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## Civil Procedure Update 2020: New Mexico Annual Judicial Conclave

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# CIVIL PROCEDURE UPDATE 2020



**June 19, 2020**

**New Mexico Online Judicial Conclave**

Associate Professor George Bach

Assistant Professor Veronica C. Gonzales-Zamora

UNM School of Law

## CIVIL PROCEDURE UPDATE 2020 PRESENTER BIOGRAPHIES

**George Bach** teaches constitutional law, evidence, federal jurisdiction, civil procedure, trial practice, and clinic.

During and after law school, Bach worked for K. Lee Peifer litigating in civil rights, union-side labor law and employee-side employment law. In 2005, Bach became the first staff attorney at the American Civil Liberties Union of New Mexico, where he litigated a wide variety of civil rights cases in state and federal courts. In 2009, he teamed up with Matthew L. Garcia and formed the firm of Bach & Garcia. He also worked as an attorney at Garcia Ives Nowara.

A former president of the New Mexico Lesbian and Gay Lawyers Association, Bach was honored with a Santa Fe Human Rights Alliance "Treasure" Award in 2007 for his work in the LGBT community. In 2009, U.S. Rep. Martin Heinrich nominated him to the New Mexico State Advisory Committee to the U.S. Commission on Civil Rights. Bach serves as a volunteer member of the American Civil Liberties Union of New Mexico's legal panel and on the board of directors for Enlace Comunitario.

**Veronica C. Gonzales-Zamora**, an Assistant Professor at the University of New Mexico School of Law, teaches civil procedure, ethics, poverty law, and appellate decision-making. She previously taught in the Southwest Indian Law Clinic.

During law school, Gonzales-Zamora worked at the Institute of Public Law; clerked at local law firms Freedman Boyd Hollander Goldberg Urias & Ward PA and SaucedoChavez PC; and externed for the late Justice C.W. Daniels. Since graduating, she clerked for New Mexico Supreme Court Justice P. Jimenez Maes (ret.) and for New Mexico Court of Appeals Judge E. Kihne and then-Chief Judge M. Zamora (ret.). She subsequently worked on complex litigation at David Walther Law and Brownstein Hyatt Farber Schreck as a litigation associate.

Gonzales-Zamora currently serves on the NM Chapter of the Federal Bar Association Board and is the current and founding chair of the Solare Collegiate Charter School Governing Board. She previously served as an Executive Member of the NM Hispanic Bar Association. Gonzales-Zamora is a member of the Volunteer Attorney Panel for the New Mexico Legal Aid and the ABA's freelegalanswers.org initiative in New Mexico.

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## CIVIL PROCEDURE UPDATE 2020 PRESENTATION OBJECTIVES

1. Learn about recent amendments to the state and federal rules of civil procedure.
2. Understand the impact of recent federal and state published opinions interpreting and applying the rules of civil procedure.
3. Learn trivia about the legal profession, lawyers, or judges.

## PRESENTATION MATERIALS

For the full text of the amendments and proposed amendments noted below, please see attached copies of relevant portions of the state and federal rules.

<h3>New Mexico Rules of Civil Procedure</h3>
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#### Rule Changes:

- 1-007.1(H). Notice of completion of briefing (allowing any party to file notice of completion of briefing instead of just movant)
- 1-055. Default (adding committee commentary requiring attachment of negotiable instrument in non-consumer debt claims unless the party seeking default provides sufficient alternative evidence to demonstrate their right to relief)
- 1-072(N). Disposal of appeals [from magistrate courts in trial de novo cases] (extending deadline from 15 days to 30 days for court to issue mandate disposing of appeal after triggering events)
- 1-079.1. Public inspection and sealing of court records; guardianship and conservatorship proceedings (clarifying framework for who may access court records that are otherwise sealed in guardianship and conservatorship proceeding based on 2019 amendments to Uniform Probate Code; deleting committee commentary)
- 1-088.1(D). Notice of reassignment (requiring notice of reassignment of cases in state bar website for 4 weeks and 2 bi-weekly bar bulletins, previously 4 weekly bar bulletins)
- 1-142. Guardianship and conservatorship proceedings; proof of certification of professional guardians and conservators (new rule establishing certification, duties, and definitions for professional guardians/conservators)
- 1-143. Guardianship and conservatorship proceedings; appointment of visitor, qualified health care professional, and guardian ad litem; timing and review of reports (new rule defining reporting requirement of guardians and health care providers and providing process for appointment of guardians)
- 2-103. Rules and forms (allowing the chief district court judge in the judicial district of a magistrate court to make changes to rules prescribed by Administrative Office of the Courts; noting that forms are approved by Supreme court and local forms are approved by chief district court judge)

**Proposed Rule Changes:**

- 1-030. Depositions upon oral examinations (adding committee commentary to clarify attendance at a deposition by other potential deponents in a case)
- 1-045. Subpoena (updating requirements for objecting and responding to information sought via a subpoena); *see also* 2-502 and 3-502
- 2-201(E). [Commencement of] Consumer debt claims (adding definition of consumer debt claims, which excludes foreclosure, and requiring that original or copy of the instrument referred to in the pleadings be served with the filing absent excusal by the court on showing of good cause); *see also* 3-201
- 2-401(D). [Parties; capacity in] Consumer debt claims (adding definitions of parties in consumer debt claims and requiring affidavit establishing chain of title where party seeking relief is not the original creditor); *see also* 3-401
- 2-702(A). Failure to respond to summons [in default proceeding] (adding that in consumer debt claims, the court shall determine if a party seeking relief has stated a claim on which relief can be granted, complied with the rules and requirements of Form 4-226 NMRA before granting default); *see also* 3-702
- 2-703(B)(5). Mistakes; inadvertence excusable neglect; fraud, etc. [when seeking relief from judgment or order] (adding that the court may relieve a party from a final judgment on motion and just terms if the reason is failure to comply with consumer debt claim amendments to rules); *see also* 3-704 (adding same *and* “any other reason”)
- Form 4-226. Civil complaint provisions; consumer debt claims (applying minimum pleading assertions to consumer debt claims and adding check boxes for attaching original instrument and disclosing a party is not the original creditor)

<b>Federal Rules of Civil Procedure</b>
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**Rule Changes:**

- None.

**Proposed Rule Changes:**

- Rule 7.1(a). Who Must File; Contents [of a Disclosure Statement] (applying disclosure of stock requirement to nongovernmental corporations seeking to intervene; adding required disclosure of names and citizenship of every party in an action in which jurisdiction is based on diversity)
- Rule 30(b)(6). Notice or Subpoena Directed to an Organization [Depositions by Oral Examination] (adding that before or promptly after subpoena is served, the serving party and the organization have a duty confer in good faith about the matters for examination; adding a duty of the organization to designate each person who will testify)

## New Mexico Supreme Court Opinions

### **DISMISSAL; SOVEREIGNTY; JOINDER OF PARTY**

*Mendoza v. Isleta Resort and Casino*, 2020-NMSC-006, 460 P.3d 467

Plaintiff (Worker) filed a workers' compensation claim with the New Mexico Workers' Compensation Administration (WCA) after she suffered an on-the-job injury at Isleta Resort & Casino. Because Worker's injury occurred within the Pueblo's sovereign jurisdiction, the WCA dismissed Worker's claim for lack of jurisdiction, referencing the Pueblo's tribal sovereign immunity. The New Mexico Court of appeals reversed and remanded to the WCA. The New Mexico Supreme Court granted certiorari and reversed the Court of Appeals in its entirety, affirming dismissal of Worker's claim by the WCA.

First, the Court held that the Pueblo of Isleta, in entering the 2015 Indian Gaming Compact (Compact), did not expressly and unequivocally waive its tribal sovereign immunity to permit jurisdiction shifting of workers' compensation claims originating on tribal land to the WCA, NMSA 1978, § 11-13-app. (2015). See *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668. Similarly, Congress had not expressly abrogated tribal sovereign immunity through legislation. See *Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782, 790 (2014).

Second, the Court held that Worker, as a non-party to the Compact, could not challenge the Pueblo's compliance with the terms of the Compact because there is no private right of action for Worker to enforce Compacts. See, e.g., *Antonio v. Inn of the Mountain Gods Resort*, 2010-NMCA-077, ¶ 18, 148 N.M. 858, 242 P.3d 425 (“[E]ven if, as Worker argues, the Tribe did not have a workers' compensation program in place when he was injured, the Compact still does not provide a private right of action.”).

Finally, the Court held that Isleta Casino, an entity of the Pueblo of Isleta, is an indispensable party to a lawsuit against its workers' compensation insurers because its interests could be affected absent its joinder and sovereign immunity protects it from litigating in state court. Thus, dismissal of Worker's claim was appropriate. See *Gallegos*, 2002-NMSC-012, ¶ 39.

### **WRIT OF MANDAMUS**

*State v. Oliver*, 2020-NMSC-002, 456 P.3d 1065

Legislators sought to effectuate intended “staggered” election and “leveled” ballot goal by sponsoring a bill to extend the terms of certain public offices. Petitioners represented “officers who would be affected the election deferral provisions... [such as] district attorneys, district and metropolitan judges, and county public offers,” in seeking a writ of mandamus “challenging the constitutionality of House Bill 407 (HB 407), 54th Leg., 1st

Sess. (N.M. 2019) to the extent it postpones the times of election and extends the [constitutionally-mandated] terms of certain public offices.”

First, noting “the legal nature and public importance of the election issues raised herein, the need for expeditious resolution of those issues in the face of stringent ballot access requirements, and the unavailability of an adequate alternate remedy,” the Court concluded that the use of the prohibitory mandamus was appropriate in this matter.

Second, the Court narrowed the substantive issue to “whether the challenged provisions of HB 407, in delaying Petitioners’ election cycles and extending—either expressly or, in the case of the office of the district attorney, by necessary implication—their term limits, exceeded the Legislature’s authority.” The Court recognized: “No New Mexico case has dealt with this type of statute, and the out-of-state decisions on the subject yield no firm rule.” The Court rejected the Legislature’s arguments that it should apply the approaches in *State ex rel. Martin v. Preston*, 385 S.E.2d 473 (N.C. 1989), and *Murray v. Payne*, 21 P.2d 333 (Kan. 1933), which reviewed and upheld deferral statutes as constitutional because the terms were not extended and intervals were added between the end of one term and beginning of another, respectively.

Rather, the Court held that the unambiguous terms of HB 407 “expressly extended the terms of office of certain district and metropolitan court judgeships, see 2019 N.M. Laws, ch. 212, §§ 279 to -80, and authorized the Secretary to ‘provide for an extended term to the general election in 2022 or 2024’ of certain county offices. *Id.* § 281.” This was an impermissible alteration of the constitutionally prescribed terms of office of the Petitioners, notwithstanding that the “Legislature is vested with broad authority to regulate the timing, process, and conduct of elections” in N.M. Const. art. VII, §1(B)). The Court issued the writs of mandamus directing the Secretary of State to refrain from implementing the challenged provisions.

<b>New Mexico Court of Appeals Opinions</b>
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## **ARBITRATION**

*Rogers v. Red Boots Investments, L.P.*, Nos. A-1-CA-36308 & A-1-CA-36309 (N.M. Ct. App. Dec. 24, 2019) (slip op.)

Bill and Karen Rogers divorced and formed Red Boots to distribute their assets. Much of the property involved in the dispute was located in New Mexico and owned by RSF Land and Cattle Company, LLC (RSF), for which Bill Rogers served as managing member and Smoak served as president. The Settlement Agreement designated a preference of Smoak as the arbitrator and noted in the Settlement Agreement that Smoak disclosed his role as the president and a member of RSF, and that because Bill Rogers was the managing member of RSF, Smoak “may have an interest in the resolution of the disputes between the Parties and may be susceptible to influence by

[Husband].” Smoak acted as the arbitrator and the parties came to a settlement, which was confirmed by the district court in 2009. Five arbitrations were held and the court concluded that equity demanded Smoak’s removal prior to the entry of an award.

The Court of Appeals affirmed. First, it held that the arbitrator Smoak has the right to appeal the district court orders removing him from arbitration and vacating his award of attorney’s fees and costs. See NMSA 1978, Section 39-3-2 (1966) (allowing a right of appeal to ‘any aggrieved party’ by a district court’s decision, order, or judgment).

Second, the district court correctly vacated Smoak’s arbitration award for “evident partiality” under the New Mexico Uniform Arbitration Act, NMSA 1978, §§ 44-7A-1 to -32 (2001) (NMUAA). The Court held that the standard adopted by the Fourth Circuit’s was most persuasive: “[t]o demonstrate evident partiality . . . , the party seeking [vacatur] has the burden of proving that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration.” *Consol. Coal Co. v. Local1643, United Mine Workers of Am.*, 48 F.3d 1125, 129 (4th Cir, 1995) (noting that this reasonable person standard “requires a showing of something more than the appearance of bias, but not the insurmountable standard of proof of actual bias.”). Here, the district court finding of evident partiality was not in error due to evidence from which a reasonable person would have to conclude that Smoak was partial and had improper motives in favor of Bill Rogers and against Karen Rogers.

Finally, the Court of Appeals held that the district court’s prospective disqualification of Smoak based on its finding of evident partiality was a proper use of equitable authority. The NMUAA did not expressly state or necessarily imply that district courts are prohibited from exercising equitable authority to prospectively disqualify arbitrators.

## **DISMISSAL; RELIEF FROM JUDGMENT DUE TO MISTAKE**

*Rogers v. Bd. of Cty. Commissioners of Torrance Cty.*, 2020-NMCA-002, 455 P.3d 871

Plaintiff filed a complaint under the New Mexico Tort Claims Act in 2014 in state court and a year later, filed a second lawsuit under Fourth Amendment in federal court based on the same events. Plaintiff’s counsel contacted Defendant to report Plaintiff’s wish to dismiss the state case without prejudice, which Defendants opposed due to the cost of preparing the go to trial in the state case. Plaintiff’s counsel mistakenly filed an opposed motion to dismiss the case *with* prejudice, to which Defendants consented, and the Court granted in 2016. Two months later, Defendants moved for summary judgment in the federal case arguing it should be terminated because the state case had been dismissed with prejudice.

Plaintiff moved under Rule 1-060(B) to re-open the state law claim, arguing that his counsel acted without authorization in unknowingly terminating both state and federal cases, and sought to recharacterize the stipulated order as “without” prejudice. The district court ruled that this was a strategic decision made by Plaintiff’s counsel with Plaintiff’s consent. The Court of Appeals held that when an attorney “lacks client

authority to dismiss a case with prejudice, yet does so, whether intentionally or inadvertently, in a manner that terminates litigation, that attorney has committed a “mistake” under Rule 1-060(B)(1). In this case, relief from unjust judgment was proper where Plaintiff counsel’s unauthorized actions resulted in the permanent preclusion of Plaintiff’s claims in a separate but related cause of action.

## **DISMISSAL; FAILURE TO PROSECUTE**

*Rodriguez as Next Friend of Rodarte v. Sanchez*, 2019-NMCA-065, 451 P.3d 105

In 2012, Plaintiff sued Defendant for legal malpractice. On June 25, 2015, the district court dismissed the action without prejudice for failure to prosecute under Rule 1-041(E)(2). The same day Plaintiff moved to reinstate the case, which the district court granted on July 8, 2015. Then on July 10, 2015, Defendant moved to dismiss with prejudice under Rule 1-041(E)(1) arguing that Plaintiff had taken no significant action to bring the action to a conclusion. Plaintiff responded and the day after, requested a scheduling conference hearing. The district court denied Defendant’s motion to dismiss. The following month on September 9, 2015, the court entered a joint Rule 1-016(B) scheduling order agreed to by the parties.

On October 9, 2015, Defendant filed a motion to reconsider the district court’s denial of his motion to dismiss several months earlier. The district court granted it, finding that “Plaintiff took no significant action to prosecute this matter for a two-year period” from June 5, 2013 to July 8, 2015 (the same day it granted the motion to reinstate). Although it had entered the Rule 1-016(B) scheduling order on September 9, 2015, it held that it was not filed until significantly after the Defendant filed the original motion to dismiss in July and was therefore in error. Plaintiff moved to reconsider, arguing that she had sent discovery in April 2013, took depositions in September 2013, filed her preliminary witness and exhibit lists after reinstatement, and complied with the Rule 1-016(B) scheduling order. The district court denied the motion, stating that it would not consider Plaintiff’s activities after the Defendant filed the motion to dismiss July 10, 2015.

The Court of Appeals held that the 1990 Amendment to Rule 1-041(E)(1) prohibits a district court from dismissing a party’s action or claim on an opposing party’s motion to dismiss for failure to prosecute if the party opposing dismissal is in compliance with an order entered under Rule 1-016. “By granting Plaintiff’s motion to reinstate and entering a scheduling order contemplated by the rule, the district court—in its discretion—effectively curtailed its discretion” unless it first found that Plaintiff was not in compliance with the scheduling order. Despite later expressing that it should not have reinstated the case, “the district court could not un-ring that bell, particularly not when Defendant had not challenged the reinstatement in any way.”

## **INJUNCTION; DAMAGES**

*Gaume v. N.M. Interstate Stream Comm’n*, 2019-NMCA-064, 450 P.3d 476

Plaintiff filed a complaint against the Defendant alleging 13 different meetings were held privately by the Gila Committee, in violation of the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (OMA). Plaintiff also petitioned for a temporary restraining order (TRO) and preliminary injunction. Plaintiff claimed “there was an immediate risk of harm because the Gila Committee could ‘create new policy regarding proposals considered under the [Arizona Water Settlement Act],’ which could lead to the improper spending of state and federal funds,” and that Defendant should similarly be enjoined. The district court granted the TRO ex parte without a hearing. Defendant moved to dissolve the TRO, requesting that the district court require Plaintiff to post a one million-dollar bond to compensate Defendant for costs and damages for the wrongfully granted TRO under Rule 1-066(C). Defendant argued the injunction bond was necessary because the TRO could prevent the state from obtaining approximately \$62 million in federal funding. Plaintiff then voluntarily dismissed his petition for a preliminary and permanent injunction after indicating that it could only afford a \$500 bond, which the district court said was insufficient.

Both parties moved for summary judgment on the merits of the OMA claims. The district court granted partial summary judgment to Defendants and partial summary judgment to Plaintiffs on the claims that the Defendant had violated the OMA through approval of two service contracts. But, the district court ruled it would not award Defendant any attorney’s fees for its successful defense of the majority of Plaintiff’s claims because although the Plaintiff brought the action without good grounds to support it, see Section 10-15-3(C), the court found that the TRO was overly broad in that it prevented Defendant from performing its lawful duties contrary to law. The court awarded Defendant \$35,752.50 plus gross receipts tax for the portion of attorney fees related to seeking to dissolve the TRO.

On appeal, the New Mexico Court of Appeals held that the district court had no authority to grant damages (attorney fees) to a wrongfully enjoined Defendant when it did not require Plaintiff to post an injunction bond under Rule 1-066(C) NMRA. Rather, the Court held, “the wrongfully enjoined defendants’ only remedy is to pursue an independent action for malicious abuse of process.” The Court of Appeals reversed the district court order granting attorney fees to Defendant.

## **RES JUDICATA**

*Sandel v. Sandel*, No. A-1-CA-36397, 2020 WL 522212 (N.M. Ct. App. Jan, 20, 2020) (slip op.)

Defendant and his wife executed a trust in 1974. After Mrs. Sandel’s death, Defendant, as representative of her estate, informally probated her estate in 2002. Plaintiff sued Defendant in both his personal capacity and as representative of the estate in federal court for breach of contract, conversion, and fraud. Plaintiff argued that when he and his siblings turned 35 years old, they were supposed to be able to demand their share of the trust’s principle. The trust was amended in 1995 and 2001 which abolished this

right, but a handwriting expert for Plaintiff found that the signatures on Mrs. Sandel's behalf had been forged. Defendant moved for a judgment on the pleadings, which the district court granted, finding that Plaintiff's claims were foreclosed by *Wilson v. Fritschy*, 2002-NMCA-105, 132 N.M. 785 (requiring that interference with inheritance claims be challenged in probate rather than thru tort claims).

Plaintiff then brought suit in state court for fraud breach of trust and tortious interference with an expected inheritance. Defendant moved to dismiss arguing that res judicata and the statutes of limitation in NMSA 1978, Section 46A-6-604(A) (2007) barred Plaintiff's claims. Treating the motion to dismiss as a motion for summary judgment (due to the addition of exhibits), the district court ruled that Plaintiff was collaterally estopped and the statute of limitations had run.

On appeal, the Court of Appeals held that Plaintiff's claims were barred by res judicata, not collateral estoppel because the "new" claims in the state lawsuit arose out of the same cause of action (nucleus of operative facts) as the federal suit, and were therefore precluded. In addition, the Court held that Plaintiff's claims were barred by the statute of limitations because Plaintiff "knew or with reasonable diligence should have known of Defendant's purported forgeries in 2009." See *Yurcic v. City of Gallup*, 2013-NMCA-039, ¶ 9, 298 P.3d 500 (ruling that if a reasonable person in the plaintiff's position would have made an inquiry leading to the discovery of the fraud, then the plaintiff is said to be on "inquiry notice" and deemed to have "discovered" the cause of action for purposes of accrual). Finally, Plaintiff failed to meet the elements of collateral estoppel because he failed to show that the Defendant's conduct caused Plaintiff to refrain from filing his claim within two years of discovering the alleged fraud.

## **REVIVAL; JUDGMENT**

*Cadle Co. v. Seavall*, 2019-NMCA-062, 450 P.3d 471

In 1987, Defendant entered a stipulated judgment with Sandia Federal Savings and Loan Association against Defendant for \$36,388.12. The 1987 Judgment was eventually transferred to Plaintiff, who filed suit on the 1987 Judgment in June of 2001. The district court entered judgment in Plaintiff's favor in June 2002. Subsequently, Plaintiff filed suit on the 2002 Judgment in 2009, and the district court entered judgment in the Plaintiff's favor in September of 2009. Subsequently, in 2016, Plaintiff filed a complaint seeking to enforce the 2009 judgment and an additional award of \$136,876.03 in interest.

Defendant moved for summary judgment arguing that the statute of limitations barred any revival of the 2016 action and in the alternative, a motion to dismiss. The district court granted summary judgment in Defendant's favor, concluding that the 2009 Judgment, upon which Plaintiff was suing, was founded on the 2002 Judgment, which was founded on the 1987 Judgment. The district court found that the 2016 suit was barred under Section 37-1-2 as it was "an action to revive a judgment" and was filed 29 years after the 1987 judgment was rendered, which exceeded the 14-year time limit.

The Court of Appeals reversed, holding that Plaintiff-creditor's 2016 lawsuit was an action on the 2009 Judgment (not revival of the 1987 Judgment) and thus not barred under the 14-year statute of limitations in Section 37-1-2. The Court explained, "a revival seeks to ensure the vitality of an existing judgment while an action on a judgment seeks an entirely new judgment." Each of the prior actions resulted in a new judgment, from which the statute of limitations period started anew. The Court qualified its holding in stating: "To the extent our holding – mandated by a lack of statutory abrogation of the common law action on a judgment – has the potential to extend the life of an original judgment in perpetuity, it is for the Legislature, not this Court to determine when, if ever, the common law action on a judgment is no longer permissible under New Mexico law."

## **SOVEREIGN IMMUNITY; WRIT OF ERROR**

*Salehpoor v. N.M. Institute of Mining & Tech.*, 2019-NMCA-046, 447 P.3d 1169

Plaintiff was employed as a tenure track professor under a series of one-year contracts and after four years, Plaintiff was informed that his contract would not be renewed by Defendant. Plaintiff commenced this wrongful termination lawsuit alleging that Defendant had breached their contract by wrongfully terminating him in violation of "the total employment agreement." See generally *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, 121 N.M. 728, 918 P.2d 7. Defendant moved for summary judgment arguing that the claim was time-barred for not bringing within two years of accrual under Section 37-1-23(B) and that it was not based on a valid written contract. The district court denied the motion and the court granted Defendant's petition for a writ of error pursuant to Rule 12-503 to review a nonfinal order.

The Court of Appeals affirmed the district court's denial, holding that Plaintiff's action accrued when his employment was terminated however, the Defendant did not fail to perform its obligations under any implied agreement by providing Plaintiff a notice of non-renewal, and the district court correctly concluded the purported implied agreement was not authentic based on distinctive characteristics.

## **VENUE; JOINDER OF PARTIES**

*Kaywal, Inc. v. Avangrid Renewables, LLC*, No. A-1-CA-37664, 2019 WL 6485167 (N.M. Ct. App. Nov. 25, 2019) (slip op.)

Defendants, private companies in the wind energy business, contracted with the Commissioner of Public Lands to acquire a "wind lease" on state land. According to Plaintiff's complaint, Defendants attempted to obtain easements and licenses from Plaintiff to access the leased land via Plaintiff's land to the east of the leased parcel, which Plaintiff did not grant. Defendants obtained a Right of Entry permit from the Commissioner to obtain access to their leased parcel, which Plaintiff's argue caused

them to trespass across Plaintiff's private land. Plaintiff filed a complaint for trespass and nuisance in Chaves County, where Plaintiff's principal place of business is located.

Defendant filed a motion to dismiss for improper venue arguing that the action should have been filed in the county where the land was located. Defendant filed a second motion to dismiss for failure to join the Commissioner and Torrance County, allegedly indispensable parties under Rule 1-019 NMRA. The district court denied both motions.

The Court of Appeals granted an interlocutory appeal and affirmed. Regarding venue, the Court held that Plaintiff's second amended complaint, which seeks monetary and injunctive relief for trespass, nuisance, and unjust enrichment, does not have as its object an interest in lands. NMSA 1978, § 38-3-1(D)(1) (1988) (requiring that only actions the object of which are "lands or any interest in lands" must be brought in the county where the land is situated). Since Plaintiff's suit is not to quiet title or restrain Defendants from asserting an interest in land, but to restrain future trespasses on lands to which Plaintiff claims title and right of possession, venue was proper. See Section 38-3-1(C), (E) (trespass actions and actions to recover personal property, both local actions at common law, may be brought as transitory actions *or* in the county where the property at issue is located).

Regarding indispensable parties, the Court of Appeals, engaging in limited review to inquire whether the allegedly indispensable party was prejudiced by the judgment entered in their absence, agreed that the Commissioner and the County are not indispensable parties. There was nothing in the record requiring the conclusion that the Commissioner's participation is necessary as a matter of public interest (such as the relief would preclude continuance of the wind farm project such that the larger purpose of the wind lease would be compromised). As to the County, even if Defendants succeed in using the prescriptive easement affirmative defense as a "shield," such a finding could not be used as a "sword" against Torrance County absent formal acceptance as a public road by the County, see *McGarry v. Scott*, 2003-NMSC-016, ¶ 19, 134 N.M. 32, 72 P.3d 608, or dedication to public use.

## U.S. Supreme Court Opinion

### REMOVAL

*Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S.Ct. 696 (2020)

In 1979, the Office of the Superintendent of Catholic Schools of the Archdiocese of San Juan created a trust to administer a pension plan for employees of Catholic schools. In 2016, active and retired employees of the academies filed complaints alleging that the Trust had terminated the plan, eliminating the employees' pension benefits. The plaintiffs sued in a Puerto Rico court. The matter was then removed to federal court but

the federal court remanded it back to the Puerto Rico Court of First Instance. Prior to the remand, the Court of First Instance ordered the Roman Catholic and Apostolic Church in Puerto Rico to make payments to the employees in accordance with the pension plan. On appeal, the Puerto Rico Court of Appeals reversed, and the Puerto Rico Supreme Court reversed again, reinstating the preliminary injunction requiring Defendants to make payments in accordance with the pension plan.

The U.S. Supreme Court was tasked with considering whether the Puerto Rico Supreme Court had authority to reinstate the preliminary injunction issued by the trial court. The Court held that upon the filing of the notice of removal, the state trial court lost jurisdiction. The state court jurisdiction was restored neither by the Plaintiff-archdiocese filing motions in state court nor by the federal district court's nunc pro tunc order. The Court reasoned that the orders requiring Defendants to make payments were therefore void because at that time, the Court of First Instance had no jurisdiction over the proceeding.

## Supreme Court of the Navajo Nation Opinion

### TRIBAL LAW

#### *Henio v. Navajo Nation*, 16 Am. Tribal Law 56 (2019)

A tribal member filed an action for wrongful death against the Navajo Nation which was dismissed for failure to serve notice of the claim by registered mail as required by the Navajo Sovereign Immunity Act, 1 N.N.C. § 555(A). The tribe member filed a second wrongful death action alleging that her mother slipped and fell on a concrete slab outside a building under the Nation's control, which caused her mother to suffer a broken hip and she later died from complications. The tribe member served the summons and complaint on the relevant parties by personal service, rather than registered mail as required by 1 N.N.C. § 555(C). The Nation moved to dismiss for lack of jurisdiction based on the failure to timely serve the Nation's President, Attorney General, and Chief Legislative Counsel by registered mail. The Window Rock District Court granted the motion.

The Supreme Court of the Navajo Nation held that the procedure of the Act requiring service by registered mail is not a jurisdiction condition precedent but rather a procedural mechanism. Personal service, however, "is the method most likely to actually notify the person or entity being served of the suit." Navajo Rules of Civil Procedure. Nav. R. Civ. P. 4(b)(3) (listing personal service first in order of preference, over certified mail and publication). The Court held that personal service, by exceeding the requirement for service by registered mail, fulfilled the requirement of 1 N.N.C. § 555(C) (allowing service on any "officer, employee or agent of the Navajo Nation" to be made "by any means authorized under the rules of the courts of the Navajo Nation.").

The Nation waived their defense of insufficiency of service of process by failing to timely raise it. Because the Nation's amended answer was not timely, having been filed 27 days after the original answer rather than within 20 days after it the original answer was served, and the Nation did not seek leave of court to amend or the consent of the tribe member, the defense was waived. Nav. R. Civ. P. 12(i)(1) (A party waives a defense of insufficiency of service of process when it is not made by motion or included in a responsive pleading or an amendment permitted by Rule 15(a)); Nav. R. Civ. P. 15(a)(1) (allowing 20 days after service to amend a responsive pleading).

Finally, the Supreme Court concluded that dismissal was not proper under Rule 6(f), Nav. R. Civ. P. where subsequent service by registered mail was completed nine months after the complaint was filed. *Blackhorse v. Hale*, 7 Nav. R. 304, 305, 1 Am. Tribal Law 477 (Nav. Sup. Ct. 1997) (Rule 6(f) mandates dismissal only when both the summons was not issued *and* it was not served within six months). The order of dismissal was reversed and the case remanded for reinstatement of the cause of action.