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Civil Procedure Update 2021 (Handout and Slide Deck)

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CIVIL PROCEDURE UPDATE 2021 PRESENTER BIOGRAPHIES

Julio C. Romero is a partner at Martinez, Hart, Thompson & Sanchez, P.C. His practice focuses on general personal injury claims, representing crime victims in sexual abuse civil claims, civil rights claims, and claims against insurance companies for insurance bad faith. Currently, he serves as a cooperating attorney with the ACLU of New Mexico to protect litigants' equal access to New Mexico courthouses, and he also serves as a special prosecutor for the District Attorney's Office to prosecute cases in the rape kit backlog.

Prior to joining Martinez, Hart, Thompson & Sanchez, P.C., Julio served as a Judicial Law Clerk to Justice Edward L. Chavez (ret.) of the New Mexico Supreme Court and thereafter worked at Butt Thornton & Baehr, P.C.

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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. Kiehne 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 previously served as an Executive Member of the NM Hispanic Bar Association.

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For the Civil Procedure Update 2020 materials discussing cases released May 1, 2019 to May 1, 2020, please visit https://digitalrepository.unm.edu/law_facultyscholarship/802/.

CIVIL PROCEDURE UPDATE 2021

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. Assess your understanding of the updates.

PRESENTATION MATERIALS

New Mexico Rules of Civil Procedure

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)
- 1-030 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
- 1-088.1 (F) Peremptory Excusal of a District Judge; Recusal; Procedure for Exercising (removing language pertaining to the cause and good faith of the peremptory excusal)
- 1-106 Enforcement of Mediated Settlement Agreement (new rule addressing the enforcement of mediated settlement agreements)
- 1-144 Guardianship and conservatorship proceedings (new rule, requiring proposed guardians and conservators to watch the New Mexico Courts Guardian and Conservator Orientation Program Videos before the court can appoint a guardian)
- 2-106 (E) Excusal; Recusal; Disability (allowing Chief Judge of the District to report any misuse of excusals for improper purposes to the Chief Justice of the Supreme Court, who could revoke said individuals right to file excusals for a specific period of time)
- 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
- 2-205 (B) [Electronic Service and Filing of pleadings and other papers] (mandating magistrate court to implement mandatory filing of documents by electronic transmission; exempting elf-represented parties; and allowing for service by electronic transmission to parties or attorneys who have registered with the courts for electronic filing)

- 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
- 2-502 (C) Subpoenas (updating requirements for objecting and responding to information sought via a subpoena)
- 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 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”)
- 3-106(F) Excusal; recusal; disability (allowing Chief Judge of the Metropolitan Court to report any misuse of excusals for improper purposes to the Chief Justice of the Supreme Court, who could revoke said individuals right to file excusals for a specific period of time)
- 3-201 [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)
- 3-205 (L) Electronic Service and Filing of Pleadings and Other Papers (updating the method by which parties submit proposed documents to the court via EFS)
- 3-401 (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)
- 3-502 (C) Subpoenas (updating requirements for objecting and responding to information sought via a subpoena)
- 3-702 (A) [Default] Failure to respond to summons (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 before granting default)
- 3-704 (B) 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)
- 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)

Proposed Rule Changes:

- 1-034 (B) Production of documents and things and entry [upon] on land for inspection and other purposes (with committee commentary regarding four key changes: (1) clarifying that in answering a request for production, the responding party shall permit inspection in its entirety unless the responding party files a

proper objection; (2) requiring the responding party to state the specific reasons for an objection to a request for production; (3) requiring the responding party to state whether the response includes all responsive materials; and (4) if the responding party withholds any responsive materials based on an objection, requiring that the objection must clearly describe with reasonable particularity the materials withheld for each objection)

- 1-054 Judgments; costs (making electronic filing and service fees a recoverable costs); *see also* 2-701 and 3-701
- 1-102 Deposit of Litigant Funds (clarifying that district courts must deposit litigant funds within two (2) business days of receipt in a bank that is a member of the Federal Deposit Insurance Corporation and in an account that is distinct from the court's accounts for general funds) (also to specify that funds deposited in a court trust fund checking account must be invested and maintained in a financial institution located within the court's judicial district and in accordance with governing statutes and any regulation prescribed by the Director of the Administrative Office of the Courts)
- 1B-102 Probate Definitions (clarifying that a domiciliary foreign personal representative includes a tribal court appointee designated by a tribal court or the Bureau of Indian Affairs. The Committee further proposes to amend Forms 4B-801 and 4B-802 to recognize tribal court appointments and to allow "equivalent indicia of authority from a tribal court or the Bureau of Indian Affairs" to serve as a substitute for Letters of Administration or Letters Testamentary, recognizing that tribal courts may title documents differently than probate courts); *see also* Forms 4B-801 and 4B-802
- 2-202 Summons and order for free process (replacing "incapacitated" with "incompetent" for consistency with Rules 1-004(I) and 1-017(D) applicable to the district courts); *see also* 3-202
- Form 4-204 Summons and order for free process (permitting pro se parties to serve a summons by mail)
- Form 4-223 Summons and order for free process (specifying the methods of service a person seeking free service of process must first attempt in the district, magistrate, and metropolitan courts)
- Form 4-708 Title page of transcript of civil proceedings (reflecting that the court clerk, rather than the judge, issues the title page of a transcript of civil proceedings).
- UJI 13-215 Request for Admission (new UJI providing jurors with the definition of a request for admission and informs them of the effect of an admitted fact at trial)
- UJI 14-101 Explanation of Trial Procedure (noting that transcripts of testimony are not provided to jurors and simplify instructions on outside communications and internet use and to clarify that jurors ordinarily will not receive transcripts of witness testimony)

Federal Rules of Civil Procedure

Rule Changes:

- 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)

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); *see also* Rule 7.1(b) (not published for comment because it is a technical and conforming amendment)
- Rule 12 (a)(4). Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing (extending the time to respond after denial of a rule 12 motion when a U.S. officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States from 14 days after notice of the action to 60 days for U.S. employees only) (anticipated Dec. 1, 2022)
- 42 U.S.C § 405 (g). Supplemental Rules for Social Security Review Actions (the rules set put simplified leadings and service and make clear that cases are presented for decision on the briefs, and establish a practice of presenting actions as appeal to be decided on the brief and the administrative record).
- The Subcommittee on Multidistrict Litigation is in the process of fact gathering and may prepare recommendations for amendments to civil rules

RES JUDICATA; COLLATERAL ESTOPPEL

Sandel v. Sandel, 2020-NMSC-025, 463 P.3d. 510

The case involves a dispute over the proceeds of a marital trust (Trust), between the Plaintiff Jeffrey Sandel (son) and Defendant Jeffrey Sandel (father). The Trust terms indicated that following the death of both Defendant (father) and the Decedent (mother), the principal of the Trust was to be distributed to Plaintiff and his siblings until the age of 35, at which time they could request the remaining full share of the principal. However, the Trust was amended and restated in 1995, 1999, and 2001 in such a way that Plaintiff could not demand that principal, which he claimed to be in the millions of dollars. Plaintiff claimed that the signatures on the amendment were forged.

Plaintiff first brought suit against Defendant, individually, as well as in his capacity as the personal representative of the estate and trustee of the Trust in federal court for fraud, breach of trust, and conversion. In that original lawsuit, Defendant filed a motion for judgment on the pleadings, which the federal district court granted as to the counts for fraud, breach of trust, and conversion. The federal district court relied on *Wilson v. Fritschy*, 2002-NMCA-105, providing that “ ‘when the interference with inheritance takes place in the context of a will or other testamentary device that can be challenged in probate,’ the plaintiff must utilize the Probate Code, rather than tort law, to obtain relief.”

Plaintiff (son) then filed the current action in state court, based on similar facts asserted in the prior suit and added claims for tortious interference with expected inheritance and violation of the NM Probate Code. Defendant (father) moved to dismiss for failure to state a claim, arguing that (1) the tort claims were barred under the doctrine of res judicata because of the prior suit, and (2) that the probate claims were time barred under Section 46A-6-604 (A) NMSA 1978. The district court agreed, dismissing the claims with prejudice. Plaintiff appealed.

First, the New Mexico Court of Appeals held that the Plaintiff's two lawsuits were the same because they arose out of the same transaction or series of connected transactions: “Defendant's purported forgeries and alleged motivation to wrongfully disinherit Plaintiff.” The federal court order granting judgment on the pleadings disposed of Plaintiff's tort claims to the fullest extent possible; considered the merits of whether the claims were foreclosed by *Wilson*; and Plaintiff did not dispute that the parties and causes of action were the same in both suits. Thus, the tort claims were precluded.

Second, the Court concluded that the Plaintiff's claims under the Probate Code were time barred. In New Mexico, a cause of action sounding in fraud does not accrue until the plaintiff “discovers” the fraud and expires two years after the discovery. See *Wilde v. Westland Dev. Co.*, 2010-NMCA-085, ¶ 18, 148 N.M. 627, 241 P.3d 628; NMSA 1978, § 45-1-106 (“[a]ny proceeding must be commenced within two years after the discovery of the fraud.”). Plaintiff should have known in 2009, when Defendant informed Plaintiff

that “there was no trust in which the plaintiff had any interest.” Plaintiff knew that Defendant and Decedent disinherited him by devising Mrs. Sandel's (Decedent and mother) estate to the Trust. The district court properly determined that a reasonable person would have diligently investigated the validity of a trust he believed was illegally altered and would have investigated the authenticity of Decedent's unnotarized signature on the 2001 Restatement. Once the Defendant made this showing that Plaintiff was on inquiry notice, it became the Plaintiff's burden to demonstrate that if he had diligently investigated the Trust, he would have been unable to discover that Defendant allegedly forged signatures. The dismissal was affirmed.

WRIT OF SUPERINTENDING CONTROL; TRO

Grisham v. Honorable Raymond L. Romero et al., 2021 WL 608790, S-1-SC-38396 (Feb. 15, 2021) (slip op.)

On March 11, 2020, Governor Michelle Lujan Grisham issued an executive order that a public health emergency exists in New Mexico due to the spread of COVID-19, invoked her power under the All Hazard Emergency Management Act (AHEMA), NMSA 1978, §§ 12-10-1 to -10 (2007), and declared a public health emergency under the Public Health Emergency Response Act (PHERA), NMSA 1978, §§ 12-10A-1 to -19. Indoor and outdoor dining at restaurants was banned effective March 24, 2020. See N.M. Dep't of Health, Public Health Order at 4 (March 23, 2020). The Court took judicial notice of (1) the serious health risks posed by COVID-19, a “highly contagious and potentially fatal” disease, (2) the disease's transmission within New Mexico, and (3) the emergency orders issued by Governor Grisham and the Secretary. Rule 11-201(B), (C) NMRA; see also *Reeb*, 2020-NMSC—, ¶ 23, — P.3d —.

The restrictions imposed in the initial emergency orders were gradually relaxed as New Mexico's daily rate of new infections declined, with outdoor dining permitted at 50% capacity under the fire code as of May 27, 2020 and indoor dining permitted at 50% capacity as of June 1, 2020. Then, in response to a second wave of COVID-19 infections, the Secretary of Health reinstated the ban on indoor dining on July 13, 2020. The July Order was amended several times in accordance with changing COVID-19 conditions and, as of early November 2020, the emergency order permitted indoor dining at 25% capacity and outdoor dining at 75% capacity. The restrictions continue to be modified in a county-by-county approach based on COVID conditions.

On July 14, 2020, six food and drink establishments and the New Mexico Restaurant Association (Real Parties) filed an application in the fifth Judicial District Court, seeking a temporary restraining order (TRO) and a preliminary and permanent injunction against Governor Grisham and the Secretary, “prohibiting [them] from enforcing their recently ordered quarantine of all indoor dine-in service spaces for all restaurants and brewery businesses in New Mexico.” The district court issued the TRO prior to receiving a response from Governor Grisham and the Secretary, noting that the immediate irreparable injury --“permanent loss of revenue, permanent business closure, and/or

bankruptcy” would result if the TRO was not issued immediately. That same day, Governor Grisham and the Secretary (Petitioners) filed an emergency petition in the NM Supreme Court for a writ of superintending control and stay of the TRO asking the Court to determine whether the Secretary had legal authority to issue the July Order and if so, whether it was unconstitutional.

First, the NM Supreme Court affirmed the Court’s power of superintending control over inferior courts as an appropriate vehicle for the resolution of whether the Secretary had the legal authority to issue the July Order banning indoor dining in restaurants and breweries. N.M. Const. art. VI, § 3. This power enabled the Court to enter the stay due to the Court’s authority to control the course of litigation in inferior courts and “to correct any specie of error.” *Kerr v. Parsons*, 2016-NMSC-028.

A TRO is a species of injunctive relief, similar to a preliminary injunction but for its expiration after a limited period of time and, under particular circumstances, its issuance without notice to the adverse party. *Compare* Rule 1-066(B) (governing temporary restraining orders), with Rule 1-066(A) (governing preliminary injunctions); *see, e.g., Hope v. Warden York Cty. Prison*, 956 F.3d 156, 160 (3d Cir. 2020) (explaining the similarities and differences between TROs and preliminary injunctions). Real Parties had the burden to show that all four elements for seeking injunctive relief weighed heavily and compellingly in their favor. Because the application lacked support for the contention that no harm would be posed by enjoining Petitioners’ enforcement of the July Order or that enjoining it was in the public interest, the application failed to withstand the heightened scrutiny necessary to alter the status quo. In addition, the district court’s lack of findings additional to ordinary requirements for the grant of injunctive relief required the Court to enter a stay. Rule 12-504(D) NMRA.

The Court also rejected Amici’s argument that the Secretary was required to go through rule-making procedures before issuing the order, because, assuming the Order amounts to a rule, the Legislature may create exceptions to the applicability of rulemaking requirements. Section 9-7-6(B)(5). The notion that the Legislature did not intend to grant the Secretary of Health discretion to implement Section 24-1-3(E) through orders is inconsistent with the foregoing holdings and the underlying principles recognizing both the necessity and constitutionality of orders exercised in the discretion of executive officials charged with managing public health crises. The Governor and Secretary were thus empowered under the PHERA and the Public Health Act to issue business restrictions such as the indoor dining ban at issue.

Second, the Court held that the public health order was neither arbitrary or capricious. The administrative review standards are consistent with the deferential standard of constitutional review applicable to laws or executive orders issued for the protection of public health during a public health crisis. The unique risks of indoor dining, described by Dr. Scrase in his affidavit, and the increased COVID-19 cases among New Mexico restaurant staff during the time period when indoor dining restrictions were relaxed show a real and substantial relation between the July Order’s temporary prohibition and the object of controlling and suppressing the spread of COVID-19. *See Jacobson v.*

Massachusetts, 197 U.S. 11, 31 (1905) (discussing smallpox vaccinations). The Court would not second-guess the wisdom or efficacy of the July Order merely because reasonable minds may differ about the best approach to suppressing community transmission of COVID-19. *Jacobson*, 197 U.S. at 30. The Court lifted the previously-ordered stay, and ordered the district court to vacate the TRO and dismiss the Real Parties' application.

New Mexico Court of Appeals Opinions

COLLATERAL ESTOPPEL

O'Brien v. Behles, 2020-NMCA-032

In the first lawsuit, some of the Defendants claimed to have a lien on real property owned by OBA. The lien claim was relatively complex and resulted in a lengthy trial, appeal, and a post-judgment motion, which resolved in OBA's favor.

In this (second) lawsuit, Plaintiffs claim that Defendants maliciously abused the proceedings in the first lawsuit. Plaintiffs first argue that the district court erroneously granted judgment as a matter of law on OBA's malicious abuse of process claim. Second, Plaintiffs seek reversal of the district court's award of costs to the Behles firm. The Behles firm argues, on conditional cross-appeal, that the district court erred (under the Rules of Evidence and principles of collateral estoppel) by admitting into evidence the findings of fact and conclusions of law resulting from the lien litigation.

The Court of Appeals held as a matter of first impression that lack of probable cause to continue proceedings is a cognizable malicious abuse of process claim. Plaintiffs asserted such a claim in this case, and the district court erred in dismissing it. Among the district court's errors was its decision to give preclusive effect to all of the underlying findings of fact and conclusions of law and to admit these into evidence.

Green, a former client of the Behles and Miller firms, was indebted to them for unpaid professional fees for matters unrelated to the issues in the lien litigation. On July 2, 2004, the firms filed an action to foreclose on certain security interests purportedly conveyed to them by Green in consideration for his debt and won. The firms claimed their lien Orilla del Rio property by way of the aforementioned security agreement and transcript of judgment. OBA filed suit in 2006, seeking to cancel the liens on the Orilla del Rio property, one of which was the lien claimed by Behles and Miller. Judge Kase stated in his findings that the Behles and Miller firms had become aware "as of at least May 8, 2009" that Phillips did not sign the collateral assignment or security agreement, or the disclaimer of interest, but that the firms "transferred, issued, or continued to use and rely upon" those documents, knowing "that they contained acknowledgements of their legal efficacy which were improper and/or forged." However, Judge Kase rejected some of OBA's proposed findings that Behles and Miller had participated in the forgeries or had committed fraud.

The Behles and Miller firms appealed. In July 2012, this Court affirmed the district court's findings and conclusions in their entirety, on several grounds. The Behles and Miller firms' primary argument on appeal was that they had a valid lien on the Orilla del Rio property by way of Green's personal interest in the August 22, 2002 contract, which they claimed had not been terminated prior to their judgment foreclosing Green and/or Riverside's interest in that contract. But the Court agreed with Judge Kase's findings that Green individually never had any equitable interest under that contract and noted the firms' apparent stipulation that Green had no such interest.

Plaintiffs' malicious abuse of process claim was that "Defendants misused the legal process by continuing their defense [of the lien claim] after May 8, 2009, when they learned of information during the deposition of ... Phillips ... that showed their defense was without probable cause." After this Court issued its decision affirming Judge Kase's dismissal of the lien claim, Plaintiffs filed a motion to bar relitigation of the issues decided by Judge Kase, including virtually all factual findings and conclusions of law relating to the Behles and Miller firms' lien claim. On February 11, 2014, the district court (in Lincoln County) granted Plaintiffs' motion but held that Plaintiffs were permitted to offer as evidence in support of their malicious abuse of process claim only certain findings and conclusions related to the lien claim. The district court also held that Plaintiffs were barred from relitigating findings rejected by Judge Kase (i.e., the findings that the Behles and Miller firms had committed fraud or participated in the forgery), as these had the legal effect of factual findings against Plaintiffs.

Only the factual findings necessary to a determination on the lien claim are findings which may have preclusive effect. Therefore, the Court (1) reversed and remanded for a new trial because the district court erroneously admitted in evidence and barred relitigation of non-essential findings (and non-essential rejected findings) from Judge Kase's findings and conclusions; and instructed (2) that the preclusive effect of any findings essential to the lien determination should be analyzed under the framework set forth above; (3) the procedural fact of the lien's invalidity is to be considered established such that the Behles firm is barred from relitigating the lien's validity; and (4) if any particular factual issues are found to be preclusive, they should be deemed established, not admitted as an evidentiary exhibit.

DISMISSAL; GOOD CAUSE

State ex rel Foy v. Vanderbilt Capital Advisors, LLC, 2020 WL 4188180, No. A-1-CA-36925 (June 9, 2020) (slip op.)

The former Chief Investment Officer of the NM Education Retirement Board (NMERB) brought a qui tam action under Fraud Against Taxpayer's Act, NMSA 1978 § 44-9-14 (2007, as amended through 2015) (FATA). The complaint focused on investments made by the State Investment Council and the New Mexico Educational Retirement Board, alleging that they executed fraudulent schemes that led to the NMERB's loss of hundreds of millions of dollars. The district court granted the motion to dismiss and a

motion to approve alternate-remedy settlement by the Attorney General's Office (AGO) negotiated with several but not all Defendants. One of the qui tam Plaintiffs appealed.

First, the Court held that the AGO had authority to seek dismissal even though it declined to take over the action based on a "relatively straightforward reading of FATA combined with the broad statutory powers and duties of the Attorney General." In dicta, the Court noted a more difficult question would be how the litigation would have proceeded had the AGO intervened because then two parties would be representing the state and Section 44-9-6 does not address whether qui tams continue as the lead party representing the state.

Second, in dismissing the action, the district court correctly applied the "good cause" standard required in qui tam actions in New Mexico. Under a similar standard in other jurisdictions, courts have adopted a highly deferential rational basis standard of review requiring a proffer of a reason for dismissing the action that is "rationally related to a valid governmental purpose." The district court correctly applied the standard.

Third, the Appellate Court recognized that the Plaintiff-Appellant did not include any specific attack, or disagreement with, any of the district court findings and conclusions and thus was not entitled to appellate relief. See Rule 12-318(A)(4) NMRA (requiring a "specific attack on any finding, or the finding shall be deemed conclusive"). The Court noted that the brief in chief did not keep with the spirit of the rules of appellate procedure, as it "discusses only those aspects which tend to support its position." IT also failed to cite relevant portions of the 16,000 page record. Determining that there was no error, the Appellate Court affirmed the district court's dismissal.

DISMISSAL; FAILURE TO PROSECUTE

Director of Labor Relations v. New Mexico Leisure Inc./Texas Leisure Inc., 2020 WL 7021774, A-1-CA-037466 (Nov. 23, 2020) (slip op.)

This case arose out of claims by three former employees of NM Leisure for payment of wages due upon discharge from their employment, pursuant to NMSA 1978, Section 50-4-2 (2005). The Director of the Labor Relations Division of the Department of Workforce Solutions (the Director) filed this action in the magistrate court on behalf of the three employees. See NMSA 1978, § 50-4-8(A) (1983) (authorizing the director to pursue claims of unpaid wages on behalf of affected employees). After a trial, judgments were entered against NM Leisure for wages and other compensation due to each employee, and post-judgment interest.

NM Leisure appealed to the District Court. Six months after the appeal was filed, a proposed joint Rule 1-016(B) NMRA scheduling order was submitted by the parties for the district court's approval. The parties filed a stipulated request for a continuance of the hearing on the motion to amend in November 2012 on the grounds that the parties were discussing settlement. The case then languished, and there was no activity for

four years. The Director filed a motion to enforce the judgments of the magistrate court, because NM Leisure has neither paid the judgments nor posted the bond required to stay the judgments in the more than six years since the appeal had been pending. After NM Leisure was not responsive, the Director filed a motion to dismiss NM Leisure's appeal for failure to prosecute pursuant to Rule 1-041(E)(1), which the district court granted. NM Leisure appealed the dismissal with prejudice.

Although the appellate court had not previously addressed in a civil case which party is “the party asserting the claim” and therefore responsible for taking significant action to bring the appeal to conclusion pursuant to Rule 1-041(E)(1), the question had been addressed in criminal appeals from the magistrate court. The Court applied that standard to this civil case, confirming that in an appeal from the magistrate court to district court, the party pursuing the claim or seeking relief from a magistrate court judgment has the primary duty under Rule 1-041(E)(1) to bring the case to trial or other final disposition. See *State v. Ball*, 1986-NMSC-030, ¶ 23; NMRA 1-072.

Here, the district court dismissal of NM Leisure's appeal pursuant to Rule 1-041(E)(1) for insufficient activity to bring the appeal to final disposition was a proper exercise of its discretion. First, the appearance of NM Leisure's counsel at a hearing and status conference, or in filing a stipulated motion to dismiss a defendant improperly named in the magistrate court were not the type of decisive action to bring the case to disposition that our Supreme Court has held necessary to avoid dismissal after an extended period of inaction. See *Rodriguez ex rel. Rodarte*, 2019-NMCA-065, ¶ 14. Second, at the hearing on the motion to dismiss, NM Leisure claimed it had participated in recent negotiations to settle (which was disputed by the Directors counsel) and belatedly asked the court to enter the proposed scheduling order and set a trial date, which the court reasonably refused in light of the facts and circumstances. *Summit Elec. Supply Co.*, 2010-NMCA-086, ¶ 6 (holding that “[d]iscretion is abused [only] when the court exceeds the bounds of reason, all the circumstances before it being considered” (internal quotation marks and citation omitted)). Third, NM Leisure further failed to present any evidence or to offer any explanation of how the changes of counsel or the retirement of a judge prevented it from taking timely, significant action to bring its appeal to conclusion or to show that it was excusably prevented from prosecuting its appeal.

SOVEREIGN IMMUNITY

Quarrie v. New Mexico Institute of Mining and Technology, 2020 WL 4455806, A-1-CA-37965 (Aug. 3, 2020) (slip op.)

Plaintiff Lindsey O'Brien, was enrolled in a Material Engineering doctoral program at NM Tech. While defending her paper, a required element of the doctoral degree, the members of the committee expressed concern that he was deficient in his knowledge of the discipline and that he was not ready to defend his dissertation. After those statements were made, according to the committee, Lindsey made threats against the members. Shortly after, he was terminated from the doctoral program.

Plaintiff Lindsay O'Brien Quarrie and New Mexico Institute of Mining and Technology (New Mexico Tech), and other named Defendants (collectively, Defendants) entered a settlement agreement for Plaintiff to drop the suit for \$6000 and for New Mexico Tech to drop the words, "Terminated from Graduate Program" from her transcript. According to Lindsay, New Mexico Tech did not honor the agreement after they still included in his transcript the words, "no degree earned".

Plaintiff filed suit arguing that the settlement agreement between the parties is "void, invalid, and unenforceable" because prohibiting him from re-enrolling in New Mexico Tech amounted to racial discrimination in violation of public policy. Defendants moved to dismiss the amended complaint, claiming that the action was barred by the two-year statute of limitations in NMSA 1978, Section 37-1-23 (1976) (granting governmental entities immunity from actions based on contract, except actions based on a valid written contract and requiring that all claims be brought within two years from time of accrual). The district court dismissed Plaintiff's claim with prejudice, finding that Plaintiff failed to file his complaint within the statute of limitations.

The NM Court of Appeals, in order to determine whether the claim was barred, considered whether the Plaintiff's cause of action falls within the ambit of Section 37-1-23's grant of sovereign immunity. In accordance with the plain language and purpose of Section 37-1-23, New Mexico courts have held that actions touching upon questions of contract law, even those which might otherwise be characterized as seeking non-contract remedies (such as equitable remedies), fall within the ambit of the immunity statute.

Here, Plaintiff's declaratory judgment action seeks an interpretation of a settlement agreement against a governmental entity. See N.M. Const. art. XII, § 11 (recognizing New Mexico Tech as a state educational institution). The Court recognized the settlement agreement as a contract subject to contract law. *Herrera v. Herrera*, 1999-NMCA-034, ¶ 9. In addition, contract law applies to Plaintiff's claim that the Settlement Agreement violates public policy. See UJI 13-835 NMRA (applying contract law to the question of whether a contract violates public policy). Plaintiff's request for a ruling declaring the Settlement Agreement void ab initio, is ipso facto, a question of contract law because it seeks a determination regarding whether or not a contract exists. See *Corum v. Roswell Senior Living, LLC*, 2010-NMCA-105, ¶ 3 ("The question of whether a valid contract . . . exists is a question of contract law.").

The Court rejected Plaintiff's argument that his action for a declaratory judgment was exempt because the complaint sought enforcement based on breach. It was thus "based on contract" subject to the two-year statute of limitations in Section 37-1-23(B). *Hydro Conduit Corp. v. Kemble*, 1990-NMSC-061, ¶ 23 (barring even causes of action not based on contract in a strict theoretical sense, if they are closely related to an action which is so based). Because Plaintiff did not file his first complaint until more than two years after discovery of the facts forming the basis of his cause of action, the action was barred and the dismissal was affirmed.

DISMISSAL; CERTIFICATION OF STATE LAW QUESTIONS

McKesson v. Doe, 141 S.Ct. 48 (2020)

A police officer, who was seriously injured at a protest when an unidentified individual hit him with a heavy object, brought an action against the protest organizer and a group associated with the protest. As officers began making arrests to clear the highway in Baton Rouge, Louisiana, an unknown individual threw a “piece of concrete or similar rock-like object,” striking the respondent officer in the face. The police officer suffered injuries in the line of duty, including loss of teeth and brain trauma.

In the complaint, Plaintiff alleged that the protest was negligently staged by directing it onto a highway. The district court denied the Plaintiff’s request to proceed anonymously, and granted the Defendant’s motion to dismiss the negligence claim as barred by the First Amendment. Plaintiff appealed to the Fifth Circuit, where a divided panel reversed the dismissal, holding that Plaintiff stated a negligence claim against the organizer under Louisiana state law and the First Amendment did not bar the negligence claim.

On appeal, the Supreme Court held that in exceptional instances, a federal court’s certification of a question of state law, to a state’s highest court, is advisable before addressing a federal constitutional issue. The Supreme Court found that certification to the Louisiana Supreme Court, by the federal Court of Appeals, of questions of Louisiana law, was warranted in the police officer’s action for damages against the protest organizer. The Supreme Court noted the negligence claims turned on whether the organizer breached a duty of care in organizing the protest and leading it onto a highway, and whether the officer alleged a particular risk within the scope of any duty recognized under state law. The Supreme Court held these novel issues of state law peculiarly called for exercise of judgment by state courts, and certification would ensure that any conflict between state law and the First Amendment was not purely hypothetical.

PERSONAL JURISDICTION

Ford Motor Co. v. Montana Eighth Judicial Dist. Ct. et al, 141 S.Ct. 1017 (2021)

This case arose from two cases where state courts exercised jurisdiction over Ford Motor Co. (Ford) in products-liability lawsuits stemming from car accidents that injured a resident of that forum state. A unanimous Supreme Court held that Ford is subject to product-liability suits in those states as a result of its marketing and sales of cars identical to those involved in the lawsuits.

The *Gullet* case arose from a 2015 accident in Montana involving a 1996 Ford Explorer that killed driver M.J. Gullet. Her estate sued Ford in state court in Montana, alleging design defect, failure to warn and negligence. Gullett's car was assembled in Kentucky, sold to a dealership in Washington and originally sold to a consumer in Oregon. It went through numerous sales before reaching Gullett in Montana.

Bandemer arose from a 2015 accident in Minnesota involving a 1994 Ford Crown Victoria that injured passenger Adam Bandemer. Bandemer sued Ford in state court in Minnesota, asserting claims for products liability, negligence and breach of warranty. The car involved in the accident was designed in Michigan, assembled in Ontario, Canada, and sold to a dealership in North Dakota. The vehicle was with its fifth owner when registered in Minnesota in 2013.

Ford moved to dismiss both suits for lack of personal jurisdiction arguing that the company's conduct in the forum States did not give rise to Plaintiffs' claims. Ford argued that the causal link could have been met if the company had designed, manufactured, or sold the vehicle involved in the accident in the State. In both cases, the vehicles were designed and manufactured, and originally sold outside the forum States. It was only after resale and relocation by consumers that the vehicles ended up in Montana and Minnesota. Both States' supreme courts rejected that argument, holding that Ford's activities were sufficiently close enough to the Plaintiffs' allegations that a defective Ford caused in-state injury such that the forum states had specific jurisdiction.

A state court may exercise general jurisdiction only when a defendant is "essentially at home" in the state. *Goodyear Dunlop Tires Operations, S. A v. Brown*, 564 U.S. 915, 919 (2011). Specific jurisdiction covers defendants less connected with a forum state, such as when the defendant must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U. S. 235, 253 (1958). And the plaintiff's claims "must arise out of or relate to the defendant's contacts" with the forum to support specific jurisdiction. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017).

Here, apart from sales, Ford works hard to foster ongoing connections to its cars' owners. Because Ford had systematically served a market in Montana and Minnesota for the very vehicles that the Plaintiffs allege malfunctioned and injured them in those States, there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 (1984). Furthermore, Plaintiffs are residents of the forum States, used the allegedly defective products in the forum States, and suffered injuries when those products malfunctioned in the forum states. Allowing jurisdiction in these circumstances both treats Ford fairly and serves principles of "interstate federalism." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 293 (1980).

RES JUDICATA; CLAIM PRECLUSION

Brownback v. King, 141 S.Ct. 740 (2021)

James King sued the United States under the Federal Tort Claims Act (FTCA) after a violent encounter with members of a federal task force. He also sued the task force officers individually on *Bivens* claims for violations of the Fourth Amendment.

The district court granted summary judgment on James King's FTCA claims, holding the federal government was immune because the officers were entitled to qualified immunity under Michigan law, or in the alternative, that King failed to state a valid claim under Rule 12(b)(6). The district court also dismissed King's *Bivens* claims, ruling that the officers were entitled to federal qualified immunity.

King only appealed the dismissal of his *Bivens* claims. The Sixth Circuit assessed whether the dismissal of King's FTCA claims triggered the judgment bar under 28 U.S.C. § 1346(b) and thus blocked the parallel *Bivens* claims. See 28 U.S.C. § 2676 (precluding "any action by the [plaintiff], by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim" if a court enters "[t]he judgment in an action under section 1346(b).") The Sixth Circuit reasoned King's failure to establish all elements of his FTCA claims had deprived the court of subject-matter jurisdiction and thereby could not have reached the "merits" of the *Bivens* claims. The Sixth Circuit then held that the defendant officers were not entitled to qualified immunity and reversed the district court.

The United States Supreme Court granted certiorari review. It reversed the Sixth Circuit, holding the district court's decision is claim preclusive, as it was passed directly on the substance of the King's FTCA claims. The Supreme Court explained that the "judgment bar" was drafted against the backdrop doctrine of res judicata, which is triggered when a judgment is "on the merits. As such, the Supreme Court found the district court's summary judgment ruling "hinged on a quintessential merits decision: whether the undisputed facts established all the elements of King's FTCA claims." *King*, 141 S.Ct. at 748. The Supreme Court reasoned that even though the district court's ruling in effect deprived the court of subject matter jurisdiction, the district court necessarily passed on the substance of King's FTCA claims, which in turn barred King's *Bivens* claims.

AFFIRMATIVE DEFENSE

Frost v. ADT LLC, 947 F3d. 1261 (10th Cir. 2021)

The case involves a wrongful death action. A minor child and the estate of a homeowner who died in a house fire brought a wrongful death action against ADT, the security monitoring service, alleging that service's failure to notify emergency services when it received several alerts through its system and no response from the homeowner caused or contributed to the homeowner's death. The district court dismissed the action, holding the one-year suit-limitation provision in the contract between ADT and Frost barred the claims and that Claimants failed to state a claim with respect to certain counts. The Plaintiffs appealed.

Plaintiffs argued that the one-year bar was not enforceable due to unconscionability, gross negligence, or under Kansas public policy, and that it was not applicable (because minor was not a party to the contract and that the tort claims are independent from the contract), arguments which the Court rejected. Second, Plaintiffs argued that the district court should not have entertained the motion to dismiss because it was "predicated on issues that are affirmative defenses" which were not before the district court. Because the issue was raised for the first time on appeal, the Tenth Circuit reviewed for plain error. To show plain error, an appellant must establish (1) an error, (2) that is plain, (3) which affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The Court held that the complaint and Contract between the parties "admit[] all the elements of [ADT's] affirmative defense." In such circumstances, where "there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense it is appropriate and expedient to dispose of a claim by a motion to dismiss under Rule 12(b). See Wright & Miller, *Federal Practice and Procedure* § 1277 (3d ed. 2002) (August 2019 update) (noting some disagreement among federal courts, but stating that the more recent cases ... hold that a complaint containing dates (noting that show the claim is time-barred) can be dismissed on a motion under Rule 12(b)(6))." The Court concluded: "Although some affirmative defenses may present more difficult questions, the statute of limitations defense is unusual in that ... its effectiveness may well appear on the face of the complaint as we find it does here." The Tenth Circuit affirmed.

CLAIM PRECLUSION

Gale v. City and County of Denver, 962 F.3d 1189 (10th Cir. 2021)

Plaintiff Frank Gale brought a civil rights action against the City and County of Denver pursuant to 42 U.S.C. § 1983. The district court permitted Denver to amend its answer by adding the affirmative defense of claim preclusion, then granted summary judgment in favor of Denver on that ground. On appeal, Gale contends the doctrine of claim preclusion cannot bar a § 1983 claim under the circumstances presented, and that the district court erred in granting Denver leave to amend its answer.

Under Colorado law, claim preclusion applies to a current proceeding when four elements are met: (1) the judgment in the prior proceeding was final; (2) the prior and current proceeding involved identical subject matter; (3) the prior and current proceeding involved identical claims for relief; and (4) the parties to both proceedings were identical or in privity with one another

The court found that, when a former city employee sued in state court challenging his termination, and where prior to final appellate review of the dismissal of that state court suit, the employee brought a § 1983 civil rights action against the city and a county regarding his termination, a ruling in favor of the governments on the basis of claim preclusion was warranted because the employee's § 1983 claims could have been brought in the first state court proceeding. In addition, in the answer to a certified question, the state supreme court concluded that under state law, § 1983 claims were not excepted from the claim preclusion doctrine such that a prior Colo. R. Civ. P. 106(a)(4) action could not preclude a § 1983 claim that could have been brought in the prior state action.

DAMAGES

Jensen v. West Jordan City, 968 F.3d 1187 (10th Cir. 2020)

Aaron Jensen sued defendant West Jordan City and Robert Shober for Title VII retaliation, First Amendment retaliation, malicious prosecution, and breach of contract. At trial, the jury returned a verdict in favor of Jensen on all his claims and awarded \$2.77 million in damages. The jury did not properly fill out the verdict form, however, so the district court instructed the jury to correct its error. When the jury returned the corrected verdict, it had apportioned most of the damages to Jensen's Title VII claim. Because the district court concluded that Title VII's statutory damages cap applied, the court reduced the total amount of the award to \$344,000. Both parties appealed. The civil procedure issues in the case are two: damages/compensatory damages, and province of court and jury.

Where a single injury gives rise to more than one claim for relief, a plaintiff may recover his damages under any claim, but he may recover them only once. Damages are to be

apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm. Damages for any other harm cannot be apportioned among two or more causes. In other words, a jury should apportion damages where there is a reasonable basis for doing so but the jury cannot be required to apportion damages where the injury is indivisible. Whether damages are capable of apportionment among two or more causes is a question of law for the court to decide. But once it is determined that the harm is capable of being apportioned, the actual apportionment of the damages among the various causes is a question of fact, which is to be determined by the jury.

The Court affirmed the district court decisions and concluded that, after reviewing the district court's instructions as a whole, that the jury was not misled when the court instructed it to "allocate, as best [it could], the [total damages award] for the various claims." The district court instructed the jury to "justly, fairly, and adequately compensate" Jensen for the damage that he suffered, but cautioned that it "must not award compensatory damages more than once for the same injury." The district court further instructed the jury on the elements of each claim and told the jury the types of damages that could be awarded.

The district court acted within its discretion by instructing the jury to amend its initial verdict because the verdict contained inconsistencies that could have created "a potential appeal problem." The initial verdict awarded Jensen \$2.77 million in total damages but it reported that each specific claim resulted in no damages. Thus, the verdict form did not consistently state whether the total damages should have been zero or \$2.77 million. Additionally, if West Jordan prevailed on an aspect of its appeal that concerned only certain claims, there would be no way of knowing which damages were associated with those claims.

The district court also allowed Jensen's counsel to argue in closing that the jury could determine the apportionment of the damages among Jensen's claims. Furthermore, the verdict form allowed the jury to follow the instructions of Jensen's counsel and decide how damages should be apportioned among each of Jensen's claims. Viewing the district court's jury instructions as a whole, the Tenth Circuit did not have "a substantial doubt [as to] whether the jury was fairly guided in its deliberations," and thus affirmed the judgment.

DISMISSAL; FAILURE TO STATE A CLAIM; QUALIFIED IMMUNITY

Ullery v. Bradley, 949 F.3d 1282 (10th Cir. 2020)

The Plaintiff filed a 42 U.S.C. Section 1983 complaint alleging the Defendant, a corrections officer, sexually abused her and that abuse violated her Eighth Amendment right to be free from excessive force and Fourteenth Amendment right to be secure in her bodily integrity.

Defendant filed a Rule 12(b)(6) motion to dismiss for failure to state a claim. The district court denied the motion and held that Plaintiff sufficiently stated a violation of Eight Amendment's prohibition of cruel and unusual punishment. Defendant filed an interlocutory appeal.

First, Defendant argued that the district court erred in considering allegations in support of claims that would have been time barred. "The forum state's statute of limitations for personal-injury actions sets the limitations period for § 1983 actions," *Gee v. Pacheco*, 627 F.3d 1178, 1190–91 (10th Cir. 2010), which was two years in Colorado. Federal law, on the other hand, governs when a § 1983 claim accrues and when the limitations period begins to run. It is proper to dismiss a claim on the pleadings based on the statute of limitations only if the affirmative defense appears plainly on the face of the complaint itself. *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018). Plaintiff's complaint, however, did not identify specific dates when each alleged instance of sexual abuse occurred. Although claims arising out of constitutional violations Defendant committed before April 10, 2016 are time-barred, it is still plausible—when construing the complaint in the light most favorable to Plaintiff—Defendant engaged in this conduct at least once, and possibly on several occasions, within the limitations period.

Next, Defendant argued that the Court not consider the allegation he "purposefully and knowingly used physical force against [Plaintiff] by touching her breasts" because it is conclusory. The Court disagreed, stating "[U]nder Rule 8, specific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *S.E.C. v. Shields*, 744 F.3d 633, 641 (10th Cir. 2014) (internal citation omitted). When read in the context of the entire complaint, rather than in isolation, this allegation provides Defendant sufficient notice of the ground upon which Plaintiff's claim for relief rests. *See Burnett v. Mortg. Elec. Registration Sys.*, 706 F.3d 1231, 1236 (10th Cir. 2013). Thus, the facts in the complaint were well-pleaded.

Finally, Defendant asserted the defense of qualified immunity and argued he is entitled to a dismissal even if he violated her Eighth Amendment right because the law was not clearly established at the time of the alleged events. When a defendant raises the qualified-immunity defense, the plaintiff must therefore establish (1) the defendant violated a federal statutory or constitutional right and (2) the right was clearly established at the time of the defendant's conduct. The latter was at issue on appeal but ultimately the Court held that the "[l]imiting the source of clearly established law to only Supreme Court precedents also is unwarranted and impractical given the current state of the doctrine. Such a restriction would transform qualified immunity into an absolute bar to constitutional claims in most cases—thereby skewing the intended balance of holding public officials accountable while allowing them to perform their duties reasonably without fear of personal liability and harassing litigation." After a lengthy analysis, the Court holds that the law was clearly established in the Circuit Courts by 2015, the year before the 2 year statute of limitations began to run. Thus, Defendant was not entitled to qualified immunity and the decision was upheld.

INTERLOCUTORY APPEAL

United States v. Abouseiman, 976 F.3d 1146 (10th Cir. 2020)

This case originated in federal district court in 1983 as an action to allocate water rights in the Jemez River in New Mexico. This litigation presents a myriad of issues, most of which have not yet been resolved by the district court as they are being litigated in stages. For the first stage, each side engaged their own expert on Spanish law, both of whom drafted reports and testified at a three-day evidentiary hearing to determine whether Pueblos had ever possessed aboriginal water rights in connection with their grant or trust lands, and if so, whether they had been modified or extinguished.

The district court found that the Pueblos had aboriginal water rights and concluded that the Pueblos' aboriginal water rights were extinguished by Spain's assertion of sovereignty over the region in the 1500s. Because this was a critical ruling that would dispose of many of the remaining issues in this case, the parties requested and the district court agreed to certify that discrete issue to the Tenth Circuit for interlocutory appeal.

The Court first provided an overview of both Spanish sovereignty in the 1500s and aboriginal title. Aboriginal title "refers to land claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters of patent or any formal conveyance." 1 Cohen's Handbook of Federal Indian Law § 15.04 (2019). The concept of aboriginal title, sometimes called "Indian title" or "native title," comes from a recognition that the property rights of indigenous people persist even after another sovereign assumes authority over the land. See *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 784 (1993). "if there is doubt whether aboriginal title has been validly extinguished by the United States, any 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of' the Indians." *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1162 (quoting *Santa Fe Pac. R.R. Co.*, 314 U.S. at 354, 62 S.Ct. 248).

The Tenth Circuit Court then concluded: "All conquering sovereigns possess authority over their land and resources. However, it is not until the sovereign exercises this authority through clear and adverse affirmative action that it may extinguish aboriginal rights." The Tenth Circuit therefore reversed the district court's order and remanded the case for further proceedings.

In his dissent, Judge Tymkovich wrote: "It is apparent to me that the resolution of this appeal is not likely to materially advance the ultimate termination of this 37-year-old case, see 28 U.S.C § 1292(b), and that this interlocutory appeal therefore should not have been granted. The question of whether aboriginal water rights have been extinguished is an undeniably important aspect of this case. But deciding that issue in a vacuum without also considering related issues of quantification and the settled expectations of the many interested parties in this case, is not the best way to achieve a just result."

MOTION TO AMEND OR ALTER JUDGMENT

United States v. RaPower-3 LLC, 960 F.3d 1240 (10th Cir. 2020)

After a bench trial the district court decided that Defendants —RaPower-3, LLC; International Automated Systems, Inc. (IAS); LTB1, LLC; Neldon Johnson (the sole decision-maker for the preceding entities); and R. Gregory Shepard (who assisted Johnson in marketing and sales for the entities)—had promoted an unlawful tax scheme. To remedy the misconduct, the court enjoined Defendants from continuing to promote their scheme and ordered disgorgement of their gross receipts from the scheme. Defendants' tax scheme was based on a supposed project to utilize a purportedly new, commercially viable way of converting solar radiation into electricity. Mr. Johnson's design, as he advertised it, was to install arrays of framed, triangular plastic sheets ("lenses") on towers. The lens arrays would track the sun and focus its radiation onto a "receiver," where it would heat a "heat transfer fluid." The transfer fluid would be pumped to a "heat exchanger" to boil water and generate steam. The steam would spin a turbine to produce electricity, which would be sent onto wires connected to the electricity grid.

There was no connection from the towers to the electricity grid; the only thing at the site was "a brown pole with wires dangling from the top." Mr. Johnson testified that he could have "easily" put electricity onto the grid "at any time since 2005," but he had "made a business decision" not to do so. However, there was no independent verification that his unit could connect to the grid or that it was a viable source of solar power. Customers were told that buying a lens would have very favorable income-tax consequences. Mr. Johnson and Mr. Shepard sold the lenses by advertising that customers could "zero out" federal income-tax liability by taking advantage of depreciation deductions and solar-energy tax credits.

First, Defendants argued that evidence obtained after trial necessitated a remand to the district court with instructions to dissolve the injunction. The Court understood this argument to be a challenge to the district court's denial of their motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). In that motion, the Defendants asked for an amendment or alteration of the judgment in light of new evidence -- expert testimony that a system involving a commercially available engine had been used, in connection with the lenses at the Delta site, to produce electricity after the trial was conducted.

The court denied the motion because "[t]he expert testimony that Defendants now seek to introduce was within their control to produce before and at trial." In addition, Defendants did not challenge that statement or otherwise argue that there was anything preventing them from producing this evidence before or during trial and the Court affirmed the denial of their Rule 59(e) motion. *See Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1369 (10th Cir. 2015) ("[W]e affirm the district court's dismissal of the stigma-plus due-process claim because [Appellant]'s opening brief contains nary a word to challenge the basis of the dismissal[.]").

Second, Defendants contend that the district court improperly denied them a jury trial. They filed a jury demand two months after this lawsuit was filed. On the Government's motion the Magistrate Judge assigned to the case struck Defendants' jury demand on May 2, 2016, on the ground that there was no Seventh Amendment right to a jury because the United States was seeking only equitable relief. The court later set the deadline for pretrial motions at November 17, 2017. On February 9, 2018, Defendants again moved for a jury trial, relying largely on the June 5, 2017 decision of the Supreme Court in *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017). The district court denied Defendants' motion on two grounds: (1) on the merits, *Kokesh* did not support Defendants' jury demand; and (2) the renewed motion for a jury trial was untimely.

Third, Defendants challenged the district court's admission of evidence that supported the amount of disgorgement, contending that the evidence had not been adequately disclosed before trial. Rule 26(a)(1)(A)(iii) requires each party to "provide to the other parties ... a computation of each category of damages claimed by the disclosing party." Moreover, the claimant has an ongoing duty throughout the litigation to supplement the damages computation "in a timely manner [(1)] if the party learns that in some material respect the [initial] disclosure or response is incomplete or incorrect, and [(2)] if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.]" Rule 26(e)(1)(A). If a party fails to disclose or, where appropriate, supplement computations, Rule 37(c)(1) prohibits the use of that "information or witness to supply evidence ... unless the failure was substantially justified or is harmless." The district court denied Defendants' motion in limine to exclude evidence and testimony relating to disgorgement, ruling that "[d]isgorgement is not a damages remedy, and therefore the disclosure required by Rule 26(a)(1)(A)(iii) is inapplicable." *United States v. Stinson*, 2016 WL 8488241, at *7 (M.D. Fla. 2016).

But, the Court noted, it is possible that disgorgement falls within the meaning of damages in the rule. The advisory committee note to the 1993 amendments to Rule 26 (addressing 26(a)(1)(C), which became 26(a)(1)(A)(iii) in the 2007 amendment restyling the Rule) says: "A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying" The Court concluded that it therefore appears to require disclosure of calculations for equitable remedies providing monetary relief. On the other hand, the last sentence of that paragraph in the 1993 note states: "Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person." *Id.* As with disgorgement here, the recovery sought in a patent-infringement action may be based on the defendant's income (rather than the injury to the plaintiff); so the sentence certainly supports the district court's decision, although on a slightly different ground—the fact that the information necessary to calculate the monetary relief is in the hands of the Defendant. To make a more complete assessment of what disgorgement damages it would seek, the government needed to review Defendants' records that would show how many lenses had been purchased and how much money

they had taken in. But despite discovery requests for those records in April 2016 and a motion to compel filed in August 2017, Defendants were not forthcoming. Finally, on October 16, 2017, Defendants provided 190 pages of customer information. With that information, the government disclosed about five months before trial a disgorgement figure in the same ballpark as the ultimate award. Because the government was required only to supplement its initial Rule 26(a)(1)(A)(iii) disgorgement computation “if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing,” because the information was largely “made known” to Defendants in the government’s motion to freeze their assets, and because the complete evidence of Defendants’ gross receipts was not obtained by the government until shortly before the motion in limine was filed, it was not an abuse of discretion for the district court to admit the government’s evidence of Defendants’ gross receipts. The judgment was thus affirmed.

PERSONAL JURISDICTION

CGC Holding Co., LLC v. Hutchens, 974 F.3d 1201 (10th Cir. 2021)

The case at bar involved lenders (hustlers) who promised to give individuals and entities desperate for money, loans if those individuals paid an upfront non-refundable “loan commitment fee.” Sandy was the brains of the operation, Tanya was Sandy’s wife, and Jennifer is Sandy’s daughter, who played the role of receptionist in the entire scheme. Sandy ultimately walked away with over \$8.4 million of the class’s loan commitment fees after committing to over \$3 billion in loans he could not fund. Tanya’s role was not as clear and she denied ever participating in the scheme but the class presented evidence showing that Tanya did in fact have involvement by typing up loan commitments and letters of intent for the shell companies they created. The class’s main contention was that Tanya’s connection was her “receipt of dirty money.” Tanya used that money to invest in property investments, including her own home, and 23 other locations around Canada.

The borrowers never received the money and sued as a class against the lenders and the leaders under the Racketeer Influenced and Corrupt Organization (RICO) and obtained a \$8.5 million jury verdict. Despite the class win, they were not able to collect judgment from the defendants. So, as a remedy, the district court imposed a constructive trust on the properties and entities in Canada. The Defendants appealed, raising challenges to personal jurisdiction. The Defendants contend that because Tanya had no minimum contacts with the United States, the district court lacked personal jurisdiction over her.

Rule 4(k)(2) provides for federal long-arm jurisdiction if the plaintiff can show that the exercise of jurisdiction comports with due process. *Compañía De Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 970 F.3d 1269, n.1 (10th Cir. 2020). The Court found that Tanya had minimum contacts with the United States, not because of Sandy’s contacts, but because her own actions—as a participant

in the conspiracy—were directed at the United States and its citizens. The Court concluded that the class's injuries arose out of Tanya's forum-related activities, as a co-conspirator in the scheme. Thus, the exercise of personal jurisdiction over Tanya satisfied due process.

Compañía De Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V., 970 F.3d 1269 (10th Cir. 2020)

This case involves two foreign companies, CIMSA (Bolivia) and GCC (Mexico). The Bolivian company CIMSA filed a petition seeking to confirm the arbitral award issued in Bolivia against Mexican companies (such as GCC). After plethora of different suits, CIMSA, invoking the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards, filed a confirmation action in the U.S District Court for the District of Colorado. CIMSA received permission for the District Court to serve GCC through its American counsel pursuant to Rule 4 (f)(3). GCC subsequently challenged on the basis of lack of personal jurisdiction, which the district court agreed with and granted the petitioner. GCC appealed.

The appellate court determined that the Bolivian companies contractual losses “arose out of” the Mexican companies’ American contacts per specific personal jurisdiction requirements. The court held that the exercise of jurisdiction was reasonable and that the district court properly approved service on Mexican companies’ American counsel. Finally, the appellate court held that the district court accurately concluded that substitute service on GCC's United States counsel did not run afoul of The Hague Service Convention or Rule 4(f)(3).

RELIEF FROM JUDGMENT; CLAIM PRECLUSION

Johnson v. Spencer, 950 F.3d 680 (10th Cir. 2021)

In 2013, Andrew Johnson was found innocent for crimes he was incarcerated for. In 2017 he brought suit against the city of Wyoming and the officer responsible for violations of his constitutional rights. While incarcerated, Mr. Johnson had previously and unsuccessfully brought similar suits against those officers in 1991 and 1992. Mr. Johnson moved for relief from those judgments in 1991 and 1992 under Rule 60(b)(4) and (6).

Rule 60(b) "provides an 'exception to finality' that 'allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances.'" *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269-70 (2010) (citation omitted). Rule 60(b)(4) states that the court must relieve a party from a judgment if "the judgment is void." Rule 60(b)(6) provides courts with the authority to relieve parties from a judgment for any "reason that justifies relief." The district court denied Mr. Johnson's motions for Rule 60(b) relief under both provisions.

Because relief under Rule 60(b)(4) is mandatory, the Court agreed with the district court in rejecting Mr. Johnson's arguments that the challenged judgments are "void." Next, addressing the Rule 60(b)(6) arguments, the Court concluded that the district court's rejection of those arguments rested on two legal errors. But relief under Rule 60(b)(6) is discretionary, and, thus, it would be—at the very least—imprudent to endeavor to resolve Mr. Johnson's Rule 60(b)(6) motions in the first instance. The Court therefore vacated the district court's orders denying those motions and remanded for further proceedings.

SUMMARY JUDGMENT

Aubrey v. Koppes, 975 F.3d. 995 (10th Cir. 2020)

Aubrey was an employee for the Weld County, Colorado County, and Recorder's Office. She became unable to work for a time due to posterior reversible encephalopathy, a rare condition characterized by fluctuating blood pressure that causes swelling in the brain, coma, and sometimes death. The County allowed her to take several months off but eventually terminated her employment. After she contacted the human resources department to tell them that she had been released from rehabilitation, the human resources representative told the human resources director for her employer that it would be "months" until she could return to work.

Shortly after, the employee was informed that of a pre-termination hearing the next morning. The notice informed Aubrey that the county scheduled the pre-termination hearing because it could not accommodate Aubrey's restrictions from her medical problems. It also stated that if she had "any medical updates regarding her medical condition that she had the right to present that information" and that "this hearing is your opportunity to present any relevant information which would have bearing on your employment status." With less than 24 hours though, Aubrey was unable to obtain any updated information to present.

Employee sued the County under the Americans with Disabilities Act ("ADA"), and several related statutes. The district court granted the County's motion for summary judgment on all claims. The appellate court reversed in part.

The Tenth Circuit found that summary judgment was improperly granted to the County on the employee's ADA failure-to-accommodate claim where a jury could have found from the evidence that the county failed to engage in an interactive process with her to determine if there was a reasonable accommodation that would have enabled her to perform the essential functions of her job, and the evidence could have supported findings that additional time to consult with a neurologist, retraining, and reassignment were reasonable accommodations. The court found that a "reasonable jury could find from the overall tenor of that meeting that the county officials were not interested in

gaining information about Aubrey’s limitations and exploring whether she could return to her job, but instead have already decided to terminate her employment.”

Although the County presented evidence challenging the employee's prima facie claim, the disputed material issues of fact required a trial. The ADA discrimination claim should have survived summary judgment because the jury could have found that the County's stated reasons for the termination were inaccurate or false.

Doe v. Univ. of Denver, et al., 952 F.3d 1182 (10th Cir. 2020)

Plaintiff John Doe, a university student, sued the private university Defendant, alleging that the disciplinary proceedings and subsequent expulsion resulting from alleged sexual assault against another student, violated his rights under the Fourteenth Amendment due process clause (which applies to the states) and Title IX (prohibiting gender discrimination). The district court granted summary judgment to the Defendants and the student appealed. The appellate court affirmed, holding that the complaint would not be construed as asserting a procedural due process claim under the Fifth Amendment rather than the Fourteenth Amendment and the evidence of the federal government’s involvement in the affairs of the private university had no bearing on whether the university was a state actor for Fourteenth Amendment purposes.

SUPPLEMENTAL JURISDICTION

Foxfield Villa Assocs., LLC v. Robben, 967 F.3d 1082 (10th Cir. 2020)

This case involved a suit alleging securities fraud against the former president of a limited liability company (LLC). The Plaintiffs, investors in the real estate development LLC, sued the former president for fraud under the Securities Exchange Act and related claims under Kansas Law. The Court granted summary judgment and dismissal for failure to state a claim on the securities claim, which was the sole federal claim. The twenty-three state claims remained and the court declined to exercise supplemental jurisdiction, given that no other federal claims remained. See 28 U.S.C. § 1367(c)(3). Plaintiffs appealed, arguing that nearly four years had passed since they filed their relevant complaint, that the parties engaged in a great deal of discovery and filed many motions, and that the parties had already filed and objected to the pretrial order. Plaintiffs argued that “[r]equiring the parties to start over again in state court is an affront to judicial economy,” especially since that would lead to "dramatically increasing" litigation costs. *Anglemyer v. Hamilton Cty. Hosp.*, 58 F.3d 533, 541 (10th Cir. 1995).

The district court declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3), concluding that the copious state law issues warranted a Kansas state court’s consideration in the absence of the sole federal claim. Further, the district court determined that retaining the case in federal court might lead to inconsistent findings of fact or law given that a similar, corollary case already existed in Kansas state court.

Miscellaneous Memorandum Opinions issued by the U.S. District Court for the District of New Mexico

Bailey v. Markham, ____ F. Supp. 3d ____, 2020 WL 1324477 (D.N.M. Mar. 20, 2020) (granting motion to remand and concluding that the district court lacked subject matter jurisdiction over the property owners' action against contractor and construction company for state-law claims of breach of contract and civil conspiracy, arising from events stemming from contractor allegedly providing services for building owners' home without being licensed in state; holding that certain parties were not fraudulently joined and that unanimous consent to removal was satisfied; and predicting that New Mexico law recognizes a private right of action to sue licensed contractors for violating Construction Industries Construction Act based on civil conspiracy theory).

Curtis v. Oliver, 479 F.Supp.3d 1039 (D.N.M. Aug. 14, 2020) (granting in part a plaintiff political party's emergency motion for temporary restraining order and/or preliminary injunction in 42 U.S.C. § 1983 action against the NM Secretary of State for failure to conduct recount of primary election votes; concluding that the 11th Amendment barred state law claims; and concluding that Plaintiffs' were likely to succeed on the merits of their federal constitutional due process claim).

Evanston Insurance Company v. Desert State Life Management, 434 F.Supp.3d 1051 (D.N.M. Jan. 16, 2020) (denying insurer's summary judgment motion in insurer's action brought against insured, a nonprofit trust corporation that acted as a trustee for disabled individuals, seeking rescission of professional liability insurance policy and declaration that it had no duty to defend or indemnify underlying claims relating to chief executive officer's embezzlement scheme; and predicting that New Mexico law would not impute CEO's knowledge of embezzlement would not be imputed to the company to allow the insurer to rescind the policy).

Favela v. City of Las Cruces Police, 431 F.Supp.3d 1255 (D.N.M. Jan. 6, 2020) (dismissing federal claims in action by arrestee for unreasonable search in violation of the Fourth Amendment and other claims arising from events stemming from arrest which resulted in subsequent nonconsensual catheterization at hospital; declining to exercise supplemental jurisdiction over lack of informed consent claim, assault and battery, and false imprisonment claims; and remanding back to state court).

First National Insurance Company of America v. Xahuentitla, 439 F.Supp.3d 1249 (D.N.M. Feb. 11, 2020) (granting a motion to dismiss for lack of subject matter jurisdiction in commercial general liability insurer Plaintiff's action seeking a declaration on whether the policy required it to defend and indemnify insured restaurant in state court wrongful death suit on the grounds that although the district court could exercise diversity jurisdiction over a declaratory judgment action, it would decline to do so).

Flor v. University of New Mexico, 469 F.Supp.3d 1143 (D.N.M. June 20, 2020) (denying motion by professor Plaintiff for temporary restraining order and preliminary injunction to prevent the university Defendant from carrying out their decision to suspend him for a

year without pay for violating university policy; and concluding that defendant's did not violate procedural due process rights by not holding a hearing prior to suspending him among other things, that the Plaintiff received sufficient post-deprivation procedural due process, and that Plaintiff failed to establish that he was likely to succeed on the merits of his Title IX claim).

Garcia Gutierrez v. Puentes, 437 F.Supp.3d 1035 (D.N.M. Feb. 5, 2020) (granting motion for default filed by migrant workers in action against their agricultural employer who owned the farm, alleging various violations of the Migrant and Seasonal Agricultural Workers Protection Act; and holding that service on employer was proper and workers were entitled to post judgment interest).

Jones v. Azar, 447 F.Supp.3d 1121 (Mar. 20, 2020) (granting prospective employer Defendant's motion for summary judgment in action by applicant Plaintiff, a 70-year-old worker who was not hired; concluding that Plaintiff's allegations of misconduct were not enough to grant summary judgment in his favor, and finding that Plaintiff did not prove that he was otherwise qualified for the position).

LeBlanc v. Halliburton Energy Services, Inc., 446 F.Supp.3d 879 (Mar. 17, 2020) (denying motion for reconsideration of denial of employer Defendant's motion to compel arbitration in action by employees alleging the employer failed to pay employees overtime in violation of federal labor law and the state wage act; and concluding that the employer waived its right to arbitrate by its litigation conduct).

Legacy Church, Inc. v. Kunkel, 455 F.Supp.3d 1100 (April 17, 2020) (denying motion for temporary restraining order and dismissing claims by Church in 42 U.S.C. § 1983 action for injunctive relief against the State of New Mexico Secretary of Health, asserting violations of Free Exercise Clause of the First Amendment right to peaceably assemble relating to Secretary's emergency order issued during the COVID-19 pandemic removing exemption for Churches from prohibition against gatherings of five or more people; and holding that the State had 11th Amendment immunity to suit and the Church did not demonstrate likelihood of success on the merits of their claims).

Lopez v. Walker Stainless Equipment Company, LLC, 431 F.Supp.3d 1253 (Jan. 3, 2020) (concluding that complete diversity of the parties did not exist and plaintiffs were entitled to remand of action brought in New Mexico state court against Defendants under the New Mexico Tort Claims Act).

New Mexico ex rel. Balderas v. Monsanto Co., 454 F.Supp.3d 1132 (D.N.M. April 9, 2020) (granting motion to remand an action initially brought in state court by the State of New Mexico against a manufacturer of polychlorinated biphenyls (PCBs) alleging that New Mexico's natural resources were contaminated with toxic PCBs, and asserting claims for public nuisance, design defect, failure to warn and instruct, negligence, unjust enrichment, and violations of New Mexico Unfair Practices Act; holding that the manufacturer could not invoke federal officer jurisdiction or federal enclave jurisdiction

as basis for removal and that claims did not arise under federal common law solely because they involved environmental pollution).

New Mexico ex rel. Balderas v. Tiny Lab Productions, 457 F.Supp.3d 1103 (April, 29 2020) (granting a motion to dismiss in part in Stat's action asserting statutory claims against developer of child-directed, mobile game applications, advertising networks, and operator of digital content store, for violation of the Children's Online Privacy Protection Act and the New Mexico Unfair Practices Act, and a state common law claim for intrusion on seclusion, arising out of the collection of personal information from children who used applications; and holding that State's UPA and intrusion upon seclusion claims were expressly preempted by COPPA, as to advertising networks other than operator's; and holding as a matter of first impression that tate failed to allege that advertising networks other than that operated by operator of digital content store acquired actual knowledge of the child-directed nature of developer's applications via communications between software development kits and their servers, as required to hold networks liable under COPPA).

Sosa v. Flintco, LLC, 2021 WL 430055 (D.N.M. Feb. 8, 2021) (slip copy) (granting renewed motion to dismiss based on lack of personal jurisdiction over Defendant employer in employment discrimination case alleging all state claims).

Stevenson v. City of Albuquerque, 446 F.Supp.3d 806 (Feb. 21, 2020) (granting in part Defendant officers' motion for summary judgment on the basis of qualified immunity from being sued for claims by guardian ad litem and conservator of arrestee, individually, and as guardian of arrestee's children, filed in state court, alleging violations of 42 U.S.C. §§ 1983 and 1988 and the New Mexico Tort Claims Act for excessive force by city police officers, and asserting claim under *Monell v. Department of Social Services*, 436 U.S. 658 against the City; and denying Plaintiffs' Rule 56(d) motion requesting additional discovery).

Weathers v. Circle K Stores, Inc., 434 F.Supp.3d 1195 (D.N.M. 2020) (denying motion to remand by motorist Plaintiff who brought action in state court against gas station, automobile insurer, and automobile financier, alleging state-law claims for negligence, breach of contract and of the covenant of good faith and fair dealing, and for violation of the New Mexico Unfair Claims Practices Act, arising from allegedly mislabeled gasoline causing damage to his vehicle, which motorist drove as independent contractor for shipping company; and concluding that it was more likely than not that amount in controversy requirement was satisfied as required to remove action to federal court on basis of diversity jurisdiction, and that insurer sufficiently expressed its consent for removal).