the practice area of their choice.
Attorneys fluent in Spanish are needed.

Earn pro bono hours!

For more information or to volunteer, visit www.nmbar.org/AskALawyer

State Bar of New Mexico
Young Lawyers Division

Legal Education

April

26 **Defined Value Clauses: Drafting & Avoiding Red Flags**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Oil and Gas: From the Basics to In-Depth Topics (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Ethics for Government Attorneys (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Add a Little Fiction to Your Legal Writing (2017)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

27 **Lawyer Ethics in Real Estate Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Legal Rights and Issues Affecting Pregnant and Parenting Teens in New Mexico**
1.0 G
Live Seminar, Albuquerque
Southwest Women's Law Center
swwomenslaw.org

27 **How to Practice Series: Demystifying Civil Litigation, Pt. I**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Law Day**
3.0 G
Live Seminar, Albuquerque
State Bar of New Mexico-Paralegal Division
www.nmbar.org/ParalegalDivision

30 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Guardianship Updates from the 2018 Legislature**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Children's Code: Delinquency Rules, Procedures and the Child's Best Interest**
1.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

May

1 **The Law of Consignments: How Selling Goods for Others Works**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 **Valuation of Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Ownership of Ideas Created on the Job**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **2018 Trust Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **How Ethics Rules Apply to Lawyers Outside of Law Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Reps and Warranties in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

17 **2018 Wrongful Discharge & Retaliation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

18 **The Basics of Family Law (2017)**
5.2 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **A Little Planning Now, A Lot Less Panic Later: Practical Succession Planning for Lawyers (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Escrow Agreements in Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Introduction to New Mexico's Uniform Directed Trust Act**
1.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

23 **The Cyborgs are Coming! The Cyborgs are Coming! Ethical Concerns with the Latest Technology Disruptions (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Digital Communications**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **33rd Annual Bankruptcy Year in Review Seminar (2018)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

30 **Basics of Cyber-Attack Liability and Protecting Clients**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Professionalism for the Ethical Lawyer**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

1 **Choice of Entity for Service Businesses**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **2018 Ethics in Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

8 **Text Messages & Litigation: Discovery and Evidentiary Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Closely Held Company Merger & Acquisitions, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Closely Held Company Merger & Acquisitions, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **My Client's Commercial Real Estate Mortgage Is Due, Now What?**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Practice Management Skills for Success**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics and Email**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Director and Officer Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Holding Business Interests in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

25 **The Ethics of Bad Facts and Bad Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Classes of Stock: Structuring Voting and Non-voting Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Roadmap/Basics of Real Estate Finance, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Roadmap/Basics of Real Estate Finance, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

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 April 13, 2018

PUBLISHED OPINIONS

A-1-CA-35520	G Mendoza v. Isleta Resort	Reverse/Remand	04/09/2018

UNPUBLISHED OPINIONS

A-1-CA-35178	A Montoya v. Walgreen Co	Affirm	04/09/2018
A-1-CA-36364	J Mendoza v. PES Payroll	Affirm	04/09/2018
A-1-CA-36443	State v. D C De Baca	Affirm	04/09/2018
A-1-CA-36639	State v. M Hammond	Affirm	04/10/2018
A-1-CA-36943	CYFD v. Terry M	Affirm	04/10/2018
A-1-CA-34857	State v. P Gadbury	Affirm	04/11/2018
A-1-CA-35379	D Murphy v. J Davis	Affirm	04/11/2018
A-1-CA-36536	J Franco v. Nelson Meats	Affirm	04/11/2018
A-1-CA-36693	State v. A Duran	Affirm	04/12/2018
A-1-CA-36900	C Kowal v. Phi Air Medical	Affirm	04/12/2018
A-1-CA-36675	CYFD v. Julianna R	Affirm	04/13/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF WITHDRAWAL AND CHANGE OF ADDRESS

Effective April 12, 2018:
Robert A. Bassett
910 Fillmore Street
Denver, CO 80206

Effective April 12, 2018:
Ira Donald Bolnick
4641 Sutton Street, NW
Albuquerque, NM 87114

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective April 12, 2018:
Wendy D. Buckels
3212 Monte Vista, NE
Albuquerque, NM 87106

IN MEMORIAM

As of March 25, 2018:
Hon. Joe H. Galvan (ret.)
PO Box 411
Las Cruces, NM 88001

CLERK'S CERTIFICATE OF CORRECTION

Dated March 16, 2018:
Billy J. Jimenez
Adams+Crow, PC
5051 Journal Center Blvd., NE, Suite 320
Albuquerque, NM 87109
505-582-2819
505-212-0439 (fax)
billy@adamscrow.com

CLERK'S CERTIFICATE OF ADMISSION

On April 10, 2018:
Wayne O'Brien McCook
257 Foxboro Drive
Newington, CT 06111
860-856-1236
waynemccook@yahoo.com

CLERK'S CERTIFICATE OF NAME CHANGE

As of April 9, 2018:
Jerrald J. Roehl
F/K/A Jerrald Joseph Roehl
The Roehl Law Firm, PC
300 Central Avenue, SW, Suite 2500E
Albuquerque, NM 87102
505-242-6900
505-242-0530 (fax)
jerry@roehl.com

As of April 3, 2018:
Theresa L. Romero
F/K/A Theresa Lorraine Romero
Office of the Second Judicial District Attorney
520 Lomas Blvd., NW
Albuquerque, NM 87102
505-222-1379
505-241-1379 (fax)
theresa.romero@da2nd.state.nm.us

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective January 1, 2018:
J. Henry Messinger
809 Branding Iron Street, SE
Albuquerque, NM 87123

Effective January 1:
Charles Sanchez
1610 Camino Corona
Los Lunas, NM 87031

Effective January 15, 2018:
Gina M. Maestas
PO Box 20784
Albuquerque, NM 87154

Effective March 13, 2018:
Kelly Hooper Burnham
4509 Falcon Drive
Las Cruces, NM 88011

Effective April 1, 2018:
Mari T. Spaulding-Bynon
9521 San Mateo Blvd., NE
Albuquerque, NM 87113

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

The Ad Hoc Guardianship and Conservatorship Rules and Forms Committee has recommended amendments to Rules 1-079 and 1-104 NMRA, and has recommended adoption of proposed new Rules 1-003.2 and 1-141 NMRA and new Forms 4-992 and 4-992.1 NMRA for the Supreme Court's consideration. The proposed amended and new rules and forms are posted to the Supreme Court's website as Proposal 2018-027, and may be found at https://supremecourt.nmcourts.gov/open-for-comment.aspx. Due to the length of the proposal, the full text is not being published in the *Bar Bulletin*.

The committee has proposed the new and amended rules and forms in response to recent amendments to the Uniform Probate Code that will take effect on July 1st, 2018. See 2018 N.M. Laws, Ch. 10. The amendments to the Uniform Probate Code will affect, among other things, persons entitled to receive notice, to access court records, and to attend hearings in guardianship and conservatorship proceedings. The proposed new and amended rules and forms are intended to implement these new legislative requirements.

If you would like to comment on the proposed amendments before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's website at **http://supremecourt.nmcourts.gov/open-for-comment.aspx** or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 30, 2018, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-011
No. S-1-SC-35104 (filed January 18, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
FILEMON V.,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
J.C. Robinson, District Judge

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Opinion

Barbara J. Vigil, Justice

I. INTRODUCTION

{1} In this case we reexamine a juvenile's right to be free from self-incrimination, as secured by the Fifth Amendment of the United States Constitution and the Basic Rights provision under the Delinquency Act of the Children's Code, NMSA 1978, Section 32A-2-14 (2009). The State appeals the suppression of two statements made by sixteen-year-old Filemon V.

{2} Filemon made the first statement to his probation officers. We hold that, absent a valid waiver, Section 32A-2-14(C) precludes the admission of Filemon's statement to his probation officers while in investigatory detention. We affirm the district court's order suppressing the use of the statement in a subsequent prosecution.

{3} The second contested statement was elicited by police officers at the Silver City Police Department. Filemon was at this point in custody, and entitled to be warned of his *Miranda* rights. At issue is whether the midstream *Miranda* warnings were sufficient to inform Filemon of his rights. We conclude that the warnings were insufficient under *Missouri v. Seibert*, 542 U.S. 600, 617 (2004). Because the statement was elicited in clear violation of the Fifth Amendment and Section 32A-2-14, we affirm the district court's suppression of the statement.

II. BACKGROUND AND PROCEDURAL HISTORY

{4} This case comes to this Court on interlocutory appeal from the Sixth Judicial District Court. Pursuant to Rule 12-201(A)(1)(a) NMRA, the State appeals the district court's order to suppress two statements, one elicited at the juvenile probation office and the other at the Silver City Police Department.

{5} Filemon was on probation for committing a delinquent act and expected to come to the probation office to pick up a travel permit. Filemon arrived at the probation office with his mother and stepfather. When he entered the lobby, Supervisor Rachel Medina greeted Filemon and asked if he was there to pick up the travel permit. Filemon responded that he "just shot Chugie and Eric."[1] Supervisor Medina asked what Filemon was talking about, and Filemon's mother interjected, stating that he was there "to turn himself in." At that point, Filemon's probation officer, Cody McNiel, entered the lobby. Filemon again said that he was there to "turn[] himself in," this time adding, "for murder, I guess."

{6} Prior to Filemon's arrival, McNiel had been informed of a shooting and was helping to locate a potential suspect—Filemon's co-defendant in another case. Thus, McNiel knew what Filemon was talking about. McNiel told Filemon to "go ahead and come in and . . . we'll go to my office and . . . we'll discuss it."

{7} McNiel escorted Filemon through a locked door and a hallway, to Supervisor Medina's office. McNiel shut the door. Filemon's parents told McNiel and Supervisor Medina that Filemon wanted to turn himself in to New Mexico State Police Officer Michael Dunn, because "that's who he trusts." McNiel stepped out and asked another probation officer to call the police, identifying Filemon as "the shooter."

{8} Inside Supervisor Medina's office, McNiel asked if Filemon was there "to confess [to] the drive-by shooting." Filemon responded, "[I]t wasn't a drive-by." McNiel persisted, "[O]kay . . . why don't you go ahead and tell me the story then." Filemon responded with the first contested statement. McNiel continued to speak to Filemon until police arrived.

{9} Supervisor Medina later testified that Filemon arrived at the probation office of his own volition, and neither she nor McNiel questioned Filemon. According to McNiel, however, McNiel "wanted to keep him talking until . . . law enforcement got there so that they could take him into custody." Filemon's mother "[did] most of the talking" and "Filemon said very little." Neither probation officer advised Filemon of his *Miranda* rights or his right to remain silent under Section 32A-2-14. *See Javier M.*, 2001-NMSC-030, ¶ 41 (determining that Section 32A-2-14 requires a child to be warned of the right to remain silent during an investigatory detention).

{10} Several police officers arrived at the probation office, including Officer Dunn and Sergeant Joseph Arredondo. Sergeant Arredondo had been present at the hospital with the victims prior to his dispatch and knew Filemon was a suspect. Supervisor Medina told at least one police

[1] We do not assess the admissibility of the statements in the lobby. The district court found that these statements were spontaneous and unsolicited and Filemon does not contest that finding on appeal. *See State v. Javier M.*, 2001-NMSC-030, ¶ 40, 131 N.M. 1, 33 P.3d 1 (stating that volunteered statements are "not subject to the protections of Section 32A-2-14 since such statements are generally not in response to any 'questioning' or 'interrogation.' ").

officer what Filemon had said. According to Supervisor Medina, the parking lot of the juvenile probation office looked "like Christmas" due to the number of police units and flashing lights.

{11} Sergeant Arredondo informed Filemon that "detectives needed to speak with him" and transported Filemon and his mother to the Silver City Police Department, where he turned Filemon over to Captain Javier Hernandez. Captain Hernandez met Filemon and his mother in the parking lot and asked if they would come inside. Captain Hernandez had been actively questioning an eyewitness to the shooting, and knew that the likely shooter was short, named "Fil," and had a "peanut-shaped" head, which matched Filemon's appearance.

{12} Seeing that the interview room was occupied with another suspect, Captain Hernandez took Filemon and his mother to his office. Captain Hernandez summoned the case agent assigned to the murder investigation, Detective Pat Castillo. Captain Hernandez later testified that he intended for Detective Castillo "to sit there and listen to what [Filemon] had to say because the other witness . . . wasn't cooperating with us." Captain Hernandez turned on his belt recorder and asked Filemon "how old he was" and "if he was going to tell me what happened today." Filemon responded, "What [do] you want to know?" Captain Hernandez answered, "Everything." Filemon proceeded to give a full statement.

{13} At no time did Captain Hernandez advise Filemon of his constitutional rights. When asked why he did not advise Filemon of his constitutional rights, Captain Hernandez said, "I didn't really think about it. I wasn't sure what his involvement was . . . if he was the shooter or if he wasn't the shooter. I just wanted to see what information he had." Once he obtained Filemon's statement, Captain Hernandez told Filemon that he would be detained. The State concedes that the statement elicited by Captain Hernandez is inadmissible.

{14} Captain Hernandez then asked Filemon to make a statement to Detective Castillo. Detective Castillo took Filemon and his mother to the interview room, where he read Filemon his *Miranda* warnings. Before continuing the interview, Detective Castillo told Filemon that he was "finishing up." Detective Castillo characterized the *Miranda* warnings as a "formality," and instructed Filemon and his mother to sign the written waiver of rights, which they did. Detective Castillo explained that their conversation would "go the same way" as the conversation with Captain Hernandez, but in greater detail. Detective Castillo did not inform Filemon that the statement he had just given to Captain Hernandez would not be admissible at trial. Detective Castillo then obtained a second statement, which included the same content as the statement elicited by Captain Hernandez.

{15} At the conclusion of the suppression hearing, the district court determined that the statement in Supervisor Medina's office was inadmissible because Filemon was not advised of his statutory right against self-incrimination and did not knowingly, voluntarily and intelligently waive his rights under Section 32A-2-14(D). The district court also suppressed both statements elicited at the Silver City Police Department, finding that the pre-*Miranda*, unwarned statement was inadmissible; Detective Castillo's midstream *Miranda* warnings were constitutionally inadequate under *Seibert*, 542 U.S. at 604; and neither statement was made subject to a valid waiver under Section 32A-2-14(D).

{16} The State appeals the district court's order to suppress two statements: (1) the statement in Supervisor Medina's office; and (2) the post-warning statement to Detective Castillo. On appeal, the State contends that Section 32A-2-14 does not preclude the admission of the statement and that Section 32A-2-14 applies only when law enforcement places a child in investigatory detention. The State also contends that the post-*Miranda* statement to Detective Castillo is admissible because it was voluntary, uncoerced, and made subject to a valid waiver. Because the charges expose Filemon to a potential sentence of life imprisonment, we have jurisdiction to decide the appeal under Rule 12-102(A)(1) NMRA. *State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821.

III. STANDARD OF REVIEW

{17} An appeal of a district court's suppression ruling raises a mixed question of fact and law. *State v. Wyatt B.*, 2015-NMCA-110, ¶ 16, 359 P.3d 165. We review "whether the law was correctly applied to the facts," viewing the facts "in a manner most favorable to the prevailing party." *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted). We defer to the district court's findings of fact so long as they are supported by substantial evidence. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Wyatt B.*, 2015-NMCA-110, ¶ 16 (internal quotation marks and citation omitted). "The district court's application of the law to the facts is a question of law that we review de novo." *Id.*

IV. DISCUSSION

{18} In determining the admissibility of the statements, we begin with the fundamental principles against self-incrimination. The right against self-incrimination is borne of the Fifth Amendment and applied to the states through the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Fifth Amendment may be invoked in response to "official questions . . . in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate . . . in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (internal quotation marks and citation omitted).

{19} In *Miranda v. Arizona*, the United States Supreme Court adopted a warnings-based approach for determining the admissibility of statements elicited in police custody. *See* 384 U.S. 436, 476 (1966). Prior to police questioning, police must advise the person of the right to remain silent, that any statement made may be used as evidence against him or her, and of the right to an attorney. *Id.* at 444. It is only through these warnings, and an awareness that anything said can and will be used against the person in court, "that there can be any assurance of real understanding and intelligent exercise of the privilege." *Id.* at 469. Of particular importance is the notion that statements that would otherwise be considered voluntary must be excluded for failure to warn. *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).

{20} In addition to the constitutional protections against self-incrimination, Section 32A-2-14 provides a statutory right against self-incrimination to children suspected of delinquent conduct. *Javier M.*, 2001-NMSC-030, ¶ 41. Section 32A-2-14(C) provides, in part:

> No person subject to the provisions of the Delinquency Act who is alleged or suspected of being a delinquent child shall be interrogated or questioned without first advising the child of the child's constitutional rights and securing a knowing, intelligent and voluntary waiver.

In *Javier M.*, we explained that "Section 32A-2-14 is not a mere codification of *Miranda*, but was intended instead to provide

children with greater statutory protection than constitutionally mandated." *Javier M.*, 2001-NMSC-030, ¶¶ 30, 32. "Instead of using *Miranda* triggering terms such as 'custody' or 'custodial interrogation,' the Legislature used much broader terms, such as, 'alleged,' 'suspected,' 'interrogated,' and 'questioned.' " *Id.* ¶ 29 (quoting Section 32A-2-14(C)). It is well settled that unwarned statements that are admissible under *Miranda* may be inadmissible under Section 32A-2-14. *See, e.g.*, *id.* ¶ 48; *State v. Antonio T.*, 2015-NMSC-019, ¶¶ 15-17, 352 P.3d 1172.

{21} Questioning officials must exercise greater vigilance with child suspects due to their "[l]ack of experience, perspective, and judgment," and their diminished "ability to recognize and avoid various choices detrimental to them." *State v. Rivas*, 2017-NMSC-022, ¶ 43, 398 P.3d 299 (citing *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (internal quotation marks omitted)). "That a child will experience police questioning in many ways distinct from an adult is a 'commonsense reality.' " *Id.* (citation omitted). Even with respect to adults, the United States Supreme Court has recognized that the pressure of interrogation "may induce a frighteningly high percentage of people to confess to crimes they never committed." *Id.* (internal quotation marks and citation omitted). These concerns for truth and reliability apply with greater force when the suspect is a child. *See Javier M.*, 2001-NMSC-030, ¶ 37. Mindful of the foregoing principles against self-incrimination, and with particular attention to Filemon's youth, we analyze the admissibility of the contested statements.

A. Section 32A-2-14 Prohibits the Admission of an Unwarned Statement to Probation Officers in a Subsequent Prosecution

{22} The question of whether a child's unwarned statement in response to questioning by his probation officer is admissible under Section 32A-2-14 is a matter of statutory interpretation to be reviewed de novo. *See Antonio T.*, 2015-NMSC-019, ¶ 12. To determine if a statement is admissible under Section 32A-2-14, we first establish "the minimum constitutional guarantees available to the Child." *Javier M.*, 2001-NMSC-030, ¶ 11. We then determine "what, if any, additional protections are available to the Child under the statute." *Id.*

{23} With respect to these minimal constitutional guarantees, the *Miranda* warnings are typically required in circumstances of custodial interrogation. *Id.* ¶¶ 14-15. Our cases hold that "[a]n individual is subject to custodial interrogation when he or she lacks the freedom to leave to an extent equal to formal arrest." *Id.* ¶ 18. The threshold question in determining whether a person is in custodial interrogation is whether there were "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

{24} While the United States Supreme Court has yet to consider the Fifth Amendment rights of juvenile probationers, it considered the rights of adult probationers in *Murphy*, 465 U.S. at 422. The *Murphy* Court determined that probation officers are not required to provide *Miranda* warnings to adult probationers who are not in custody. *Id.* at 429-30, 433. Because probation meetings do not routinely give rise to the coercive pressures of a custodial interrogation, an adult probationer's unwarned statements to a probation officer can be admitted in a subsequent criminal prosecution. *See id.* at 422, 433, 440. The Fifth Amendment forbids, however, a state from compelling self-incriminating statements as a condition of probation and then using the statements to prosecute a new offense. *Id.* at 435 n.7; *cf. United States v. Von Behren*, 822 F.3d 1139, 1141 (10th Cir. 2016) (concluding that the Fifth Amendment was violated by requiring a probationer to submit to a lie detector test as a condition of supervised release and threatening to revoke it for invoking the privilege against self-incrimination). Here, because neither party contends that the events at the juvenile probation office amounted to a custodial interrogation, or that the statement was compelled over Filemon's objection, we assume, without deciding, that the statement is admissible under the Fifth Amendment. This does not preempt our analysis of whether the statement is admissible under Section 32A-2-14, because the statute bestows greater protection to youth than the Fifth Amendment requires. *Javier M.*, 2001-NMSC-030, ¶¶ 24, 37.

{25} Unlike *Miranda*, "Section 32A-2-14 does not require that a child be subject to custodial interrogation in order for the protections of the statute to come into force." *Javier M.*, 2001-NMSC-030, ¶ 32. We have interpreted Section 32A-2-14 as requiring a child to be warned of the statutory right against self incrimination when subject to a limited scope encounter known as an "investigatory detention." *Javier M.*, 2001-NMSC-030, ¶ 38.

{26} Investigatory detentions are "substantially less coercive than custodial interrogations." *Id.* ¶ 19. For example, a traffic stop is an investigatory detention because it is brief, temporary, and "not so inherently coercive" as to compel a typical person to self-incriminate. *Id.* We first determined that a child was subject to an investigatory detention in the context of police questioning. *See id.* ¶ 40. In *Javier M.*, a police officer removed a child from a party to question him about underage drinking. *Id.* ¶¶ 2-4, 20. There was no custodial interrogation because the encounter was not coercive and the child was not "overpowered by police presence." *Id.* ¶¶ 20-21. Nevertheless, the child was (1) suspected of a delinquent act; (2) questioned; and (3) not free to leave. *Id.* ¶ 20. Given these circumstances, we determined that the child was in investigatory detention and entitled to be advised of his right to remain silent. *Id.* ¶ 38.

{27} In addition to being less coercive than custodial interrogations, investigatory detentions are less adversarial. *Id.* ¶ 22. Unlike custodial interrogations, investigatory detentions are not "police dominated" and the child is not "overpowered by police presence." *Id.* ¶ 21 (internal quotation marks and citation omitted). There is no requirement that the child be "swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . so that the individual feels under compulsion to speak." *Antonio T.*, 2015-NMSC-019, ¶ 14 (omission in original) (alteration, internal quotation marks, and citation omitted). Rather, a child is subject to an investigatory detention when merely suspected of having committed an offense and questioned in circumstances under which the child is not free to leave. *See Javier M.*, 2001-NMSC-030, ¶¶ 34-35, 38.

{28} While the district court did not expressly recognize that Filemon was in an investigatory detention in Supervisor Medina's office, it did find that McNiel was "holding" Filemon until police arrived, that McNiel was actively investigating Filemon, and that the statement was elicited. There was substantial evidence to support these findings, which lead us to conclude that Filemon was in investigatory detention. The district court also concluded that Section 32A-2-14 is not limited to

statements elicited by police officers. We agree.

{29} Filemon was suspected of committing a new offense, other than that for which he was on probation. *See Javier M.*, 2001-NMSC-030, ¶¶ 34-35 ("As a prerequisite to requiring that a child be advised of his or her rights under Subsection (C), the [c]hild must be either 'alleged' or 'suspected' of being a delinquent child."). Whether a child was 'suspected' of delinquent activity for purposes of Section 32A-2-14(C) is evaluated using an objective standard. *Javier M.*, 2001-NMSC-030, ¶ 35. Upon hearing Filemon's statement in the lobby, it was objectively reasonable for McNiel and Supervisor Medina to conclude that Filemon had committed a new delinquent offense. This is obvious given that McNiel was aware of a shooting and that a suspect was acquainted with Filemon. Thus, Filemon was suspected of committing a delinquent act by the time the probation officers escorted him to Supervisor Medina's office. *See id.* ¶¶ 20-21.

{30} Once in Supervisor Medina's office, Filemon was questioned about a new offense. *See Antonio T.*, 2015-NMSC-019, ¶ 27. McNiel asked, "[A]re you here to confess about the drive-by shooting," a question which was reasonably likely to reveal incriminating information. *See Javier M.*, 2001-NMSC-030, ¶ 52 (Minzner, J., specially concurring). This interaction went beyond a routine meeting regarding Filemon's compliance with his conditions of probation and became investigatory when McNiel prompted Filemon to reveal incriminating information about an offense for which he was not already on probation. *See, e.g.*, *State v. Taylor E.*, 2016-NMCA-100, ¶¶ 23-24, 385 P.3d 639 (holding that a probation officer was not required to give *Miranda* warnings before asking routine questions relating to probationary status). Supervisor Medina shared the information with the police, thereby serving as a conduit to the criminal investigation.

{31} Filemon was not free to leave Supervisor Medina's office. *Javier M.*, 2001-NMSC-030, ¶ 38 (stating that Section 32A-2-14(C) applies "when a child is seized pursuant to an investigatory detention and not free to leave"). To determine whether a child is free to leave, we examine "all of the factual circumstances," including "(1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical surroundings of the encounter." *Jason L.*, 2000-NMSC-018, ¶ 15 (internal quotation marks and citation omitted). Filemon's youth is of importance in determining whether he was free to extract himself from the encounter. *See id.* ¶ 18; *see also Javier M.*, 2001-NMSC-030, ¶ 37 (citing children's "immaturity and susceptibility to intimidation" as a reason why they must be advised of their rights during an investigatory detention); *Rivas*, 2017-NMSC-022, ¶¶ 42-43 (describing a child's vulnerability in the context of interrogation).

{32} While Filemon entered the probation office of his own volition, the nature of the encounter changed when he made the initial voluntary statements in the lobby. The probation officers isolated Filemon by escorting him through a locked door and down a hallway to a supervisor's office in the interior of the building. *See Javier M.*, 2001-NMSC-030, ¶ 18. Though Filemon was not a stranger to the probation office, he knew that police were on their way. We are unpersuaded that a child in Filemon's position would feel free to extract himself from this situation, and for this reason conclude that he was not free to leave.

{33} Section 32A-2-14 is not limited to police questioning, as the State asserts. The presence of a police officer is relevant, but not dispositive, to determining whether a child is in investigatory detention. *See Antonio T.*, 2015-NMSC-019, ¶¶ 24-27. In *Antonio T.*, we held that Section 32A-2-14 applied to questioning by a school principal. *Id.* ¶ 27. The presence of a police officer added an element of coercion that is not usually present in a school disciplinary proceeding; but perhaps more importantly, granted access to evidence used to prosecute a delinquent offense. *Id.* The protections of Section 32A-2-14 were brought to bear because the evidence was used to prosecute the child. The same result pertains when the statement is elicited by probation officers and used to prosecute a new offense.

{34} The Court of Appeals held that a child's unwarned statements to his probation officer were admissible for the limited purpose of a probation revocation proceeding in *Taylor E.*, 2016-NMCA-100, ¶ 19. As the State contends here, the Court of Appeals noted that requiring probation officers to issue *Miranda* warnings could "transform[] a relationship intended to be rehabilitative . . . into an adversarial relationship[.]" *Id.* ¶¶ 47-48, 65. The admission of the statements did not turn on the nature of the relationship, however. *See id.* ¶¶ 14-15. Rather, the statements were admissible because they were elicited in a routine meeting and not used to prosecute a new offense. *See id.* ¶¶ 23-24. The Court of Appeals emphasized the distinction between probation revocation hearings, in which the prosecution has already occurred, and a new prosecution in which the Fifth Amendment is at stake. *Id.* ¶¶ 14-15. Unlike *Taylor E.*, Filemon's encounter with the probation officers was far from routine, and the statement is being introduced to prosecute Filemon for a new offense. This distinguishes the situation from the introduction of a statement in a probation revocation hearing. It is the use of the statement to prosecute a new offense that implicates fundamental concerns against self-incrimination.

{35} We conclude that Filemon was subject to an investigatory detention for purposes of Section 32A-2-14, and the unwarned statement to his probation officers cannot be used to prosecute a new offense. The absence of a police officer does not bar this result where the statements were elicited in an investigatory detention and offered in a new criminal case. For this reason, we affirm the district court's suppression of the statement.

B. The Post-*Miranda* Statement Is I admissible Under *Seibert*

{36} Filemon was transported from the juvenile probation office to the Silver City Police Department. At the police department, Captain Hernandez was informed that Filemon was there to speak to him. Captain Hernandez turned on his recorder and escorted Filemon and his mother to his office, where he proceeded to interview Filemon in the presence of the detective assigned to the case, Detective Castillo. Captain Hernandez did not inform Filemon of his *Miranda* rights. Once Captain Hernandez elicited a full, detailed statement from Filemon, he informed Filemon that he was going to be detained. Immediately following this interview, Captain Hernandez directed Filemon to repeat the statement to Detective Castillo. Detective Castillo took Filemon and his mother into the interview room, gave Filemon his *Miranda* warnings, and obtained a second, detailed statement.

{37} The district court suppressed both statements elicited at the police department. The State appeals the suppression of the post-*Miranda* statement. We affirm the district court's suppression of the statement because the midstream *Miranda* warning was ineffective in informing Filemon of his *Miranda* rights. *Seibert*, 542 U.S. at 617.

{38} It is well established that before any person is the subject of a custodial police interrogation, the suspect must be advised of his or her *Miranda* rights. 384 U.S. at 444. *Miranda* is intended to protect a suspect's constitutional right against self-incrimination and requires that, for a statement to be admissible at trial, the suspect be advised of the right and the officer obtain a knowing, intelligent and voluntary waiver of the suspect's right to self-incrimination. *Id*. at 468. A valid waiver is made free from "intimidation, coercion, or deception" and "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

{39} It is undisputed that Filemon was subject to a custodial interrogation when Captain Hernandez interviewed him, triggering the requirement of *Miranda* warnings. *See* 384 U.S. at 467. Because Filemon was at this point firmly in police custody and not provided with his *Miranda* warnings, the State concedes that the unwarned statement to Captain Hernandez was properly suppressed. However, the State argues that the district court erred in suppressing Filemon's post-*Miranda* statement to Detective Castillo. The State cites *Oregon v. Elstad*, and argues that Filemon's post-*Miranda* statement is admissible because his pre- and post-*Miranda* statements were voluntary. 470 U.S. 298, 309 (1985) (stating that *Miranda* does not preclude the admission of a statement that is unwarned but voluntary and uncoerced).

{40} We disagree. First, the State places improper emphasis on the voluntariness of the statements elicited at the police station. *See Dickerson*, 530 U.S. at 436 (overruling a statute that eliminated *Miranda*'s warning requirement and designated "voluntariness as the touchstone of admissibility"). The touchstone question is not whether a statement was voluntary, but whether the *Miranda* warnings were adequate to inform the suspect of his or her rights. *See Seibert*, 542 U.S. at 608-09. The *Miranda* warnings given to Filemon were not adequate to inform him of his rights. Second, the manner in which the *Miranda* warnings were given rendered the statement elicited by Detective Castillo presumptively coerced. Therefore, the district court's suppression of the statements was proper.

{41} The United States Supreme Court has decided two cases relevant to the discussion of whether a warned statement is admissible following an unwarned statement: *Elstad* and *Seibert*.

{42} The question in *Elstad* was whether a suspect's post-*Miranda* statement was admissible after the suspect had already made an incriminating statement to a police officer. 470 U.S. at 300. In *Elstad*, two officers went to a suspect's house with an arrest warrant. *Id.* One officer sat down with the suspect in his living room and asked if the suspect knew the victim. *Id*. at 301. The suspect said he did, and was aware that the victim had been burglarized. *Id.* When the officer stated that he felt that the suspect was involved, the suspect stated: "Yes, I was there." *Id.* (internal quotation marks omitted). The suspect had not been advised of his rights. *Id.* The officer did not continue to question the suspect, but instead escorted the suspect to a patrol car, and took him to the sheriff's headquarters. *Id.* Approximately an hour later, the suspect was given his *Miranda* warnings. *Id.* The suspect said he understood his rights, still wished to speak to the officers, and then gave a full statement. *Id.* at 301-02. Subsequently, the suspect was charged with burglary and moved to suppress his second statement, arguing that the first unwarned statement "let the cat out of the bag" and tainted his second statement. *Id.* at 302 (internal quotation marks and citation omitted). The *Elstad* Court held that while the first statement was inadmissible, the second statement was admissible, because neither statement was coerced, and the second statement was obtained after careful administration of *Miranda* warnings and after a voluntary waiver of the suspect's rights. *Id.* at 310-11, 17-18.

{43} The Court revisited the question of whether a second, warned statement was admissible after a first, unwarned statement in *Seibert*. 542 U.S. at 606-07. The plurality in *Seibert* limited *Elstad* to its facts and held that the relevant question was not the voluntariness of the two statements, but whether the *Miranda* warnings given after the first statement were effective in informing the suspect of her constitutional rights. *Seibert*, 542 U.S. at 615. In *Seibert*, the suspect was arrested, taken to the police station, and questioned for an extended period of time prior to being given her *Miranda* warnings. *Id.* at 604-05. The police officer elicited a full confession from the suspect. *Id.* The suspect was then given a twenty-minute break, Mirandized, and questioned a second time by the same police officer in the same location. *Id.* at 604-05, 616. In the second interview, the officer asked the suspect to repeat the information she had given in her first statement and reminded the suspect of what she had said prior to being advised of her rights. *Id.*

{44} In distinguishing *Seibert*'s facts from *Elstad*'s, the Court listed facts relevant to determining whether midstream *Miranda* warnings are effective in informing a suspect of his or her constitutional rights:

> the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second [rounds of interrogation], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Seibert, 542 U.S. at 615. The *Seibert* Court determined that the first and second interviews were effectively continuous: both were held in the same location, the break between the first and second interview was limited, and the police officer referenced statements the suspect made during the first interview while conducting the second interview. *Id.* at 604-05, 616-17. Furthermore, the officer did not remedy the initial failure to warn by informing the suspect that her first statement could not be used against her at trial. *Id*. at 616. The *Seibert* Court held that the suspect's constitutional rights were violated because the *Miranda* warnings given were ineffective in informing the suspect that she had a genuine right to remain silent and therefore, the post-*Miranda* statement was inadmissible. *Seibert*, 542 U.S. at 617.

{45} In distinguishing the *Seibert* interrogation from the interrogation in *Elstad*, the *Seibert* Court noted that the *Elstad* questioning was "a new and distinct experience," such that "the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Seibert,* 542 U.S. at 616. The scope of the pre-*Miranda* questioning in *Elstad* and *Seibert* was categorically different. In *Elstad*, the police officer asked the suspect one question, and the interrogation immediately ceased when the suspect gave an incriminating statement. 470 U.S. at 301-02. In *Seibert*, the suspect was questioned extensively and gave a full confession before being Mirandized. 542 U.S. at 604-05.

{46} This case bears notable similarities to *Seibert*. Like *Seibert*, Filemon was

questioned extensively and gave a full confession before he was given his *Miranda* warnings. After Detective Castillo gave Filemon the *Miranda* warnings, Detective Castillo told Filemon to "start from the beginning like you did a while ago," asking him to repeat his prior confession, and ensuring that the content of the second statement completely overlapped with the content of the first statement. The lack of break between the first and second interviews, and the fact that Detective Castillo was present for both, further contributed to the continuous nature of the two interviews. Additionally, rather than taking any curative measures to ensure that Filemon understood that the pre-*Miranda* confession he gave to Captain Hernandez was inadmissible, Detective Castillo did the opposite and told Filemon and his mother that the *Miranda* warnings were merely a "formality." The *Seibert* Court recognized that "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." 542 U.S. at 613-14 (alteration, internal quotation marks, and citation omitted). This is precisely what happened here. The *Miranda* warnings given to Filemon by Detective Castillo were not adequate to inform him of his constitutional rights as required by *Miranda* jurisprudence.

{47} Given the manner in which the interview was conducted, it would have been unreasonable for Filemon to believe that he had a genuine right to remain silent. While Filemon's mother was present, there is no evidence that she herself understood the midstream *Miranda* warnings. She did not counsel or advise Filemon during either of the interviews and left it up to him to decide whether he wanted to answer the officers' questions. Filemon had already made a full confession to Captain Hernandez before he was advised of his rights. Furthermore, when Detective Castillo began to interview Filemon, he told Filemon that he was "gonna go the same way" as Captain Hernandez and that he was just "finishing up" where Captain Hernandez left off, giving the impression that the interview was just a continuation of the interview conducted by Captain Hernandez. Detective Castillo did not make it clear that Filemon could stop talking. Because of the coercive tactics employed by Captain Hernandez and Detective Castillo, Filemon was not provided with a "real choice between talking and not talking." *See id.* at 601. The State did not meet its burden in proving that the midstream *Miranda* warnings were sufficient to inform Filemon of his right against self-incrimination.

{48} The *Miranda* warnings are not a mere formality. *Miranda* warnings given after a confession are likely to be "ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id.* at 613. Police must take the utmost care to ensure that the suspect not only understands the meaning of the *Miranda* warnings, but also understands the nature of the rights being abandoned and the consequences of the decision to abandon them. *See Moran*, 475 U.S. at 421. *Miranda* warnings must be given in a manner that is clearly sufficient to grant the suspect an awareness of the right so the suspect can make a knowing, intelligent and voluntary choice to speak. *See Miranda*, 384 U.S. at 467. The tactics employed by Captain Hernandez and Detective Castillo were presumptively coercive and eviscerated the protections envisioned by *Miranda*, rendering the warnings—when they were finally given—ineffective to inform Filemon that he had a right not to incriminate himself. We uphold the district court's determination that the statement elicited by Detective Castillo is inadmissible. Because the statement is inadmissible as a matter of federal law, it is also inadmissible under Section 32A-2-14. *See Javier M.*, 2001-NMSC-030, ¶ 11.

{49} We affirm the district court's suppression of the two contested statements and remand for further proceedings consistent with this opinion.

{50} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:

JUDITH K. NAKAMURA, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-012
No. S-1-SC-36181 (filed January 22, 2018)

CRAIG BEAUDRY,
Plaintiff-Respondent,
v.
FARMERS INSURANCE EXCHANGE,
TRUCK INSURANCE EXCHANGE,
FIRE INSURANCE EXCHANGE,
MID-CENTURY INSURANCE COMPANY,
FARMERS NEW WORLD LIFE INSURANCE
COMPANY, FARMERS INSURANCE
COMPANY OF ARIZONA, LANCE CARROLL,
and CRAIG ALLIN,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
Sarah M. Singleton, District Judge

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Opinion

Edward L. Chávez, Justice

{1} Plaintiff and the corporate Defendants freely negotiated and entered into a clear and unambiguous contract for Plaintiff to sell their insurance policies. In the contract, Plaintiff consented to a provision allowing Defendants to immediately terminate the contract if he breached it in any one of five different specified ways. Plaintiff breached the contract in one of the specified ways, and Defendants exercised their right to terminate. Plaintiff sued Defendants under numerous theories of liability for terminating the contract, including under the doctrine of prima facie tort, asserting that Defendants had nefarious reasons for terminating the contract. We hold that when a contract is clear, unambiguous, and freely entered into, the public policy favoring freedom of contract precludes a cause of action for prima facie tort when the gravamen of the allegedly tortious action was the defendant's exercise of a contractual right. In this case, Defendants had the right to terminate the contract because of Plaintiff's breach.

I. BACKGROUND

{2} On December 16, 2000, Plaintiff entered into an agent appointment agreement (Agreement) with Defendant insurance companies to sell their insurance policies. Defendant Lance Carroll was the District Manager for the territory that included Plaintiff's agency. Defendant Craig Allin was the New Mexico Executive Director.

{3} The Agreement required Plaintiff to "submit to the Companies every request or application for insurance for the classes and lines underwritten by the Companies and eligible in accordance with their published Rules and Manuals." In the event of a breach, the Agreement provided that it "may be terminated by the [non-breaching] party on thirty (30) days written notice." In addition, Defendants could immediately terminate the Agreement for five enumerated types of breach, including "[s]witching insurance from the Companies to another carrier."

{4} In September 2010, Plaintiff's employee cancelled an insurance policy with Farmers, a defendant company, and switched the insured's service to a rival insurance carrier. Plaintiff does not dispute that the switching of the insurance policy occurred. However, Plaintiff argues that the breach did not cause any significant

damage to Farmers; that the employee who switched the policy was new and acted without his authorization; and that at the time of the breach Plaintiff's wife, who normally served as the office operations manager, was seriously ill. In February 2011, Defendants notified Plaintiff that they were exercising their right to terminate the Agreement because of the breach.

{5} Plaintiff asserts that his firing was orchestrated by Defendants Allin and Carroll as retaliation for his decision to go "up the chain of command" after they provided unsatisfactory responses to his allegations that a new Farmers agent, Tom Gutierrez, was "poaching" his clients. Plaintiff also claims that Defendant Carroll benefitted from Plaintiff's termination because his termination allowed Carroll to reassign half of Plaintiff's clients to Gutierrez. According to Plaintiff, if Gutierrez did not meet his quotas, while on probation, Carroll would have had to personally reimburse Farmers for "a portion of the subsidies fronted to Gutierrez."

{6} Plaintiff's third amended complaint is the operative pleading, where he alleged eight causes of action: tortious interference with contract, tortious interference with prospective contractual relations, breach of contract, breach of the covenant of good faith and fair dealing, conspiracy, intentional infliction of emotional distress, prima facie tort, and violations of the New Mexico Insurance Code. Plaintiff also sought punitive damages. Through several motions for summary judgment, the district court dismissed all claims except tortious interference with contract, breach of the covenant of good faith and fair dealing, conspiracy, and prima facie tort. Specifically, with respect to the breach of contract claim, the district court determined "as a matter of law that Plaintiff was responsible for the acts of [his employee] even if they were contrary to his instructions." Plaintiff did not appeal the dismissal of his contract claim. Plaintiff also decided to forego the claims of tortious interference with an existing contract and breach of the covenant of good faith and fair dealing, believing that the district court's dismissal of the breach of contract claim precluded them.

{7} After the court ruled in favor of Defendants on the breach of contract claim Defendants filed a renewed summary judgment motion on prima facie tort (Renewed Summary Judgment Motion). Defendants argued that Plaintiff's claim should be dismissed for three reasons:

> First, because the Contract Companies undisputedly had the right to terminate the Agreement, Plaintiff cannot demonstrate a "legally protectable interest" in the continuation of that Agreement, as required under New Mexico law to show a legally redressable injury. Any questions as to intent to injure are, therefore, immaterial (there being no legally redressable injury). Second, allowing tort recovery for a lawful contract termination impermissibly repackages a contract claim as a tort, contrary to New Mexico law. Third, Plaintiff cannot use prima facie tort to evade the more stringent requirements of claims already dismissed.

At the hearing on Defendants' Renewed Summary Judgment Motion, the judge explained that she was denying Defendants' motion in part because it was up to the jury to determine whether Defendants' conduct was justified.

{8} Ultimately, Plaintiff was allowed to present the prima facie tort and conspiracy claims to the jury. The jury found that Craig Allin, Lance Carroll, and all corporate Defendants committed prima facie tort but that no Defendants conspired to commit prima facie tort. The jury awarded Plaintiff $1,000,000 in compensatory damages and $2,500,000 in punitive damages. The court entered judgment against Defendants. A divided Court of Appeals affirmed the jury verdict. *See Beaudry v. Farmers Ins. Exch.*, 2017-NMCA-016, ¶ 3, 388 P.3d 662.

II. A DE NOVO STANDARD OF REVIEW APPLIES TO DISPOSITIVE LEGAL ISSUES

{9} The dispositive legal issues in this case were presented to the district court in Defendants' Renewed Summary Judgment Motion. Generally, we will not review the denial of a summary judgment motion after the trial court has entered a final judgment on the merits of the case. *Green v. Gen. Accident Ins. Co. of Am.*, 1987-NMSC-111, ¶ 19, 106 N.M. 523, 746 P.2d 152. However, "[w]here a motion for summary judgment is based solely on a purely legal issue which cannot be submitted to the trier of fact, and the resolution of which is not dependent on evidence submitted to the trier of fact, . . . the issue should be reviewable on appeal from the judgment." *Gallegos v. State Bd. of Educ.*, 1997-NMCA-040, ¶ 10, 123 N.M. 362, 940 P.2d 468. When it is appropriate to review the denial of a motion for summary judgment we will apply a de novo standard of review. *Kipnis v. Jusbasche*, 2017-NMSC-006, ¶ 10, 388 P.3d 654. Defendants' Renewed Summary Judgment Motion presented a purely legal basis on which the court could have granted summary judgment. As such, de novo review is the appropriate standard in this case.

III. SCOPE OF DISCUSSION

{10} In 1990, New Mexico joined a minority of other jurisdictions in recognizing a stand-alone claim for prima facie tort. *See Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 11, 109 N.M. 386, 785 P.2d 726 (citing authority from New York and Missouri to support the elements of prima facie tort); James P. Bieg, *Prima Facie Tort Comes to New Mexico: A Summary of Prima Facie Tort Law*, 21 N.M. L. Rev. 327 (1991)(discussing *Schmitz* and reviewing the history, jurisdictional recognition, and use of prima facie tort law); Dan B. Dobbs et. al., *The Law of Torts* § 643 (2d ed. 2011) ("The only significant jurisprudence on the prima facie tort is found in the courts of Missouri, New Mexico and New York and in the Restatement Second of Torts."). To bring a successful prima facie tort claim a plaintiff must show "(1) an intentional and lawful act; (2) an intent to injure the plaintiff; (3) injury to the plaintiff as a result of the intentional act; (4) and the absence of sufficient justification for the injurious act." *Lexington Ins. Co. v. Rummel*, 1997-NMSC-043, ¶ 10, 123 N.M. 774, 945 P.2d 992.

{11} Defendants concede that the lawful act requirement is satisfied. However, Defendants argue that Plaintiff cannot meet the intent, injury, or justification element of prima facie tort and that Plaintiff is using prima facie tort to evade the stringent requirements of other established doctrines. Justification, which includes an analysis as to whether Plaintiff's prima facie tort claim evades stringent requirements of other established legal doctrines, is the dispositive issue in this case.

IV. DEFENDANTS WERE JUSTIFIED AS A MATTER OF LAW IN EXERCISING THEIR CONTRACTUAL RIGHT

A. If a Plaintiff's Theory of Prima Facie Tort Undermines an Important Restriction Based on an Established Cause of Action, a Defendant's Conduct May Be Justified as a Matter of Public Policy

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{12} We have adopted the Restatement (Second) of Torts balancing test to determine whether a party's justification for the injurious act outweighs the culpability of the party's conduct. *Schmitz*, 1990-NMSC-002, ¶¶ 41, 46 (citing Restatement (Second) of Torts § 870 (Am. L. Inst. 1979)). The culpability of the actor's conduct is measured by looking at three factors: "(1) the nature and seriousness of the harm to the injured party . . . (3) the character of the means used by the actor and (4) the actor's motive." *Id.* ¶ 41. Courts must then weigh the culpability of the conduct against what may justify it, "(2) the nature and significance of the interests promoted by the actor's conduct." *See id.* ¶¶ 40-41. When weighing the seriousness of the harm, "physical, concrete harm is weighed more heavily than emotional or prospective economic harm"; when weighing the character of the means used, "conduct offensive to society's concepts of fairness and morality favors liability"; when weighing motive, "the degree of malice is significant"; and when weighing the interest promoted by the actor's conduct, "the court must consider established privileges or rights." *Id.* ¶ 65.

{13} The Restatement provides guidance on how to determine whether a defendant's interest is justified by comparing the plaintiff's claim to other established intentional torts and determining what privileges the defendant would be able to claim if the plaintiff was proceeding under an established intentional tort. *See* Restatement (Second) of Torts § 870 cmt. g, j. A judge must also engage in this comparison process to make certain that the plaintiff's prima facie tort claim is not being "used to evade stringent requirements of other established doctrines of law." *Schmitz*, 1990-NMSC-002, ¶ 63. Under the Restatement, when the prima facie tort claim is "closely related to an established tort," the court should apply the privileges and defenses that would exist if the plaintiff was proceeding under the established tort claim. *See* Restatement (Second) of Torts § 870 cmt. j. If, on the other hand, the prima facie tort claim advances an "entirely novel" cause of action the court must decide what privileges are most appropriate given the claim's similarity to other "established torts." *Id.* The mere existence of an applicable privilege does not end the inquiry because prima facie tort is designed to potentially expand the scope of established torts. *See Schmitz*, 1990-NMSC-002, ¶ 49 (acknowledging that "tort law is not static–it must expand to recognize changing circumstances that our evolving society brings to our attention"). The court must look at the importance of the privilege. Restatement (Second) of Torts § 870 cmt. j. If an applicable privilege "expresses an important policy of the law against liability" that would be undermined by allowing a prima facie tort claim, then the court should generally not allow prima facie tort to proceed unless the other justification factors weigh strongly in favor of finding liability. *Id.* cmt. j.

{14} New Mexico's approach is slightly different from the Restatement in that we chose not to limit the analysis to whether a prima facie tort claim evades only other established tort doctrines–courts must also ensure that a prima facie tort claim does not evade other established doctrines of law generally. *See Schmitz*, 1990-NMSC-002, ¶ 63 (emphasizing that "prima facie tort cannot be used to avoid [the] employment at will doctrine" (citing *Lundberg v. Prudential Ins. Co. of America*, 661 S.W.2d 667, 671 (Mo. Ct. App. 1983))). If the gravamen of the plaintiff's claim falls into an established doctrine, the court must ask why the plaintiff could not proceed under that doctrine. If the answer is that the plaintiff's claim was subject to a defense or that the established claim limited the type of damages that could be recovered, then the court must look at the "nature" of the limitation and determine whether it "expresses an important policy of the law against liability" that would be undermined by allowing a prima facie tort claim. *See* Restatement (Second) of Torts § 870 cmt. j.

{15} The following cases are examples of when New Mexico courts have concluded that a prima facie tort claim could not proceed because of policy considerations. In *Guest v. Allstate Insurance Co.*, we held that an attorney could not use prima facie tort to recover lost future earnings from a client because doing so would undermine the prohibition against allowing lawyers to recover unearned fees. 2010-NMSC-047, ¶¶ 47-51, 149 N.M. 74, 244 P.3d 342 (discussing the holding). In *Andrews v. Stallings*, the Court of Appeals upheld the dismissal of the plaintiffs' prima facie tort claim because permitting the claim would have allowed the plaintiffs "to circumvent the established defenses to defamation." 1995-NMCA-015, ¶ 64, 119 N.M. 478, 892 P.2d 611; *see also Stock v. Grantham*, 1998-NMCA-081, ¶¶ 38-39, 125 N.M. 564, 964 P.2d 125 (upholding the dismissal of prima facie tort because "[t]he only function of the claim of prima facie tort in [plaintiff's] complaint is to escape possible restrictions imposed on the torts of intentional infliction of emotional distress and interference with entitlement to unemployment compensation"); *Padwa v. Hadley*, 1999-NMCA-067, ¶ 27, 127 N.M. 416, 981 P.2d 1234 (holding that the defendant's conduct did "not rise to the level of extreme and outrageous behavior which cannot be the basis for recovery in tort" and therefore prima facie tort should not be used as a "substitute theory").

{16} The defendant has the initial burden of pleading an applicable justification or defense. *See Schmitz*, 1990-NMSC-002, ¶ 46 ("[I]f a defendant offers a purpose other than the motivation to harm the plaintiff as justification for his actions, that justification must be balanced to determine if it outweighs the bad motive of the defendant in attempting to cause injury.") A judge must weigh justification against culpability to determine whether any privileges or defenses will absolve the defendant before submitting prima facie tort to the jury. *See* Restatement (Second) of Torts § 870 cmt. k. When the facts concerning culpability and justification are not in dispute then the question is a purely legal issue for the judge to decide. If the existence of a privilege depends on an issue of material fact, then the judge must explain to the jury what it needs to find in order for the privileges to apply. Restatement (Second) of Torts § 870 cmt. k.

B. Allowing Plaintiff to Proceed with a Claim of Prima Facie Tort Would Undermine Important Restrictions In Contract Law

{17} The arguments presented to the district court at the summary judgment stage were sufficient to dispose of Plaintiff's prima facie tort claim. In their Renewed Summary Judgment Motion, Defendants argued (1) that their actions in terminating the Agreement were justified because the court found that Plaintiff had breached the Agreement, (2) that allowing Plaintiff to proceed would sanction his evasion of the stringent requirements of his claims against Defendants for breach of contract and intentional interference with contract that Plaintiff failed to prove, and (3) that allowing Plaintiff's prima facie tort claim would undermine the freedom of contract. Plaintiff responded to Defendants' Renewed Summary Judgment Motion by arguing that he was not evading other doctrines because the court's previous

ruling had left prima facie tort as his only viable remedy. He alleged that the holdings in *Schmitz* and *Portales National Bank v. Ribble*, 2003-NMCA-093, 134 N.M. 238, 75 P.3d 838, showed that the Court was willing to allow prima facie tort when the "root complaint sounded in contract." And, Plaintiff contended that weighing justification against culpability favored finding Defendants liable because Plaintiff suffered "severe" harm; because Defendants' actions were "unfair, and their motives were impure"; and because Defendants' actions did not advance any "legitimate interest."

{18} The fact that Plaintiff's other tort and contract claims were dismissed by the court or of Plaintiff's own volition does not disprove that Plaintiff is evading the stringent requirements of other established doctrines of law. It only shows that Plaintiff was unable to prove the elements of the dismissed claims or overcome any defense against those claims. The question is whether allowing prima facie tort would undermine an important policy rationale supported by the limits on the evaded claims.

{19} The cases Plaintiff cites for the proposition that courts have been willing to allow prima facie tort where the "root complaint sounded in contract" do not provide support for us to impose prima facie tort liability in this case. In *Portales*, the court never examined whether imposing tort liability on the defendant bank would undermine the policies supported by contract law. *See* 2003-NMCA-093, ¶¶ 11-12. Instead, the court focused on the question whether allowing the plaintiffs to proceed with a prima facie tort claim would undermine the policies supported by the doctrine of intentional infliction of emotional distress. *Id*. Moreover, it is not clear that the defendant's injurious actions in *Portales* were contractually authorized. *Id*. ¶ 6.[1] Similarly, in *Schmitz* we never specifically addressed the issue of whether allowing the plaintiff to recover would infringe on the defendant's privilege to exercise a contractual right. *See Schmitz*, 1990-NMSC-002, ¶¶ 65-66. This was likely due to the unique factual setting of the case. In *Schmitz*, the defendant bank loaned money to a third party. *Id.* ¶ 4. The third party used a note that he was holding in trust for the plaintiffs as collateral to obtain the loan. *Id.* ¶¶ 3-4, 33. The bank accepted the note as collateral with knowledge that the third party did not actually have an interest in it. *Id.* ¶ 4. The plaintiffs in *Schmitz* never consented to the defendant bank taking the note as collateral or to the bank's decision to eventually redirect payment on the note when the third party defaulted. *See id.* ¶ 3-4. Hence, we concluded that there was actually no privilege for the harm that the defendant bank inflicted. *Id.* ¶ 66 ("[A]lthough under other circumstances the Bank would be privileged to protect its loan and move against the collateral, the Bank's knowledge that it had no interest in the note negates its right to move against it.").

{20} With respect to weighing Defendants' justification against Defendants' culpability, Plaintiff argues that his harm was severe and that Defendants' bad motives negated any claim of privilege. The first question the court should have determined is what privilege or defense should apply. Defendants argued that their contract right privileged them to terminate the Agreement. Indeed New Mexico has a public policy that favors the freedom to contract. *See Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 18, 147 N.M. 678, 228 P.3d 462 ("[M]eeting . . . statutory and regulatory requirements plainly conditions freedom of contract. . . ."); *Gen. Elec. Credit Corp. v. Tidenberg*, 1967-NMSC-126, ¶ 14, 78 N.M. 59, 428 P.2d 33 ("[P]ublic policy encourages freedom between competent parties of the right to contract, and requires the enforcement of contracts, unless they clearly contravene some positive law or rule of public morals."). We agree that a contract right was an appropriate privilege under the facts of this case.

{21} To determine the privileges and defenses applicable to Plaintiff's claim the court should have looked at the "gravamen of his complaint." *Cf. Knapp Engraving Co. v. Keystone Photo Engraving Corp.*, 148 N.Y.S.2d 635, 637 (N.Y. App. Div. 1956) ("A cause of action, however, must be judged by its allegations, not its label."). Here, Plaintiff's complaint makes it clear that the gravamen of his cause of action was based on the allegedly wrongful termination of the Agreement. In his complaint, Plaintiff alleged that Defendants' tortious action was intentionally terminating the Agreement. Plaintiff discussed other conduct in his complaint, such as the manner in which Defendants reviewed their decision to terminate the Agreement, but at the hearing on the motion for summary judgment, Plaintiff explained that he only sought to use these other actions as evidence of Defendants' malicious intent when they terminated the Agreement. Therefore, the primary act underlying the claim for prima facie tort was the decision to terminate the Agreement. Whether a party has the right to terminate a contract is squarely a question of contract law. *Martinez v. Rocky Mountain & S.F. Ry. Co.*, 1935-NMSC-059, ¶ 10, 39 N.M. 377, 47 P.2d 903 ("[A] party relying upon . . . a right of termination [must] point to a provision of the contract plainly giving such right . . . .").

{22} The closest analogy to Plaintiff's prima facie tort claim would be a claim for breach of the implied covenant of good faith and fair dealing. At its core, Plaintiff's prima facie tort allegation was that Defendants used the terms of the Agreement to intentionally injure him and to satisfy their selfish desires. A breach of the implied covenant of good faith and fair dealing arises when "one party wrongfully and intentionally use[s] the contract to the detriment of the other party." *Sanders v. FedEx Ground Package Sys., Inc.*, 2008-NMSC-040, ¶ 7, 144 N.M. 449, 188 P.3d 1200 (internal quotation marks and citation omitted).

{23} We impose several restrictions on breach of the implied covenant claims. Most important is that "fully integrated, clear, and unambiguous," termination provisions

are legally enforceable and override a claimed breach of the covenant of good faith and fair dealing when there is no showing that the provisions of the contract were arrived at by "fraud, or unconscionable conduct." *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶¶ 17-18, 106 N.M. 726, 749 P.2d 1105 (internal quotation marks and citation omitted). Such "provisions must ordinarily be enforced as written," and courts must refuse to allow a claim for breach of the implied covenant of good faith and fair dealing. *Id. ¶ 17.* Additionally, we have held that "tort

[1] For example, the plaintiffs in *Portales* argued that the defendant bank encouraged them to take out a mortgage based on false assurances relating to overdraft charges, provided another bank with incorrect information about the plaintiffs to prevent them from being able to take their business elsewhere, and "made intentional misrepresentations to [the plaintiffs] for the purposes of acquiring a default judgment against them." 2003-NMCA-093, ¶ 6.

remedies are not available" for a breach of the implied covenant of good faith and fair dealing in the context of an employment contract. *Bourgeous v. Horizon Healthcare Corp.*, 1994-NMSC-038, ¶ 17, 117 N.M. 434, 872 P.2d 852.

{24} The restrictions on breach of the implied covenant of fair dealing claims are intended to ensure that the court only intervenes to protect the "justified expectations of the other party," Restatement (Second) of Contracts § 205 (1981), and not to "change or modify the language of an otherwise legal contract for the benefit of one party and to the detriment of another." *Melnick*, 1988-NMSC-012, ¶ 17. Contracts allow parties to come to legally enforceable agreements about the way that they will interact with one another. *See* 17 C.J.S. *Contracts* § 2 (2017) ("[T]he purpose of a contract is to reduce to writing the conditions on which the minds of the parties have met and to fix their rights and duties with respect thereto."). And, we have emphasized that "[g]reat damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relationship voluntarily assumed by the parties." *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 20, 134 N.M. 341, 76 P.3d 1098 (quoting *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 1989-NMSC-030, ¶ 14, 108 N.M. 467, 775 P.2d 233).

C. When Weighing Justification and Culpability We Determine That the Culpability Factors do not Weigh Heavily Enough to Convince Us That Prima Facie Tort Liability Is Appropriate When a Defendant Exercises an Expressly Authorized Contractual Right

{25} Comparing Plaintiff's prima facie tort claim with a breach of contract claim and with the claim of breach of the covenant of good faith and fair dealing convinces us that the appropriate privilege here is the privilege to engage in conduct that is authorized by the express terms of a contract. We have also determined the purpose of the contract privilege is to support certainty and predictability in relationships that parties voluntarily assume. *See Berlangieri*, 2003-NMSC-024, ¶ 20. This privilege and the public policy rationale underlying it provide a strong justification for Defendants' conduct. We now proceed to weigh the contract justification privilege against the culpability factors that we adopted in *Schmitz* to determine whether Plaintiff should be allowed to overcome the privilege and evade the restrictions that would be placed on his claim if he sued under contract law.

{26} The first culpability factor is the "nature and seriousness of the harm to the injured party." *Schmitz*, 1990-NMSC-002, ¶ 65. Here, the harm was significant; Plaintiff lost the benefit of a lucrative agency relationship. He also claims to have suffered emotional harm arising from the manner and timing of his termination. However, the loss of the agency relationship is not some unforeseeable or unusual injury that warrants a novel application of tort law as a remedy. Rather, the terms by which the Agreement, or any contract, can be terminated should be—and in fact were—agreed to in advance when the contract was formed. We have also held that "damages for emotional distress are not recoverable in an action for *breach* of an employment contract, whether express or implied, in the absence of a showing that the parties contemplated such damages at the time the contract was made." *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.*, 1987-NMSC-045, ¶ 8, 106 N.M. 19, 738 P.2d 513 (emphasis added). Hence, it would make little sense for us to allow emotional distress damages to be recoverable when there is no breach by Defendants who simply followed the unambiguous terms of the agreement.

{27} The second culpability factor is "the character of the means employed by the actor." *Schmitz*, 1990-NMSC-002, ¶ 66. Here, a contract was the means used to inflict the injury that Plaintiff alleges to have suffered. In *Schmitz*, we determined that the means the bank used to inflict injury on plaintiffs weighed in favor of liability because the bank knew it had no legitimate interest in taking action on the note and acted without privilege. *Id.* ¶ 65. Here, the district court was faced with the opposite situation where Defendants had already proved that they did have a legitimate right to terminate the Agreement. We see nothing "offensive to society's concepts of fairness and morality" about one party to a contract exercising a right to terminate a contract for an expressly authorized reason. *Schmitz*, 1990-NMSC-002, ¶ 65.

{28} The third culpability factor is "the actor's motive." *Schmitz*, 1990-NMSC-002, ¶ 65. The Restatement (Second) recognizes that consent can be a defense to prima facie tort "if freely given by a person of full capacity and not against public policy." Restatement (Second) of Torts § 870 cmt. n. Here, Plaintiff actually consented to the contract that allowed Defendants to engage in the conduct that he now alleges to be tortious. When consent is established, consent "negatives the wrongful element of the defendant's act, and prevents the existence of a tort." William L. Prosser and W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 18 (5th ed. 1984). Writing on the question of justification, Justice Oliver Wendell Holmes observed that some privileges are so absolute that their power "is not affected by the motive" of the party exercising the privilege. *See* Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 4 (1894). Here, the district court had already determined that Defendants had the contractual right to terminate the agreement by the time Defendants raised their Renewed Summary Judgment Motion. Accordingly, we conclude that an inquiry into their subjective motives for exercising that right could not produce evidence sufficient to warrant the imposition of tort liability.

V. CONCLUSION

{29} For the foregoing reasons the Court of Appeals and District Court are reversed and this matter is remanded to the District Court to enter judgment in favor of Defendants.

{30} IT IS SO ORDERED.
EDWARD L. CHÁVEZ, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
PETRA JIMENEZ MAES, Justice
CHARLES W. DANIELS, Justice
GARY L. CLINGMAN, Judge
Sitting by designation

Certiorari Denied, November 29, 2017, No. S-1-SC-36736

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-016

No. A-1-CA-34951 (filed October 2, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
LARRY BYROM,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
John A. Dean, Jr., District Judge

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for Appellee

Opinion

Stephen G. French, Judge

{1} The State appeals from the district court's order granting Defendant Larry Byrom's motion to suppress evidence discovered in Defendant's vehicle during a warrantless search by a police officer. The district court suppressed the evidence on the ground that the community caretaker exception to the Fourth Amendment's warrant requirement of the United States and the New Mexico Constitution was not applicable because (1) Defendant was not arrested before the officer decided to impound and inventory Defendant's vehicle, and (2) there was no evidence that the parking lot where Defendant's vehicle was located posed particular safety concerns or subjected the vehicle to the risk of theft or vandalism. We reverse the district court's decision to suppress the evidence because the applicability of the community caretaker exception does not depend on the existence of an arrest or on the presentation of evidence specifically showing unsafe conditions or the potential for loss or damage.

BACKGROUND

{2} The facts are taken from the testimony at the suppression hearing held on June 11, 2015, unless otherwise noted. New Mexico State Police Sergeant James R. Foreman responded to a call from dispatch on February 2, 2015 around 3:30 p.m. concerning a man "slumped over the steering wheel" of his vehicle in the parking lot of Dino's Mini-Mart in Farmington, New Mexico. The call was an "EMS assist"—when emergency medical services are requested, law enforcement officials often assist for safety purposes. Sergeant Foreman arrived before the medics and found the vehicle properly parked in a parking space in front of the store. Sergeant Foreman approached the vehicle from the driver's side. The window was rolled down, and he observed the driver (Defendant) "slumped over." Sergeant Foreman said he was unable to determine "if he was sleeping, passed out, . . . unconscious." Defendant "was sitting there in an unresponsive state." Sergeant Foreman reached into the vehicle through the window and "shook" Defendant. Defendant then sat up, put his hands to his face, and said "I can't see. My eyes are on fire." Sergeant Foreman said that he was not sure what to do next but that he knew emergency medical services were on the way, so he told Defendant to remain seated and wait for the medics to arrive. Sergeant Foreman then asked Defendant if he had taken narcotics, "because it's standard questioning to find out what type of medical services a person needs when [law enforcement] make[s] contact with them." Defendant answered negatively, and Sergeant Foreman asked to see Defendant's eyes. Sergeant Foreman said that Defendant's eyes were "pin-pointed" and that he "didn't do much 'til the medics got there" in order to "let them do their evaluation."

{3} Medics arrived a few minutes later, and, according to the district court's findings of fact, "[Sergeant] Foreman decided, in conjunction with the advice of the EMTs on the scene," that Defendant should be taken to the emergency room. While escorting Defendant from his vehicle to an ambulance, Sergeant Foreman told Defendant, "You go to the ER with the medics. I will take care of your vehicle, then I will meet you at the ER." The district court found that "Defendant can be heard to respond 'Okay' and then say something which is inaudible." Defendant did not instruct Sergeant Foreman about how to care for his vehicle, which turned out to be rented, and Sergeant Foreman noted that Defendant appeared to be alone, without anyone accompanying him. Sergeant Foreman then decided to have the vehicle towed because, according to his testimony, police policy required that he do so. Sergeant Foreman added that he was not allowed to simply lock the car and leave the rented vehicle in the parking lot when no other person was present to take possession of it. He testified that police policies require officers conducting inventory searches of vehicles to complete a tow authorization form listing all items worth more than $25. Sergeant Foreman further testified that the reason he decided to have the vehicle towed was "for the protection of myself and for the person who was responsible for the vehicle . . . we do it to protect ourselves from anyone saying that . . . there was $500 in that purse and now there's not."

{4} Prior to the arrival of the tow truck, Sergeant Foreman inventoried the vehicle and its contents. Sergeant Foreman found a closed backpack in the backseat and, upon opening it, discovered drugs and drug paraphernalia. Defendant was discharged from the hospital later the same day and was then arrested as a result of an arrest warrant based upon the drugs Sergeant Foreman discovered in Defendant's vehicle.

{5} Defendant was charged with trafficking a controlled substance, contrary to NMSA 1978, Section 30-31-20 (2006), and distribution of marijuana, contrary to NMSA 1978, Section 30-31-22(A)(1)

(a) (2011). Defendant moved to suppress all of the items seized during the course of Sergeant Foreman's inventory search of Defendant's vehicle, challenging Sergeant Foreman's authority to impound Defendant's vehicle. Defendant argued that an officer has statutory authority to tow a vehicle if: (1) the vehicle was involved in an accident; (2) the vehicle is evidence of a criminal offense; or (3) the vehicle was abandoned on or adjacent to a roadway. Defendant also argued that none of the exceptions to the Fourth Amendment's warrant requirement applied: Sergeant Foreman did not arrest Defendant, so the search cannot be justified as a search incident to arrest; there existed no exigencies requiring Sergeant Foreman to search the vehicle in order to preserve a life or prevent serious damage to property; Defendant did not consent to the search; and nothing in plain view in the vehicle gave rise to Sergeant Foreman's perceived need to search the vehicle.

{6} In response to the motion, the State argued that the warrantless search of Defendant's vehicle was reasonable under the community caretaker exception, citing two New Mexico cases—*State v. Shaw*, 1993-NMCA-016, 115 N.M. 174, 848 P.2d 1101, and *State v. Ruffino*, 1980-NMSC-072, 94 N.M. 500, 612 P.2d 1311—discussing the impoundment and inventory doctrine of the community caretaker exception. Following the suppression hearing, the district court allowed the parties to submit additional briefs. Defendant's supplemental brief maintained that Sergeant Foreman's decision to impound the vehicle cannot be justified under the community caretaker exception because an officer responding to an emergency assistance call must have a reasonable basis to associate the emergency with the location searched. Once medics removed Defendant from the vehicle, Sergeant Foreman could not possibly have needed to search the vehicle in order to aid in the emergency response. The State's supplemental brief maintained that during each stage of an encounter, an officer's actions must be justified. The initial encounter was "justified by the community caretaking doctrine[,]" and the justification for the decision to tow and search Defendant's vehicle after Defendant went to the hospital "is based on the inventory exception to the warrant requirement."

{7} The district court entered a written order granting Defendant's motion to suppress. In the order, the district court stated that Sergeant Foreman did not lawfully acquire custody and control of the vehicle prior to conducting the inventory search. The court noted, "[t]aking custody and control of a person's vehicle is not automatic in all circumstances where the officer is responsible for separating a person from his or her vehicle." The district court concluded that absent an arrest, the inventory search was improper. Furthermore, without evidence showing that leaving the vehicle in the parking lot subjects it to specific safety concerns, "[t]he community caretaking doctrine also does not, in this case, make the warrantless seizure of . . . Defendant's car lawful under the Fourth Amendment."

{8} The State timely appealed. The State argues that Sergeant Foreman acted as a community caretaker by responding to the call from dispatch and that his subsequent decision to impound the vehicle was justified by the impoundment and inventory doctrine of the community caretaker exception. Defendant maintains that the emergency aid doctrine of the community caretaker exception applies and does not justify Sergeant Foreman's decision to impound and inventory Defendant's vehicle. We begin with a review of the community caretaker exception to the Fourth Amendment and the doctrines it encompasses—the emergency aid doctrine, the impoundment and inventory doctrine, and the public servant doctrine. We detail the differing tests of the two doctrines at issue, determine the doctrine under which the facts of the present case must be analyzed, and apply the appropriate test.

STANDARD OF REVIEW

{9} "Appellate courts review a district court's decision to suppress evidence based on the legality of a search as a mixed question of fact and law." *State v. Ryon*, 2005-NMSC-005, ¶ 11, 137 N.M. 174, 108 P.3d 1032. "We view the facts in the light most favorable to the prevailing party and defer to the district court's findings of historical facts and witness credibility when supported by substantial evidence." *Id*. "The legality of a search, however, ultimately turns on the question of reasonableness." *Id*. "Although our inquiry is necessarily fact-based it compels a careful balancing of constitutional values, which extends beyond fact-finding, to shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context[.]" *Id*. (internal quotation marks and citation omitted). "We thus review the determination of reasonableness de novo." *Id*. Given the arguments and decision below, our analysis necessarily begins with a review of the community caretaker exception.

DISCUSSION

{10} The community caretaker exception to the Fourth Amendment developed from the understanding that police officers frequently interact with citizens without an investigative purpose. Police have "dual roles," acting as criminal investigators and as community caretakers. *Id*. ¶ 13. The caretaking function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). When police engage in conduct unrelated to crime-solving, officers need not possess warrants, probable cause, or reasonable suspicion. *Ryon*, 2005-NMSC-005, ¶ 24. However, reasonableness remains the touchstone of the Fourth Amendment. To evaluate the reasonableness of a warrantless search or seizure based on community caretaking, we must balance "the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen." *Id*. (internal quotation marks and citation omitted).

{11} From this balancing of interests, three separate doctrines within the community caretaker exception have been developed—the emergency aid doctrine, the impoundment and inventory doctrine, and the public servant doctrine. *Id*. ¶ 25 ("[D]efining the community caretaker exception as 'broad' and encompassing three versions, each requiring a different test[.]" (citing Mary E. Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 Am. J. Crim. L. 325, 330-31 (1999))). Each doctrine stems from the basic premise underlying the community caretaker exception—an officer's interaction with a citizen in need is motivated by a desire to aid, not investigate. *Ryon*, 2005-NMSC-005, ¶ 25. But, importantly, "it does not follow that all searches resulting from such activities should be judged by the same standard." *Id*. (internal quotation marks and citation omitted). We have adopted different tests for assessing the reasonableness of the officer's conduct based on the particular doctrine at issue.

{12} The State argues that the facts of this case must be analyzed under the impoundment and inventory doctrine, and not the emergency aid doctrine, as Defendant con-

tends. We outline the tests of each doctrine as set forth in several New Mexico cases and conclude that the facts of this case call for analysis under the impoundment and inventory doctrine.

{13} Under the emergency aid doctrine, the State has the burden of establishing the following three-part test:

> First, the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. Second, the search must not be primarily motivated by intent to arrest and seize evidence. Third, there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Id. ¶ 29 (alterations, internal quotation marks, and citations omitted). Typically, the application of the emergency aid doctrine is limited to situations where an officer acts to protect or preserve a citizen's life, or acts to avoid serious injury. *Id.* ¶ 26. In New Mexico, we have exclusively applied the emergency aid doctrine to intrusions into the home. *See id.* ¶ 44 (concluding that entry into a home was unreasonable under the emergency aid doctrine where an officer responded to several calls from dispatch referring to a victim of a stabbing and other persons with possible head injuries); *State v. Gutierrez*, 2005-NMCA-015, ¶ 14, 136 N.M. 779, 105 P.3d 332 (holding the search of pants pockets at a hospital was unreasonable under the emergency aid doctrine where an officer first encountered the defendant on the floor of the defendant's house in response to a call concerning a possible overdose); *State v. Nemeth*, 2001-NMCA-029, ¶¶ 32-36, 40, 130 N.M. 261, 23 P.3d 936 (determining that entry into a home in response to a possible suicide call was reasonable under the emergency aid doctrine), *overruled on other grounds by Ryon*, 2005-NMSC-005, ¶ 28. "The emergency [aid] doctrine applies to, but is not limited to, warrantless intrusions into personal residences." *Ryon*, 2005-NMSC-005 ¶ 26 (internal quotation marks and citation omitted).

{14} The impoundment and inventory doctrine has, under our cases, been applied to searches of vehicles and other personal items. To be valid under the impoundment and inventory doctrine, the seizure and search of the item must meet a three-part test, different from that required by the emergency aid doctrine. First, the vehicle must be in police custody and control. *Ruffino*, 1980-NMSC-072, ¶ 5. More specifically, the police must *lawfully* have custody and control of the item. *Id.* Police custody must be based on "some legal ground" with "some nexus between the arrest and the reason for the impounding." *Id.* Second, the officer must conduct the inventory search "pursuant to established police regulations." *Id.* These regulations may proscribe the limits of the search, but they have no bearing on the reasonableness of the search itself. *Id.* Finally, the search must be reasonable and will be upheld if made "in furtherance of any one of three purposes: (1) to protect the arrestee's property while it remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; or (3) to protect the police from potential danger." *Shaw*, 1993-NMCA-016, ¶ 10. Many of the cases applying the impoundment and inventory doctrine involve automobiles, and in all of them, officers arrested the defendant prior to gaining custody of the items and subsequently searching them. *See State v. Boswell*, 1991-NMSC-004, ¶ 2, 111 N.M. 240, 804 P.2d 1059 (describing arrest prior to the search of the arrestee's wallet); *State v. Williams*, 1982-NMSC-041, ¶ 2, 97 N.M. 634, 642 P.2d 1093 (describing arrest prior to the search of the arrestee's vehicle); *Ruffino*, 1980-NMSC-072, ¶ 2 (describing arrest prior to the search of the arrestee's vehicle); *Shaw*, 1993-NMCA-016, ¶¶ 2, 3 (describing the search of a wallet and a cigarette pack during the arrestee's booking into the detention center).

{15} We evaluate the constitutionality of the search of Defendant's vehicle in the present case using the impoundment and inventory doctrine of the community caretaker exception, rather than the emergency aid doctrine for the following reason. Generally, entry into a home in response to an emergency assistance call triggers application of the emergency aid doctrine, and an arrest preceding the search and seizure of the arrestee's possessions triggers application of the impoundment and inventory doctrine. In the present case, Defendant and the State agreed at the suppression hearing that the contact between Sergeant Foreman and Defendant occurred as a result of the officer responding to an emergency assistance call. The initial encounter was, therefore, premised on the provision of emergency care. As the district court observed, "[Sergeant] Foreman acted in his community caretaking capacity when he decided . . . Defendant should be taken to the hospital. The warrantless seizure of . . . Defendant's person was therefore constitutionally valid under the Fourth Amendment because community caretaking is a recognized exception to the warrant requirement." At issue is the officer's conduct *following* the initial encounter, specifically Sergeant Foreman's decision to impound and search Defendant's vehicle after Defendant's departure.

{16} Under our case law, the emergency aid doctrine operates to justify the search of a home upon an officer's arrival at a given location under circumstances that call for the officer to exercise the community caretaking responsibility to provide emergency assistance. *See Ryon*, 2005-NMSC-005, ¶ 4 (describing entry into a home in response to several calls from dispatch concerning a stabbing victim and other persons with possible head injuries); *Nemeth*, 2001-NMCA-029, ¶¶ 3, 8 (describing entry into a home in response to a possible suicide). In such circumstances, whatever search is conducted happens alongside the officer's actions in response to providing emergency assistance. The first requirement of the three-part test reflects the importance of this contemporaneous connection—the "police must have reasonable grounds to believe that there is . . . an *immediate* need for their assistance for the protection of life or property." *Ryon*, 2005-NMSC-005, ¶ 29 (emphasis added) (internal quotation marks and citation omitted). Here, by the time Sergeant Foreman searched Defendant's vehicle, the emergency had subsided and been resolved by the decision to have Defendant taken to the hospital. Sergeant Foreman could not possibly claim that he needed to seize the vehicle and inventory its contents in order to aid its owner where the owner was himself no longer within the vehicle and was already receiving substantial assistance from medical personnel at a different location. Unlike *Nemeth* and *Ryon*, rendering emergency assistance to Defendant did not require Sergeant Foreman to enter into or search Defendant's vehicle.

{17} We must, therefore, analyze Sergeant Foreman's decision to impound Defendant's vehicle and inventory the items within it under the impoundment and inventory doctrine of the community caretaker exception. We begin by reviewing the line of New Mexico cases discussing the

test for the impoundment and inventory doctrine, beginning with *Ruffino*. We track the development of the test, state it in its present form, and apply it to the facts of this case.

A. The Impoundment and Inventory Doctrine of the Community Caretaker Exception

{18} The State cites federal circuit court opinions in support of its argument that Sergeant Foreman's decision to tow Defendant's vehicle was justified by the impoundment and inventory doctrine. The State asserts that there is "no standardized criteria for evaluating reasonableness—it depends on a case-by-case inquiry of the facts and circumstances leading to the decision to impound." We find the State's characterization of the law accurate and supported by four decisions from New Mexico's appellate courts. We discuss these four cases sequentially, apply the resulting legal precepts to the facts of this case, and conclude that Sergeant Foreman's decision to impound and inventory Defendant's vehicle was reasonable.

B. New Mexico Cases

{19} As previously discussed, New Mexico's appellate courts have established a three-part test for assessing reasonableness under the impoundment and inventory doctrine, often referred to as the *Ruffino* requirements. In *Ruffino*, our Supreme Court found reasonable an officer's search of a vehicle following the arrest of the owner of the vehicle. The officer first searched the vehicle's interior, then used the keys to unlock the trunk and inventory the items within the trunk. The defendant challenged the search of the trunk specifically. Despite the defendant's specific complaint that the search of the trunk exceeded the officer's authority under the impoundment and inventory doctrine, the Court held that "the initial search was valid," and that "the entry into the trunk was equally valid." *Ruffino*, 1980-NMSC-072, ¶¶ 2, 6. "To forbid entry into trunks as part of an inventory search would frustrate the very purpose of the inventory, since the trunk is a likely place for valuables to be stored." *Id*. Although *Ruffino* discusses which parts of an automobile may be subject to an inventory search, a question not at issue in the present case, the decision set forth the three-part test used in New Mexico for evaluating a search and seizure based on the impoundment and inventory doctrine. In short, the vehicle must be in police custody or control, the inventory made pursuant to established police regulations, and the search reasonable.

{20} The following three cases apply the *Ruffino* requirements and together embody New Mexico law on valid inventory searches. In *Williams*, our Supreme Court found reasonable an officer's search of a vehicle legally parked behind a grocery store following the arrest of its owner. Officers arrested the defendant while he attempted to force a cashier to empty her register at gun point. *Williams*, 1982-NMSC-041, ¶ 2. After taking the defendant to the police station for booking, officers discovered "a set of keys in the defendant's pocket." *Id*. An officer returned to the store to locate the defendant's vehicle, found it "locked and legally parked behind the grocery store[,]" and then searched its contents. *Id*. The defendant sought suppression of the items found during the officer's inventory search of the vehicle, arguing that the state failed to prove the first requirement of a valid inventory search—there must exist "some nexus between the arrest and the reason for the impounding." *Id*. ¶ 5 (internal quotation marks and citation omitted).

{21} Our Supreme Court concluded that "the first *Ruffino* requirement was satisfied," citing two federal cases. *Williams*, 1982-NMSC-041, ¶¶ 5, 7 (citing *Preston v. United States*, 376 U.S. 364 (1964) and *United States v. Lawson*, 487 F.2d 468 (8th. Cir. 1973)). In *Preston*, the police properly took custody of a vehicle after arresting the defendants for vagrancy while sitting in the parked vehicle, "even though they presumedly could have locked it and left it parked where it was." *Williams*, 1982-NMSC-041, ¶ 5. In *Lawson*, the police impounded a locked vehicle parked in the parking lot of a motel on the day that they arrested the vehicle's owner for passing insufficient funds checks. *Williams*, 1982-NMSC-041, ¶ 5. Our Supreme Court observed that the decision to impound in those cases could not be justified because of some necessity, e.g., the car presented a traffic hazard or its location violated a parking ordinance. *Id*. ¶ 6. Rather, *Preston* and *Lawson* illustrate "that no compelling need must be present to justify impoundment of a vehicle incident to an arrest." *Williams*, 1982-NMSC-041, ¶ 6. "The possible use of the vehicle as evidence of the crime . . . supplies the necessary nexus between the arrest and the reason for impounding." *Id*. ¶ 7. Notably, our Supreme Court clarified, "[t]he fact that the vehicle was legally parked and could have been left there does not make the impoundment improper." *Id*.

{22} In *Boswell*, our Supreme Court found reasonable a search of the defendant's wallet conducted after an officer took the defendant to the police station for booking. Suspecting the defendant of shoplifting at his grocery store, the store's manager detained the defendant in his office. 1991-NMSC-004, ¶ 2. Upon arrival, the police requested the defendant's identification. *Id*. After retrieving his identification from his wallet, the defendant inadvertently placed his wallet on a cabinet in the office where it remained until an officer returned to the grocery store to find it during the defendant's booking. *Id*. As in *Williams*, the defendant in *Boswell* sought to suppress the drugs later found in his wallet, arguing that the police did not have lawful custody of the wallet, i.e., that there was no reasonable nexus between the defendant's arrest for shoplifting and the officer's seizure of the wallet. *Boswell*, 1991-NMSC-004, ¶¶ 4, 8.

{23} Our Supreme Court held that, "[t]he reasonable nexus between the arrest and seizure need not be based on probable cause, but can be based on all the facts and circumstances of this case in light of established [F]ourth [A]mendment principles." *Id*. ¶ 12 (alteration, internal quotation marks, and citation omitted). The Court's analysis of the first requirement tracked the facts relevant to the third requirement of a valid inventory search, that is, its reasonableness: the defendant's wallet was left in the manager's office, a location in which the defendant had no reasonable expectation of privacy or possessory interest; the defendant left the wallet accidentally and in an unsecure place "as an immediate result of [his] arrest[;]" theft or loss of the wallet was probable; and the police may be liable for such loss or theft. *Id*. ¶ 13.

{24} Importantly, *Boswell* also explicitly rejected the defendant's argument that the officer cannot lawfully acquire custody of the defendant's possessions if the defendant can arrange for someone else to retrieve the item. *Id*. "This would not have removed the risk that intervening causes would result in the loss of the wallet, nor would it exculpate the police had it been lost." *Id*. The officer's investigation of the defendant created a situation that put the defendant's property at risk of theft or loss, and therefore, the officer has an "on-going" responsibility to safeguard the defendant's property. *Id*. The risk of loss to the defendant and the possibility of police incurring liability for that loss provide valid bases

upon which an officer may claim to have custody or control of the item. "[T]he reasonable nexus between the initial arrest and [the] seizure is not found in a theory of probable cause to suspect the existence of contraband or evidence, nor necessarily on an incident to arrest theory, but in the need to safeguard [the] defendant's property from loss and to protect the police from liability and charges of negligence." *Id*. ¶ 14.

{25} Finally, in *Shaw*, this Court found reasonable a search of a cigarette pack removed from the defendant's pocket during booking, following his arrest for a domestic disturbance. 1993-NMCA-016, ¶¶ 2, 17. The defendant argued that searching the cigarette pack did not further any of the permissible purposes of an inventory search. *Id*. ¶ 12. Because the value of cigarettes is negligible, the defendant argued that a search of a cigarette pack cannot be necessary to protect the arrestee's property or to prevent claims against police for the loss or theft of the cigarettes. *Id*. We rejected this argument for "miss[ing] the essence of the law controlling inventory searches," and we emphasized "that a clearly established inventory procedure may properly require that jailers search all containers, including cigarette packs." *Id*. ¶ 13. Moreover, we acknowledged that *Boswell* "is illustrative of the broad scope of lawful inventory searches." *Shaw*, 1993-NMCA-016, ¶ 14. We concluded "there was substantial evidence to find that the inventory of [the d]efendant's cigarette pack . . . was reasonably made in furtherance of both the protection of the arrestee's property and to protect the police against false claims because items of value such as money, rings, and bracelets are often temporarily stored in open cigarette packs." *Id*. ¶ 16. In short, we found the search reasonable because the purpose was to inventory the contents of the cigarette pack and because the detention facility's procedure furthered legitimate police interests. *Id*. ¶ 17.

{26} In sum, the state of the law of the impoundment and inventory doctrine has evolved from the distinctive three-part test first established in *Ruffino*, and now focuses more generally on the reasonableness of the officer's asserted custody or control of the item seized and searched. Insofar as the officer's decision to impound the vehicle or seize the item stems from concerns that the vehicle or item could be lost or stolen and that the officer could be liable for such loss or theft as a result of the officer having separated the owner from the vehicle or item, the officer may impound or seize. Notably, the following considerations do not by themselves defeat the reasonableness of the officer's decision to impound a vehicle or seize an item: whether the vehicle could remain in its location legally if not impounded, *Williams*, 1982-NMSC-041; whether another person could acquire the item on the defendant's behalf, *Boswell*, 1991-NMSC-004; and whether the item is valuable, regardless of whether the officer has any way of knowing its value, *Shaw*, 1993-NMCA-016.

C. Application of the Impoundment and Inventory Doctrine and Parties' Arguments

{27} Turning to the present case, we address Defendant's argument and evaluate the reasonableness of Sergeant Foreman's decision to impound Defendant's vehicle. Defendant focuses on several facts that tend to show the unreasonableness of Sergeant Foreman's decision to impound his vehicle. First, Defendant rented the vehicle; he did not own it. Defendant maintains that the car rental company presumably had contingencies for retrieving its own abandoned or disabled vehicles. The initial encounter between Defendant and Sergeant Foreman began at 3:30 p.m., a time the car rental company was reachable by phone. Defendant maintains that these facts prove that calling the car rental company to seek assistance from an agent was the reasonable course of action. Alternatively, Defendant notes that the owner of Dino's Mini-Mart could have arranged for the removal of the vehicle given its location on the owner's property. Second, Defendant highlights the condition and the location of the vehicle. The vehicle was not disabled; it was not a nuisance; it was not obstructing a highway or other public roadway; and it was parked legally.

{28} We are not persuaded that these facts prove Sergeant Foreman's decision to impound the vehicle was unreasonable. Defendant asserts that the availability of two other persons besides Sergeant Foreman who initiated the police-citizen encounter compel the conclusion that Sergeant Foreman's decision to manage the vehicle himself was unreasonable. Our precedent states that such a fact cannot be dispositive of the reasonableness determination. Indeed, our Supreme Court rejected Defendant's argument in *Boswell*. There, the defendant had asked that a friend, rather than an officer, retrieve the defendant's wallet after the defendant's arrest. *Boswell*, 1991-NMSC-004, ¶ 2. Because reasonableness "can be based on all the facts and circumstances of this case in light of established [F]ourth [A]mendment principles[,]" which include safeguarding the defendant's property upon arrest and limiting the officer's exposure to liability for theft or loss, the Court rejected the defendant's argument that the search of the wallet was unreasonable because someone else could have safeguarded it on behalf of the defendant. *Id*. ¶ 12 (alteration, internal quotation marks, and citation omitted). The Court explained that allowing someone else to recover the defendant's property would not eliminate "the risk that intervening causes would result in the loss of the wallet, nor would it exculpate the police had it been lost." *Id*. ¶ 13. Rather, "[l]eaving the wallet in the office, where [the] defendant had no privacy interest or expectation of security and where any number of unknown individuals may have gained access to the wallet, subject to the friend possibly retrieving it at some future time, would be careless police procedure evincing a lack of concern for the defendant's belongings." *Id*.

{29} The same logic applies here. Fourth Amendment issues and the applicability of exceptions to the Fourth Amendment stem from conduct that occurs between an officer and a citizen. Sergeant Foreman, not the car rental company, not the owner of Dino's Mini-Mart, and not some other person Defendant might have called upon to attend to Defendant's vehicle, was responsible for separating Defendant from the vehicle. Therefore, Sergeant Foreman must also be the person responsible for safeguarding the vehicle and for taking precautionary measures to protect himself from suit should he fail to do so effectively. The willingness of a person—a person not directly involved in the police-citizen encounter but who may have some interest in the vehicle's location—to assume responsibility for a defendant's property cannot be determinative of the reasonableness of the officer's decision to care for the defendant's belongings where the officer was responsible for separating the owner from those belongings through the exercise of the officer's community caretaker obligations.

{30} Similarly, we are not persuaded by Defendant's contention that the operability of the vehicle and the fact that it was parked legally control the reasonableness of Sergeant Foreman's decision to impound the vehicle. Our Supreme Court previously

decided that "[t]he fact that the vehicle was legally parked and could have been left there does not make the impoundment improper." *Williams*, 1982-NMSC-041, ¶ 7. The Court cited two United States Supreme Court opinions where, in neither case, "could the impoundment be characterized as necessary because the car was a traffic hazard, or because it was violating a parking ordinance[.]" *Id*. ¶ 6 (citations omitted). Here, as in *Williams*, there existed no compelling need to move the vehicle because it posed a particular hazard or otherwise violated any other traffic laws. *Id*. "[N]o compelling need must be present to justify impoundment of a vehicle incident to an arrest." *Id.* Our cases show that the fact that the vehicle is properly parked does not preclude impoundment of it based on its owner's compelled absence from the parking lot.

{31} We note that we examine the reasonableness of Sergeant Foreman's conduct under circumstances unique to our past cases applying the impoundment and inventory doctrine. Unlike our other cases, Sergeant Foreman did not arrest Defendant before deciding to impound and therefore inventory Defendant's vehicle. The broader legal issue this appeal presents concerns the applicability of the impoundment and inventory doctrine where the officer does *not* arrest the owner of the vehicle prior to making the decision to impound. *See Boswell*, 1991-NMSC-004, ¶ 2 (describing arrest prior to the search of the arrestee's wallet); *Williams*, 1982-NMSC-041, ¶ 2 (describing arrest prior to the search of the arrestee's vehicle); *Ruffino*, 1980-NMSC-072, ¶ 2 (describing arrest prior to the search of the arrestee's vehicle); *Shaw*, 1993-NMCA-016, ¶¶ 2, 3 (describing the search of a wallet and a cigarette pack during the arrestee's booking into the detention center).

{32} Defendant argues that the impoundment and inventory doctrine can only apply to situations where police first arrest the owner of the vehicle. We disagree with Defendant, and we conclude that Sergeant Foreman's decision to impound and inventory Defendant's vehicle was reasonable under the impoundment and inventory doctrine given the circumstances that confronted him. We acknowledge that if the defendant's arrest is a necessary component of the rationale underpinning the impoundment and inventory doctrine, then the doctrine may not be applied to the facts of this case, absent novel reasons for the doctrine's existence. We cannot conclude, however, that the doctrine only applies to searches following an arrest for two reasons.

{33} First, the impoundment and inventory doctrine is, as explained previously, one branch of the community caretaker exception to the Fourth Amendment. The community caretaker exception, not just the impoundment and inventory doctrine, was born from the understanding that not all police-citizen encounters involve criminal investigation. Rather, police frequently interact with citizens innocuously, not seeking to implicate the citizen in a crime. The overarching concept substantiating the community caretaker exception is the non-criminal nature of the officer's contact with the citizen. The exception itself presupposes the lack of criminal activity that would precede an arrest. It therefore makes little sense to conclude that one of the doctrines within the exception would require criminal activity as a precondition to its application.

{34} Second, we believe, and our case law supports the conclusion, that an arrest is not what makes an officer's decision to impound a vehicle reasonable. Reasonableness is a function of an officer's responsibility to safeguard the citizen's property and a prudent officer's need to insulate the police from liability should the citizen's property be lost or stolen. *Shaw*, 1993-NMCA-016, ¶ 10. Any time a citizen is separated from his or her belongings, be it because an officer arrested that citizen or because the officer's judgment led the officer to believe the citizen required medical attention at a facility some distance from the citizen's vehicle where the officer responded to the citizen's medical emergency, the citizen's property is left exposed and unattended, and because the officer is involved in the separation of the citizen from the citizen's belongings, the officer opens himself or herself up to potential liability for the loss or theft of those belongings. The reasons an officer's decision to impound may be reasonable rest not on the existence of an arrest, but on the resulting circumstances after an arrest occurs—the separation of the citizen from the citizen's property leaves the citizen's property unattended and in a public place. A medical emergency may produce, exactly as it did in the present case, the same factual circumstances, i.e., the citizen no longer possesses or controls his own property because of the officer's assistance. For the foregoing reasons, we conclude that Sergeant Foreman's decision to impound and inventory Defendant's vehicle was reasonable under the impoundment and inventory doctrine, despite not having arrested Defendant prior to deciding to impound Defendant's vehicle. More specifically, it was not unreasonable for Sergeant Foreman to have decided to impound Defendant's vehicle given that Defendant understood and responded positively to Sergeant Foreman's offer to bring the tow paperwork to the hospital, and that Defendant's rental car would have been left unattended for an unknown period of time in an area known for criminal activity while Defendant received medical treatment.

{35} Finally, we address Defendant's two remaining arguments. Defendant argues that the State did not offer any evidence proving that there existed a threat of theft or vandalism to the vehicle were Sergeant Foreman to leave the vehicle parked in the parking lot. The only evidence the State presented came from Sergeant Foreman's testimony at the suppression hearing, during which he stated that the location of the convenience store was "known for criminal activity." Defendant cites to our decision in *Apodaca v. New Mexico Taxation & Revenue Dep't*, for the proposition that the officer must express "specific, articulable safety concern" to justify the intrusion. 1994-NMCA-120, ¶ 5, 118 N.M. 624, 884 P.2d 515. In the present case, the district court concluded that the community caretaker exception requires "actual" evidence of unsafe conditions, and, "[t]here was no evidence it was a high value car or that it contained visible high value items which might make it a target for theft or vandalism."

{36} We cannot rely on *Apodaca* for this proposition of law. There, an officer stopped the driver of a motorcycle weaving within one lane of traffic in a pendulum-type motion. *Id.* ¶ 2. The officer specifically admitted that he never suspected the driver was intoxicated or otherwise committing a traffic infraction. *Id.* ¶ 3. Rather, the officer initiated the stop out of concern for the driver's welfare, perhaps an injury or illness. *Id*. Accordingly, the defendant argued that the stop was unconstitutional because the officer had no reasonable suspicion that the driver was engaged in criminal activity. *Id*. ¶ 4. We found the stop constitutional because "a police officer may stop a vehicle for a specific, articulable safety concern, even in the absence of reasonable suspicion that a violation of law has occurred or is occurring." *Id*. ¶ 5. Our decision relied on *State*

v. Reynolds, 1993-NMCA-162, 117 N.M. 23, 868 P.2d 668, *rev'd on other grounds by* 1995-NMSC-008, 119 N.M. 383, 890 P.2d 1315.

{37} Both cases, *Reynolds* and *Apodaca*, fall into a different line of cases—those applying the public servant doctrine of the community caretaker exception. *See Ryon*, 2005-NMSC-005, ¶ 26 (citing, exclusively, *Reynolds* and *Apodaca* in the course of explaining the public servant doctrine, where a search and seizure of a vehicle on a public highway "is judged by a lower standard of reasonableness: a specific and articulable concern for public safety requiring the officer's general assistance"). The public servant doctrine, not the impoundment and inventory doctrine, requires the officer to identify specific safety concerns. *Id*. The third branch of the community caretaker exception stems from factual circumstances where one citizen's vehicle poses a particular hazard to the general public. *See Apodaca*, 1994-NMCA-120, ¶ 2 (describing a driver operating a motorcycle on highway erratically); *Reynolds*, 1993-NMCA-162, ¶ 2 (describing a driver operating a vehicle on highway with an open tailgate and three passengers with feet dangling). Here, because Defendant's vehicle remained stationary and in a parking lot, not a roadway, Defendant's vehicle presented no such obstacle. The public servant doctrine does not apply, and therefore, neither does its requirement that the officer proffer identifiable and particular concerns about the safety of the general public in order to justify the officer's decision to stop and search the vehicle. To the extent the district court granted Defendant's motion to suppress because of the State's failure to provide specific evidence concerning the dangerousness of the parking lot of Dino's Mini-Mart, we conclude the district court's order draws erroneous conclusions of law about the impoundment and inventory doctrine.

{38} Lastly, Defendant argues the State failed to prove Sergeant Foreman's inventory search complied with police regulations and procedures, the second *Ruffino* requirement. Defendant cites two sections of the Department of Public Safety Policy Manual, providing "[w]hen the driver is arrested, the officer shall inventory the vehicle if it is being towed from the scene[,]" and "[o]fficers shall not tow vehicles from private property at the property owner's request due to them being abandoned." According to Defendant, the policies only authorize the towing of a vehicle if the officer arrested its owner. We disagree with Defendant's reading of these policies. The first policy cited by Defendant applies *only if* the officer arrested the driver of the vehicle. It says nothing about the proper procedure to follow if the antecedent is not true, i.e., where the officer did not arrest the driver. The second policy cited by Defendant is irrelevant because Sergeant Foreman did not receive a request from anyone (neither the car rental company nor an owner or employee of Dino's Mini-Mart) to remove Defendant's vehicle.

CONCLUSION

{39} We hold that a police officer may decide to impound a citizen's vehicle under the impoundment and inventory doctrine of the community caretaker exception to the Fourth Amendment where a medical emergency results in the driver's separation from the vehicle. Applying the test appropriate to the impoundment and inventory doctrine, we conclude that Sergeant Foreman's decision to tow and subsequently search Defendant's vehicle was reasonable. We reverse the district court's order granting Defendant's motion to suppress.

{40} IT IS SO ORDERED.
STEPHEN G. FRENCH, Judge

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

Classified

Positions

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New Mexico Center on Law and Poverty (www.nmpovertylaw.org) seeks full-time staff attorney for our Public Benefits Team to provide legal representation, policy advocacy, and community education to address hunger and secure fundamental fairness in the administration of the public safety net for low-income New Mexicans. Required: Law degree and license; minimum two years as an attorney; excellent research, writing, and legal advocacy skills; 'no-stone-unturned' thoroughness and persistence; leadership; ability to be articulate and forceful in the face of powerful opposition; commitment to economic and racial justice. Preferred: knowledge and experience in advocacy, lobbying, legislative and government administrative processes; experience working with diverse community groups and other allies; familiarity with poverty law; Spanish fluency. Varied, challenging, rewarding work. Good non-profit salary. Excellent benefits. Balanced work schedule. Apply in confidence by emailing a resume and a cover letter describing your commitment to social justice and to the mission of the NM Center on Law and Poverty to veronica@nmpovertylaw.org. Please put your name in the subject line. EEOE. People with disabilities, people of color, and people who have grown up in low-income communities are especially encouraged to apply.

Position Announcement

The Pueblo of Isleta has an immediate opening for a qualified individual to serve as an Associate General Counsel for the Pueblo of Isleta. The candidate must be a license attorney duly admitted to practice law and eligible to be admitted to practice law with the Pueblo of Isleta Judiciary. The responsibility of the Associate General Counsel is to provide professional legal counsel in the areas of tribal government, federal-tribal relations, jurisdiction issues, environmental and natural resources law and policy, economic development, tribal business enterprise, and employment issues. Will review and recommend actions on a wide range of complex legal issues for Tribal Administration, Tribal Council and Tribal Enterprises. Represents the tribal and its representatives in judicial, executive or administrative proceedings. Will prepare and review contracts, agreements, leases, rights of way and similar documents in order to maintain the best legal interest of the Pueblo. Assists in negotiating contracts, purchases and other agreements maintaining the best legal and financial interests of the Pueblo. Drafts policies and procedures for government departments and entities. Indian Preference applies to this appointment. Pay is negotiable based on experience. If interested, please submit a resume and the Pueblo of Isleta Employment Application to the Human Resources Department, located at the Tribal Services Complex, 3950 Highway 47 SW., Albuquerque, NM 87105 or mail to Human Resources Department, Pueblo of Isleta, P.O. Box 1270, Isleta, NM 87022 or FAX to (505)869-7579. The Pueblo of Isleta is a drug-free workplace.

Office Of The State Engineer/ Interstate Stream Commission (OSE/ ISC) State Of New Mexico

The Litigation & Adjudication Program seeks to hire an Attorney I to work in the Administrative Litigation Unit with legal services on sensitive matters of water law in specific areas of water rights administration and enforcement for OSE and provide legal advice in litigation matters, as well as interpretation of legal research, analysis and mediation. The position is located in Santa Fe. Qualifications: Juris Doctorate from an accredited law school; licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for limited practice license. For more information on limited practice licenses, please visit http://nmexam.org/limited-license/. Must apply online at http://www. spo.state.nm.us/ by 4/30/2018. Search word: 49550. The OSE/ISC is an Equal Opportunity Employer.

Attorney Associate

The Administrative Office of the Courts (AOC) is accepting applications for a permanent, full-time Attorney Associate. Under the direction of AOC general counsel, plan, organize, direct, and manage the statewide program for Alternative Dispute Resolution (ADR), including supervision of the Children's Court Mediation Program (CCMP) and the Magistrate Court Mediation Program (MCMP). Coordinate the work of volunteers, contract personnel and outside entities. Work with statewide district courts to implement or enhance ADR programs. May supervise judicial branch program staff and provide professional support to judicial commission(s). Under general direction, as assigned by a supervision attorney, review cases, perform legal research, evaluation, analysis, and writing and make recommendations concerning the work of the Court or Judicial Entity. Salary: $58,506.24 - $73,132.80 per year (salary based on qualifications and experience). For a detailed job description, requirements and application/resume procedure please refer to https://www.nmcourts.gov/careers.aspx or contact Administrative Office of the Courts Human Resources at 505-827-4810.

Litigation Attorney

The Albuquerque branch of Fadduol, Cluff, Hardy & Conaway PC, a plaintiff's firm with branches in Texas and New Mexico, seeks a litigation attorney. Opportunity to join a highly successful, and growing, law practice. Three year's general litigation experience preferred along with specific experience in areas including investigation, pleading, discovery, motion practice, and trial. Spanish bilingual ability is a plus. Top 20% of graduating law school class required or, alternatively, documented success in multiple trials required. Full benefits. Salary at, or above, competition as base with a generous, discretionary bonus program awarded. Must be willing to travel, both in and out of state, work hard, and be a conscientious team player. Must care about clients and winning. Send resumes to hdelacerda@fchclaw.com.

13th Judicial District Attorney Senior Trial Attorney, Trial Attorney, Assistant Trial Attorney Cibola, Sandoval, Valencia Counties

Senior Trial Attorney - Requires substantial knowledge and experience in criminal prosecution, as well as the ability to handle a full-time complex felony caseload. Trial Attorney - Requires misdemeanor and felony caseload experience. Assistant Trial Attorney - May entail misdemeanor, juvenile and possible felony cases. Salary is commensurate with experience. Contact Krissy Saavedra KSaavedra@da.state.nm.us or 505-771-7411 for application.

New Mexico Court of Appeals Term/Full-Time Law Clerks in Albuquerque Courthouse

The New Mexico Court of Appeals is recruiting three (at-will) Law Clerk positions to work directly with judges on assigned cases. Must be a graduate of an ABA accredited law school and have one year of experience performing legal research, analysis, writing and editing while employed or as a student. Law Clerks are essential to the work of the Court and outstanding legal writing is paramount. These are temporary, full-time positions with benefits. Continued employment beyond the set term may be possible with excellent performance. Current salary is $27.081 per hr. Please send resume and writing sample to Agnes Szuber Wozniak, supasw@nmcourts.gov, 237 Don Gaspar, Room 30, Santa Fe, NM 87501. 505-827-4201. The New Mexico Judicial Branch is an equal opportunity employer.

Advertisement For Proposals City of Gallup, New Mexico Request for Proposals (RFP) NO. 2017/2018/06/P

Public notice is hereby given that the City of Gallup, New Mexico, is accepting proposals for: LEGAL SERVICES FOR UTILITY ISSUES. As more particularly set out in the RFP documents, copies of which may be obtained from the City of Gallup Purchasing Department, 110 W. Aztec Ave., Gallup, New Mexico 87301; or contact Frances Rodriguez, Purchasing Director at (505) 863-1334; email frodriguez@gallupnm.gov. Copies of RFP may also be accessed at www.gallupnm/bids. Sealed proposals for such will be received at the Office of the Purchasing Department until 2:00 P.M. (LOCAL TIME) on May 17, 2018 when proposals will be received in the City Hall Purchasing Conference Room. Envelopes are to be sealed and plainly marked with the RFP Number. NO FAXED OR ELECTRONICALLY TRANSMITTED PROPOSALS will be accepted, and proposals submitted after the specified date and time will not be considered and will be returned unopened. Dated the 11th day of April 2018 By: /S/ Jackie McKinney, Mayor. CLASSIFIED LEGAL COLUMN: Bar Bulletin Publishing Date: Wednesday, April 25, 2018

Independent Counsel

The Albuquerque Police Oversight Board is seeking a contract Independent Counsel to advise and represent the POB. Must be NM Bar member with experience in civil rights, police misconduct cases, criminal law, contract law, municipal regulations, Open Meetings Act/IPRA and union contracts. Contract thru June 30, 2019 with possible renewal annually. Submit letter of interest and CV by May 11, 2018 at Noon to Edward W. Harness, Esq. Executive Director CPOA, eharness@cabq.gov.

Medical Paralegal

Allen, Shepherd, Lewis & Syra, P.A. is seeking a paralegal with five years experience of directly related experience requesting, reviewing and summarizing medical records in a defense civil litigation law firm as a medical paralegal or equivalent combination of education and/or experience related to the discipline. Other primary duties including drafting documents, locating individuals, conducting research for attorneys, and requesting and organizing documents for use at depositions and trials. Must have knowledge of medical terminology and be familiar with prescription medications. Must know how to prepare medical chronologies, medical expense itemizations and other related documents. Responsible for communicating with various internal and external parties, maintaining electronic databases, and providing support to other employees as requested. Employer offers a generous benefits package. Please send resume with cover letter to Allen, Shepherd, Lewis & Syra, P.A. Attn: Human Resources, P. O. Box 94750, Albuquerque, NM 87199-4750. All replies will be kept confidential. EOE.

Legal Assistant

Downtown insurance defense firm seeking FT legal secretary with 3+ yrs. recent litigation experience. Current knowledge of State and Federal District Court rules a must. Prior insurance defense experience preferred. Strong work ethic, positive attitude, superior grammar, clerical and organizational skills required. Good benefits. Salary DOE. Send resume and salary history to: Office Administrator, Madison, Mroz, Steinman & Dekleva, P.A., P.O. Box 25467, Albuquerque, NM 87125-5467 or fax to 505-242-7184.

Paralegals

Immediate opportunity in Albuquerque for a Paralegal with Real Estate experience. Experience with HOA's a plus. WordPerfect experience is highly desirable. Send resume and writing sample to: Steven@BEStstaffAbq.com

Legal Assistant

Legal Assistant for insurance defense downtown law firm. 3+ years experience. Strong organizational skills and attention to detail necessary. Must be familiar with Outlook and Word. Full time, salary DOE, great benefits inc. health & life ins. and 401K match. E-mail resume to: kayserk@civerolo.com; fax resume to 505-764-6099; or, mail to Civerolo, Gralow & Hill, PA, P.O. Box 887, Albuquerque NM 87103.

Paralegal

Need experienced litigation paralegal for full time position with litigation firm. Must have experience filing court pleadings electronically, and helping with discovery and trial prep. Fluency in Spanish a plus. Send resume w/ references via email to smwarren@nmconsumerwarriors.com.

Positions Wanted

Legal Asst/Paralegal Seeks Immediate FT Employment

Desire to work in Personal Injury area of law. Strong Work Ethic. Integrity. Albq./RR area only. Over 5 yrs exp. E-file in State & Fed Courts. Calendaring skills. Med Rec. Rqsts & Organization. Please contact 'legalassistantforhire2017@gmail.com ' for resume/references.

Experienced Paralegal Seeks Employment In Santa Fe

Highly experienced (20+ years) and recommended paralegal wishes part-time or contract employment in Santa Fe only. For resume and references, please e-mail 'santafeparalegal@aol.com'.

Office Space

UNM area/Nob Hill Professional Office Building

1930's remodeled vintage office in high traffic area one block off Central. Large, spacious rooms with lots of historic Nob Hill character including hardwood floors, floor to ceiling windows and built-in storage cabinets. 1,200 sf with two private offices, large open staff area, reception room, 500 sf partial basement, full kitchen and ¾ bath. Updated electrical, HVAC, security doors and alarm system. Tree-shaded yard in front and private 6-space parking lot in back. Ideal for professional practice: law, accounting, health care. See Craigslist ad for photos. $1,400/month with one year lease. Contact Beth Mason, bethmason56@gmail.com, 505-379-3220

Uptown's Best Office Space

2550SF of prime office space located off the second floor lobby with immediate access to elevators and 1st floor staircase, has great presence. High end remodel. Building signage available. Great access to I-40 adjacent to Coronado and ABQ Uptown malls. On site amenities include Bank of America and companion restaurants. Call John Whisenant or Ron Nelson (505) 883-9662 for more information.

Downtown Mid Century Office for Lease

Office condo at 509 Roma NW with reserved off street parking. Walk to all courthouses and downtown services. 4 Private offices with a conference room, kitchenette and reception. Phone, copy machine, and updated furniture included if desired. $2900/mo. Email carrie.sizelove@svn.com or call 505-203-9890. Also available for purchase.

Individual Office Space for Rent in Santa Fe

Gas/electric/water included. Large reception area. Coffee/tea/water service provided. Access to copier. File room available at no extra cost. No smoking. Beautiful grounds. $500.00/month unfurnished or $550.00/month furnished. Contact Kathy Howington (505) 916-5558.

Professional Law Offices

Professional law offices for lease adjacent to Santa Fe district court at 311 Montezuma Avenue. $4400/mo for 2505 SF + utilities. 505-629-0825 LNMREB#18556

Three Large Offices

Three large offices and two secretarial ares. Reception area with cathedral ceiling and skylights. Refrig. air and great parking." $850.00 per month. Please call (505) 243-4541

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