4-22-2022

Civil Procedure Update 2022 (Handout and Slide Deck)

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CIVIL PROCEDURE UPDATE 2022

New Mexico Trial Lawyers' 41st Annual Tort Update
April 22, 2022

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PRESENTER BIOGRAPHIES

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

During law school, Professor Gonzales-Zamora worked at the Institute of Public Law, clerked at the local law firms of Freedman Boyd Hollander Goldberg Urias & Ward, P.A. and Saucedo Chavez, P.C., 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.). Professor Gonzales-Zamora subsequently worked on complex litigation at David Walther Law and Brownstein Hyatt Farber Schreck as a litigation associate.

Professor Gonzales-Zamora currently serves on the New Mexico Chapter of the Federal Bar Association Board and previously served as an Executive Member of the New Mexico Hispanic Bar Association.

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

Prior to joining Martinez, Hart, Sanchez & Romero, P.C., Julio served as a Judicial Law Clerk to Justice Edward L. Chavez (ret.) of the New Mexico Supreme Court and thereafter worked as an associate attorney at Butt Thornton & Baehr, P.C. Julio currently serves on the Board of Directors for the New Mexico Trial Lawyers Association and the New Mexico Immigrant Law Center.

Acknowledgements: The presenters wish to extend their sincerest thanks to **Ernesto A. Longa**, Professor of Law Librarianship, for researching and compiling the case opinions and rule changes, and **Angelica Aragon**, a second-year law student at the University of New Mexico School of Law, for summarizing the updates before edits by the presenters. All materials included in this handout were released between May 1, 2021 and March 30, 2021.

Civil Procedure Update 2022

New Mexico State Rules of Civil Procedure

Rule Changes:

- **Rule 1-003.3 NMRA**, Mandatory Pre-Filing and Pre-Judgment Certifications in Foreclosure Actions: New rule for the commencement of foreclosure action and the certification of a pre-filing notice is required. *See Form 4-227*

- **Rule 1-004 NMRA**, Process
    - (A)(1) Provision of the rule that governs the issuance and service of process in all civil actions except the provisions for service of process in Rule 1-077.1 (E) shall apply in proceedings brought under the Criminal Records Expungement Act.

- **Rule 1-034 NMRA**, Production of Documents:
    - (2)(B): Addition of requirement that the responding party shall state whether the response includes all responsive materials. If the responding party withholds any responsive materials based on an objection, the objection shall clearly describe with reasonable particularity what materials are being withheld for each objection.
    - Additional committee commentary explaining the purpose of this amendment, the reasonable particularity standard, how to rectify a good faith effort to resolve disputed discovery issues, and examples of the amendment.

- **Rule 1-054 NMRA**,: District Court Rule for Recovery of Filing Fees
    - (2)(C): Addition of electronic filing and service fees to recoverable costs.

- **Rule 1-054.2**, NMRA Mandatory Pre-Filing and Pre-Judgement Certifications in Foreclosure Actions: New rule that the plaintiff needs a certification concerning a loan modification for as a precondition to the entry of judgment of foreclosure by the district court. *See Form 4-712*

- **Rule 1-077.1**, NMRA Expungement: New Rule that governs proceedings for expungement of arrest and public records under the Criminal Record Expungement Act, Sections 29-3A-1 to -9 NMSA 1978. *See Forms NMRA 4-951, 4-952, 4-953, 4-954, 4-955, 4-956, 4-957, 4-960, 4-960.1, 4-960.2, 4-960.3, 4-958, 4-959.*

- **Rule 1-079 NMRA**, Public inspection and sealing of court records
  - (C)(11) Addition of limitation on public access for proceedings commenced under Section 29-3A-4 of the Criminal Record Expungement Act.
  - Addition of committee commentary clarifying the release of records sealed under the Criminal Record Expungement Act.

- **Rule 1-102 NMRA**, Deposit of Litigant Funds
  - (A): Litigant funds deposited with the district court shall be deposited by the court within 2 business days of receipt in a trust checking account in a bank that is a member of the Federal Deposit Insurance Corporation distinct from the court's accounts for general funds.
  - (B) Funds deposited in a trust fund checking account under Paragraph A shall be investing in accordance with Section 34-6-36 NMSA 1978 in obligations of the United States. To the extent that the funds are deposited with the court in accordance with Section 42A-1-19 NMSA 1978 the funds shall be invested by the court clerk in federal securities or in federally-insured interest bearing accounts in a financial institution located within the court's judicial district.
  - (D) In any case in which interest is ordered to be paid under Paragraph C, the clerk shall before making the pay ascertain the amount if interest included and shall require the payee to furnish a completed Form W-9 (Request for Taxpayer Identification Number and Certification) providing the payee's name, mailing address, and taxpayer identification number.

- **Rule 1-145 NMRA**, Conservatorship Filing of Financial Statements: New rule for conservatorship proceedings, professional conservators, procedures and time limits for filing reports and financial statements.

- **Rule 1B-102 NMRA**, Probate
    - (B)(30)(c): Updated definition for proof of authority for a domiciliary foreign personal representative to include a tribal court appointee designated by a tribal court or the Bureau of Indian Affairs for probate. *See Forms 4B-801 and 4B-802.*

- **Rule 2-202 NMRA(D)**, Summons & Free Process Order: Addition of language that process must be served by a person who is not a party to the action unless the exception of service under Paragraph E. *See Form 204 NMRA.*

- **Rule 2-701 NMRA**, Magistrate Court Rule for Recovery of Filing Fees
    - (2)(E): Filing fees include an electronic filing and service fee as a recoverable cost.

- **Rule 3-202 NMRA**, Summons & Free Process Order: Updated language for Summons.

- **Rule 3-701 NMRA**, Metropolitan Court Rule for Recovery of Filing Fees
    - (2)(E): Filing fees include an electronic filing and service fee as a recoverable cost. *See Form 204 NMRA*.

- **Rule 23-112 NMRA**, Citations for pleadings and other papers: Committee commentary was added to clarify that self-represented litigants must follow the same rules of procedure that apply to other litigants.

Uniform Jury Instructions:

- **Uniform Jury Instructions under Unfair Practices Act (UPA)**
    - **UJI 13-25 Introduction NMRA**: The purpose of the UJI instructions in this chapter are for use in cases involving claims brought under the Unfair Practices Act NMSA 1978 Sections 57-12-1 to -26 (1967, as amended through 2019). The following chapter contains instructions on the elements and damages specific to UPA violations along with a sample set of jury instructions and a specific verdict form in a hypothetical case involving UPA claims in the Appendix.

- **UJI 13-2501 NMRA**: Jury instruction outlining unfair or deceptive trade practices, the elements required for claim, and the definition of misrepresentation under the UPA.

- **UJI 13-2502 NMRA**: Jury instruction for the elements of unconscionable trade practices under the UPA.

- **UJI 13-2503 NMRA**: Jury instruction for the definition of knowingly under the UPA.

- **UJI 13-2504 NMRA**: Jury instruction outlining the connection between the unfair or deceptive trade practices and the sale of goods or services needed for a claim under UPA.

- **UJI 13-2505 NMRA**: Jury instruction for willful conduct under UPA.

- **UJI 13-2506 NMRA**: Jury instruction for damages specific for a claim under the UPA.

- **UJI 13-25 Appendix NMRA**: A hypothetical case involving a UPA claim with a sample set of jury instructions and a special verdict form to serve as a guide to structuring instructions addressing these types of claims.

- **Uniform Jury Instruction for Requests for Admissions at trial**
  - **UJI 13-215 NMRA**, Request for Admission: New Uniform Jury Instruction that is used when a request for admission is offered at trial.

- **Uniform Jury Instruction for Insurance has no Bearing**
  - **UJI 13-208 NMRA**, Insurance has no bearing: Updated uniform jury instruction instructing the jury that it may not consider the presence or absence of insurance for either the plaintiff or the defendant in determining liability or damages.

Proposed State Rule Changes:

- **Rule 11-404 NMRA**, Pretrial notice; other crimes, wrongs or acts: The Rules of Evidence Committee proposes amendments to Rule 11-404 NMRA based on a 2020 amendment to Federal Rule of Evidence 404(b). The amendments would clarify the notice requirements for the use of evidence of other crimes, wrongs, or acts in a criminal case. Under the amended rule, the prosecution must provide reasonable notice in writing before trial and "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." The prosecution may give notice in any form during trial if good cause exists to excuse the lack of pretrial notice."

- **Rule 11-803 NMRA**, Ancient Documents: The Rules of Evidence Committee proposes an amendment to Rule 11-803(16) NMRA based on a 2017 amendment to Federal Rule of Evidence 803(16). The proposal would change the definition of an ancient document from one "that is at least twenty (20) years old" to one "that was prepared before January 1, 1998."

- **UJI 13-110 NMRA**, Conduct of Jurors: Civil Committee proposes amendments to the introductory instruction given in civil jury trials. The amendments are aimed at improving the jury's comprehension of permitted conduct during trial. In particular, the amendments would revise the seventh paragraph to be more detailed and explicit in instructing jurors not to use electronic resources, including internet sites and social media, to comment on or obtain information about the parties, witnesses, counsel, or issues in the case.

- **UJI 13-2321, 13-2322, 13-2323, 13-2324, 12-2325, 12-2326, 12-2327 NMRA**, Whistleblower Protection Act: Civil Committee proposes the adoption of a set of new jury instructions, a special verdict form, and committee commentary for use in claims under the Whistleblower Protection Act (WPA), NMSA 1978, §§ 10-16C-1 to -4 (2010). The instructions explain the elements of a WPA claim and provide guidance on particular elements that may be disputed in a given case, as well as provide instruction on the statutory affirmative defense, *see* § 10-16C-4.

Federal Rules of Civil Procedure

Rule Changes Projected to go into effect December 1, 2022

- **Rule 7.1**, Disclosure Statement
  - The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene.
  - The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C Section 1332(a) or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. Subsection (a)(2) would require that a disclosure statement be filed "when the action is filed in or removed to a federal court" and "when any later event occurs that could affect the court's jurisdiction under Section 1332(a).

Proposed Rule Changes Projected to go into effect December 1, 2023:

- **Rule 15**, Amended and Supplemental Pleadings
  - Rule 15(a)(1) amends the word "within" to "no later than" to measure the time allowed to amend once as a matter of course. The new rule would be as follows:
    1. Amending as a Matter of Course: A party may amend its pleading once as a matter of course *no later than*
       A. 21 days after serving it, or
       B. If the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

- **Rule 72**, Magistrate Judges: Pretrial Order
  - Rule 72(b) replaces "prompt mail" with "immediately serve", and connects the language to the requirements provided in Rule 5(b). The new rule would be as follows:
    b. Dispositive Motions and Prisoner Petitions
    1. Findings and Recommendations. The magistrate judge must enter a recommended disposition including if appropriate proposed findings of fact. The

clerk must *immediately serve* a copy *on* each party *as provided in Rule 5(b).*

- **Rule 87**, Civil Rules Emergency
  - A new Rule 87 is proposed to address the prospect that extraordinary circumstances may so substantially interfere with the ability of the court and parties to act in compliance with a few of these rules as to substantially impair the court's ability to effectively perform its functions under these rules. The responses of the courts and parties to the COVID-19 pandemic provided the immediate occasion for adopting a formal rule authorizing departure from the ordinary constraints of a rule text that substantially impairs a court's ability to perform its functions.
  - The new rule would be as follows:

    a. Conditions for an Emergency: Judicial Conference of the United States may declare a Civil Rules emergency for extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its function.

    b. Declaring an Emergency

    1. Declaration must:

    A. Designate the court or courts affected

    B. Adopt all emergency rule in 87(c) unless it excepts one or more

    C. Be limited to no more than 90 days

    2. Early Termination: Judicial Conference may terminate a declaration before the termination date

    3. Additional Declarations: Judicial Conference may issue additional declarations.

    c. Emergency Rules

    1. Emergency Rules 4(e), (h)(1), (i), and (j)(2), and for serving a minor or incompetent person. By order, the court may authorize service on a defendant described in Rule 4(e), (h)(1), (i), or (j)(2) or on a minor or incompetent person in the judicial district of the US by a method that is reasonable calculated to give notice. A method of service may be completed under the order after the declaration ends unless the court, after notice and an opportunity to be heard, modifies or rescind the order.

    2. Emergency Rule 6(b)(2)

    A. Extension of Time to File Certain Motions: By order, a court may apply Rule 6(b)(1)(A) to

extend for a period no more than 30 days after entry of the order the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

B. Effect on Time to Appeal: Unless the time to appeal would otherwise be longer

i. If the court denies an extension, the time to file an appeal runs for all parties from the date the order denying the motion to extend is entered

ii. If the court grants an extension, a motion authorized by the court and filed within the extended period is, for purposes of Appellate Rule 4(a)(4)(A) filed "within the time allowed by" the Federal Rules of Civil Procedure and

iii. If the court grants an extension and no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period.

C. Declaration Ends: An act authorized by an order under this emergency rule may be completed under the order after the emergency declaration ends.

- **<u>Rule of Evidence 106</u>**
  - There is a proposed amendment to Rule 106, which would address completing the "remainder of or related written or oral statements" as opposed to its current form addressing the completion of the "remainder of or related writings or recorded statements." As provided by the title change, the amendment will now cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under Rule 611(a) or the common-law rule of completeness. The amendment expands the rule to now cover all writings and all statements–whether in documents, in recordings, or in oral form.
  - The proposed rule also adds a requirement that the completing statement is admissible over a hearsay objection: "The adverse party may do so over a hearsay objection."

- **Rule of Evidence 615**
  - Rule 615 has been amended to authorize the trial court to enter an order prohibiting excluded witnesses from learning about, obtaining, or being provided with trial testimony. The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.
  - The rule also has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated agent per entity. If an entity seeks to have more than one witness-agent protected from exclusion, it is free to argue under subdivision (a)(3) that the additional agent is essential to presenting the party's claim or defense.

- **Rule of Evidence 702**
  - The amendment emphasizes the admissibility requirements in federal court must be established by a preponderance of evidence under a Rule 104(a) hearing. The amendment clarifies the preponderance standard applies to the three reliability-based requirements added in 2000 in subsections (b)-(d) (i.e. the testimony is based on sufficient facts or data, that the testimony is the product of reliable principles and methods, and the expert's opinion reflects a reliable application of principles and methods to the facts of the case).
  - The rules committee advises that the amendment's reference to "a preponderance of the evidence" is not meant to indicate that the information presented to the judge at a Rule 104(a) hearing must meet the rules of admissibility. According to the rules committee, it simply means that the judge must find, on the basis of the information presented, that the proponent has shown the requirements of the rule to be satisfied more likely than not. Now, for example, if the court finds by a preponderance of the evidence that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather, it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.
  - Rule 702(d) has also been amended to emphasize that a trial judge must exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert. A testifying

expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology.

- According to the rules committee, this amendment is especially pertinent in testimony of forensic experts, where, according to the rules committee, forensic experts should avoid assertions of absolute or one hundred percent certainty–or to a reasonable degree of scientific certainty–if the methodology is subjective and thus potentially subject to error. The rules committee recommends that in deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results.

NEW MEXICO STATE APPELLATE OPINIONS

New Mexico Supreme Court Opinions

Personal Jurisdiction

Chavez v. Bridgestone Americas Tire Operations, LLC, 2022-NMSC-006, 503 P.3d 332

The New Mexico Supreme Court considered whether a foreign corporation consents to general personal jurisdiction (i.e. a state court has all-purpose personal jurisdiction over a foreign defendant regardless of the nature or extent of any connection between New Mexico and the claims asserted) by registering to do business in New Mexico and appointing a registered agent for service of process under the New Mexico Business Corporation Act. The Supreme Court consolidated three different appeals, wherein the Court of Appeals applied *Werner v. Wal-Mart Stores, Inc.*, 1993-NMCA-112, 116 N.M. 229, to conclude that general personal jurisdiction was proper over Ford Motor Company, Bridgestone Americas Tire Operations, and Cooper Tire & Rubber Company by holding each foreign corporation consented to general personal jurisdiction by registering to do business in New Mexico.

The Supreme Court found that as a matter of statutory construction, the Business Corporation Act does not require a foreign corporation to consent to general personal jurisdiction in New Mexico. It noted that the Business Corporation Act does not contain any explicit language of a foreign

corporation's consent to jurisdiction unlike other similar state statutes. Accordingly, the Supreme Court held a foreign corporation has not given consent to service and suit through mere compliance with a business registration statute. The Supreme Court concluded that it is inappropriate to infer a foreign corporation's consent to general personal jurisdiction in the absence of clear statutory language expressing this requirement.

The Supreme Court reversed the Court of Appeals' holdings in *Rodriguez v. Ford Motor Co.*, 2019-NMCA-023, ¶¶ 31-32, 458 P.3d 569, *Chavez v. Bridgestone Americas Tire Operations, LLC*, A-1-CA-36442, mem. op. ¶ 13 (Ct. App. Dec. Dec. 21, 2018) (non-precedential), and *Rascon Rodriguez v. Ford Motor Co.*, A-1-CA-35910, mem. Op. ¶ 13 (Ct. App. Dec. 21, 2018) (non-precedential). The Supreme Court also overruled the thirty year old holding from *Werner* by reasoning the analysis from *Werner* is outmoded and the Business Corporation Act does not compel a foreign corporation to consent to general personal jurisdiction.

Assignment of Claims

Leger v. Gerety, 2022-NMSC-007, 503 P.3d 349

This case concerned a medical malpractice lawsuit filed against Presbyterian Healthcare Services. Presbyterian Healthcare Services sued Dr. Richard Gerety and New Mexico Heart Institute for indemnification. Presbyterian Healthcare Services settled the medical malpractice lawsuit and, as part of that settlement, assigned its indemnification claim to the plaintiff.

The Supreme Court addressed whether the nonassignability provision of the New Mexico Medical Malpractice Act in NMSA 1978, Section 41-5-12, which states that "[a] patient's claim for compensation under the Medical Malpractice Act is not assignable," prohibits the assignment of a hospital's third-party indemnity claim against a qualified healthcare provider. Dr. Gerety and New Mexico Heart Institute argued the legislative intent of the Medical Malpractice Act prohibits the assignment of all medical malpractice claims, including third-party indemnity claims. The plaintiff holding the assignment asked the Supreme Court to adhere to the plain meaning of the Medical Malpractice Act and hold that only patient's malpractice claims are unassignable and that all other types of malpractice claims are assignment.

The Supreme Court acknowledged the Legislature used the term "malpractice claim" throughout the Medical Malpractice Act and could have used it in lieu of "patient's claim" in Section 41-5-12 had it intended the broader meaning. "We cannot ignore this specific choice of words as an indication that the Legislature intended only that patient's claims, not all malpractice claims, be

made unassignable." *Id*. ¶ 32. The Supreme Court therefore concluded that the plain language of the Medical Malpractice Act's non-assignability provision is clear and unambiguous and does not bar claims held by nonpatients, such as the indemnity cause of action at issue here. Since the plaintiff stood in the shoes of Presbyterian Healthcare Services on the assigned claims, the Supreme Court held the indemnity claims held by the nonpatient (i.e. Presbyterain Healthcare Services) were validly assigned and consistent with the legislative purposes of the Medical Malpractice Act.

New Mexico Court of Appeals Opinions

Assignment & Standing on Commercial Claims

Wilson v. Berger Briggs Real Est. & Ins., 2021-NMCA-054, 497 P.3d 654 (cert. denied Oct. 2021)

Wilson was shot and paralyzed while attending a comedy show at the Navajo Elks Lodge in Albuquerque, New Mexico. Wilson filed a complaint against Navajo Elks Lodge for personal injuries and damages relating to the shooting. While litigating the case, Navajo Elks Lodge's insurer, Cincinnati Specialty Insurance Company filed a declaratory judgment action in federal court, which did not name or include Wilson. The federal court ruled on the declaratory judgment action that the insurance policy procured by Berger Briggs did not provide coverage to the Navajo Elks Lodge. In the state court action, the court held an evidentiary hearing and entered a judgment against Navajo Elks Lodge, awarding damages in the amount of $14.5 million to Wilson. Thereafter and pursuant to an assignment from Navajo Elks Lodge, Wilson filed suit against Berger Briggs, Cincinnati Specialty, and others alleging they negligently failure to procure insurance coverage and inform, negligent misrepresentation, along with breaches of contract, fiduciary duties, and violations of the Unfair Trade Practices Act.

Berger Briggs moved for summary judgment on all claims, contending that Wilson's assignment was invalid by asserting that the claims are effectively unassignable personal injury claims. Wilson opposed the motion for summary judgment, arguing the assigned claims were not personal injury claims, but rather assignable commercial tort claims. The district court agreed with Wilson's analysis and denied the motion for summary judgment but granted interlocutory appeal.

The Court of Appeals recognized that in New Mexico, personal injury claims are not assignable, yet our jurisprudence suggests commercial disputes are.

The Court affirmed the district court's denial of the motion for summary judgment by agreeing that the assigned claims are commercial in nature, and our jurisprudence suggests and common law establishes that such commercial claims are assignment. Berger Briggs also argued that the UPA statute is a consumer protection law and therefore only provides standing to buyers and sellers of goods and services. The Court held that as the assignee of the Lodge's claims, Wilson stood in the shoes to allege the same UPA claims that the Lodge could have asserted against Berger Briggs.

Disqualification of Counsel

Day-Peck v. Little, 2021-NMCA-034, 493 P.3d 477

In 2008, Sandra Day-Peck entered into two settlement agreements on behalf of her adult son and her two minor children that addressed the life insurance policies of Day-Peck's deceased ex-husband and the children's father, Mark Day. Day-Peck and the children were represented by their attorneys and entered into the two settlement agreements. The insurance carrier of the $500,000 policy filed an interpleader action in federal district court to determine who was entitled to the payment of these benefits. The first settlement agreement with the creditors pertaining to the $5 million insurance policy was approved in July 2008. It gave Day-Peck $2.75 million and $2.75 million, plus interest, was placed in a trust for the children. The creditors received the remainder. The second settlement agreement resolved the interpleader action on the $500,000 life insurance policy in September 2008 and agreed that the proceeds would be divided equally between Shamaley and the children's trust.

In December 2014, Day-Peck filed a complaint on behalf of herself and the children for legal malpractice, negligent misrepresentation, breach of fiduciary duty, breach of contract, fraud, and conspiracy to commit fraud against the attorneys who represented them in the 2008 settlement agreements. In this malpractice action, Day-Peck claimed that the attorney's conspired to conceal the fact that life insurance benefits are exempted by New Mexico statute from both the creditors of the insured and the creditors of the beneficiary. Day-Peck alleged that *but for* the attorney's negligence and conspiracy to keep the New Mexico statute from them, she and the children would not have entered into the 2008 settlement agreements and they would have received the full $5.5 million in life insurance benefits. Day-Peck claimed her cause of action for malpractice did not accrue until 2013 and the four year statute of limitations should have started when an independent lawyer advised her that he believed there had been malpractice.

The New Mexico Court of Appeals found that the district court did not abuse its discretion in disqualifying the plaintiff's former counsel from representing Day-Peck or the children in this action. Day-Peck and the children have conflicting claims to the same $5 million in life insurance proceeds as damages in this lawsuit and Day-Peck's claim to the $2.75 million paid into the children's trust is directly adverse to the children's interests. The district court correctly concluded as a matter of law that the attorneys were privy to adverse confidential information from both Day-Peck and the children and could not avoid violating Rule 16-109(A) and (C) regarding maintaining the confidentiality of a former client. The Court of Appeals agreed with the district court that the conflict tainted every aspect of the litigation and could not be resolved by anything short of disqualification. The Court held that the district court correctly decided that the attorney's interests were sufficiently adversely affected by the alleged conflict of interest to overcome the general rule that the violation of the Rules of Professional Conduct can only be raised by a client or former client.

The Court further held that the district court did not abuse its discretion when it held her conduct was the opposite of excusable neglect because the district court had repeated findings of unjustified neglect and did not timely respond to motions of summary judgment before and after the disqualification of her counsel. The Court found that according to the record, the statute of limitations had begun immediately after the settlement agreements were adopted when she had consulted with other attorneys and not when independent counsel prepared filing the malpractice suit in 2013. The district court's grant of summary judgment and the dismissal of Day-Peck's claim was affirmed. The Court held that the district court's award for the cost of reconstructing a hard drive in defense of the lawsuit was within the district court's discretion to award the prevailing party's necessary and reasonable costs incident to their defense of an action even if the costs were not specifically authorized by Rule 1-054(D). The Court determined that because the costs were attributable to Day-Peck's protection of her own interests and not the children, it was not an abuse of discretion for the court to refuse to assess any of the costs to the children. Accordingly, the Court of Appeals affirmed the decision of the district court.

Bifurcation

Sandoval v. Gurley Properties Ltd. & Board of Regents of the University of New Mexico, 2022-NMCA-004, 503 P.3d 410 (cert. denied)

Arthur Chavez died in the care of a skilled nursing facility 19 days after he slipped and fell on ice and snow in the parking lot of his apartment. On the day of the fall, Mr. Chavez was taken to a hospital in Gallup where doctors

diagnosed him with a complex left hip socket fracture. He was then airlifted to University of New Mexico Hospital (UNMH). He remained at UNMH for seven days until he was discharged to Paloma Blanca Health and Rehabilitation, LLC. He died twelve days later from a pulmonary embolism. Plaintiffs filed suit against Gurley Properties Limited (who operated the apartment complex), UNMH, Paloma Blanca, and individual medical providers for negligence and wrongful death. A jury found in favor of plaintiffs on all matters and awarded over $18 million, determining that UNMH was 25% responsible.

UNMH appealed, claiming, among other things, the district court erred in declining to bifurcate the trial among the successive tortfeasors. UNMH argued that because an original tortfeasor may be held jointly and severally liable for the entire harm, it is "unnecessary" to join the successive tortfeasor(s) when the original tortfeasor is a party.

The New Mexico Court of Appeals determined that the district court did not abuse its discretion in declining to bifurcate the trial because the plaintiff may litigate against the original tortfeasor and the successive tortfeasor(s) in a single action. "To hold otherwise would undermine longstanding rules allowing for permissive joinder and alternative claims, Rule 1-020(A) NMRA, and would frustrate more fundamental notions of judicial economy." *Sandoval*, 2022-NMCA-004, ¶ 7. The Court of Appeals found no rationale for mandating bifurcation in a successive tortfeasor trial as a matter of law and, thus, held the district court acted within its bounds of discretion in declining the motion to bifurcate.

Further, the Court of Appeals concluded that the jury was adequately instructed on how to attribute damages for pain and suffering for each injury and were correctly instructed to decide each defendant's case separately. The jury was told that Gurley's liability was based on the alleged failure to keep the premises safe and UNMH's liability was based on having failed to recognize and diagnose Mr. Chavez's medical condition. The jury was asked the question to calculate all damages separately for the two injuries. The Court of Appeals did not find the proposed limiting instruction as necessary or appropriate in light of the other instructions. Accordingly, the Court of Appeals affirmed the decision of the district court.

Sovereign Immunity on Tribal Land

Sipp v. Buffalo Thunder, Inc., 2022-NMCA-015, — P.3d — (cert. granted Feb. 2022)

Plaintiff Jeremiah Sipp was an employee of Dial Electric, a vendor that sold lighting to Buffalo Thunder Resort and Casino. Sipp delivered the lights and

alleged that while he was moving out of the receiving area, a Buffalo Thunder employee abruptly lowered the garage door. Sipp hit his head and claimed he was knocked unconscious and suffered severe injuries including a cervical spine injury that required major surgery. Sipp sued the Pueblo of Pojoaque and several Pueblo-owned entities in New Mexico state district court.

Pueblo of Pojoaque filed a Rule 1-012(B)(1) motion to dismiss for lack of subject matter jurisdiction. Buffalo Thunder is operated by the Pueblo of Pojoaque pursuant to a Tribal-State Class III Gaming Compact with the State of New Mexico, as required by the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 to 2721. Section 8(A) of the Compact addresses subject matter jurisdiction over claims limited to "bodily injury proximately caused by the conduct of the Gaming Enterprise" and contains both a waiver of sovereign immunity for such claims and an express agreement to state court jurisdiction. The state district court dismissed the case for lack of subject matter jurisdiction, ruling that Sipp did not fall within the limited waiver of sovereign immunity contained in the Pueblo's Tribal-State Class III Gaming Compact.

The Court of Appeals concluded that the waiver was geared toward casino patrons and guests who suffer physical injuries and not business entities or corporations who enter business transactions with the Pueblo. The Court pointed to *Guzman v. Laguna Development Corp.*, 2009-NMCA-116, 147 N.M. 244, and *R&R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, 139 N.M. 85, which held that the drafters of the Compact intended a more limited usage that excludes business entities who enter into business transactions with the Pueblo.

The Court of Appeals noted that the Compact does not limit the waiver to claim for injuries occurring "in" or "at" a gaming facility, but rather, Section 8 only provides a waiver for "visitors *to* the gaming facility" that suffer an injury caused by the Gaming Enterprise. Accordingly, the Court of Appeals concluded that Sippls sufficiently pleaded he was a visitor who suffered a bodily injury proximately caused by the conduct of the Gaming Enterprise. The New Mexico Court of Appeals reversed and remanded the case. The New Mexico Supreme Court granted certiorari on February 8, 2022.

Dismissal for Inactivity/Failure to Prosecute

Del Curto v. Deschamps, No. A-1-CA-39314, mem. op. (Ct. App. Dec. 30, 2021) (Bogardus, J.) (non-precedential)

The parties actively litigated a commercial case for three years before the district court dismissed the case for lack of prosecution under Rule 1-

041(E)(2) NMRA. A scheduling order was entered on May 23, 2017, which set trial to begin in September 2018. One month before trial, on the defendants' motion and impending retirement of the trial judge, the district court entered an order amending the scheduling order time limits. That new order extended discovery deadlines and reset trial for March 2019. After the case was reassigned, the plaintiffs requested a Rule 1-016 NMRA scheduling conference. On the morning of the conference, the judge filed an order of recusal and a new judge was assigned. Seven months later, the court dismissed the case for lack of prosecution. The plaintiff filed a motion to reconsider based on the previous scheduling order instead of moving to reinstate under Rule 1-041(E)(2). The district court denied the motion to reconsider and the plaintiff appealed.

The Court of Appeals issued a 2-1 majority opinion, with Judge Duffy dissenting. Judge Bogardus authored the majority opinion, which determined there was no indication of compliance with the expired scheduling order or with the extended deadlines for discovery and where seven months of inactivity passed without explanation or good cause. Accordingly, the majority concluded the district court had discretion to dismiss and deny reinstatement under Rule 1-041(E)(2) if it found that the plaintiff was not in compliance with the scheduling order.

The dissenting opinion disagreed with the majority's conflation of the standards of review under Rules 1-041(E)(1) and (E)(2). Judge Murphy noted that under Rule 1-041(E)(1), a party can move to dismiss an action with prejudice if the claimant has failed to take any significant action within two years, but that the action *shall not* be dismissed if the party opposing the motion is in compliance with a Rule 1-016 NMRA scheduling order. In contrast, Judge Murphy cited *Rodriguez ex rel. Rodarte v. Sanchez*, 2019-NMCA-065, ¶ 19, 451 P.3d 105, to note that Rule 1-041(E)(2) was intended "to provide a standardized procedure for trial courts to evaluate the intentions of the parties and their counsel and to rid their dockets of cases that should not be carried as active cases." Judge Murphy noted that a trial judge does not have discretion to dismiss a case under Rule 1-041(E)(2) if a scheduling order has been entered.

Quiles v. Mathews, No. A-1-CA-39206, mem. op. (Ct. App. Dec. 15, 2021) (Duffy, J.) (non-precedential)

A pro se plaintiff appealed a trial court's dismissal with prejudice after the plaintiff failed to appear for an online hearing. The Court of Appeals considered whether dismissal was proper under Rule 1-041(B) NMRA, which allows for involuntary dismissal for failure of the plaintiff to prosecute or to comply with the applicable rules or court orders.

The Court of Appeals recognized that dismissal under Rule 1-041(B) is a drastic sanction and should only occur where the party's conduct is "extreme." To satisfy this high burden, the Court of Appeals reasoned that the record "must indicate willful conduct, as opposed to negligent, accidental, or involuntary noncompliance." *Id*. ¶ 4. Because the dismissal was based solely on the failure to appear for an online hearing, the Court of Appeals concluded the trial court improperly dismissed the case absent some finding that the plaintiff's conduct was willful and extreme. Notably, the Court of Appeals held that even if the dismissal was based on the trial court's inherent authority to control its docket, reversal of the dismissal was still appropriate because that standard of review is the same as a sanctions-based Rule 1-041(B) dismissal.

Timely Post-Trial Appeal

Griego v. Presbyterian Healthcare Servs., No. A-1-CA-38199, mem. op. (Ct. App. Dec. 21, 2021) (Attrep, J.) (non-precedential)

The Court of Appeals addressed the timeliness of a post-trial appeal. The plain language of Rule 12-201(b) NMRA requires a notice of appeal to be filed within 30-days after the judgment or order appealed from is filed in the district court clerk's office. The issue on timeliness arose based on a timely filed motion for reconsideration and whether that motion tolled the 30-day deadline.

Prior to entry of a judgment, the plaintiff filed a motion for new trial on August 3, 2018, and the district court entered an order denying the motion on November 29, 2018. On December 31, 2018, (*32-days later*), the plaintiff filed a motion for reconsideration of the order denying the motion for new trial, which was later denied on April 1, 2019. The plaintiff then filed a notice of appeal on the motion for reconsideration on April 29, 2019.

The Court of Appeals dismissed the appeal for lack of jurisdiction because the appeal was untimely filed past the 30-day deadline. The plaintiff argued there is potential ambiguity between Rule 1-059(E) and Rule 12-201 concerning what is the "final order" that triggers the 30-day deadline. Plaintiff sought to argue the denial of the motion for reconsideration was the triggering "final order". However, the Court of Appeals reasoned that not only was the underlying motion for reconsideration untimely, but it amounted to an impermissible successive attack on the final judgment that did not toll the time to appeal.

10th Circuit Court of Appeals Opinions

Specific Personal Jurisdiction

Hood v. American Auto Care, LLC, 21 F.4th 1216 (10th Cir. 2021)

The consumer brought a putative class action in Colorado against American Auto Care, LLC, a Florida limited liability company who sold service contracts that provide vehicle owners with extended warranties after the manufacturer's warranty expires. The class-action alleged that American Auto Care, LLC violated the Telephone Consumer Protection Act by directing unwanted automated calls to their cell phones without consent. After purchasing a used car, the plaintiff began receiving prerecorded calls to his cell phone claiming that his car warranty was about to expire and offering to sell him an extended warranty. Although he was then residing in Colorado, the calls came from numbers with a Vermont area code. The complaint alleged that American Auto Care, LLC used telemarketing to sell vehicle service contracts nationwide, including in Colorado by calling Colorado phone numbers.

The District Court for the District of Colorado dismissed for lack of personal jurisdiction. Although it determined that the class had alleged sufficient facts to establish that American Auto Care, LLC purposefully directs telemarketing at Colorado, the District Court held that the call to the plaintiff's Vermont phone number did not arise out of, or relate to, American Auto Care, LLC's calls to Colorado phone numbers. The plaintiff appealed to the Tenth Circuit the dismissal for lack of personal jurisdiction of his putative class-action claim against the defendant.

The Tenth Circuit reversed the District Court's analysis, holding that the grounds for dismissal could not stand in light of *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S.Ct. 1017 (2021). "So long as [American Auto Care, LLC's] marketing in Colorado was essentially the same as its marketing in Vermont, the telemarketing calls to [the plaintiff] related" to marketing in Colorado. The Tenth Circuit reasoned that after *Ford* a causal connection between the contacts and the claims is not required to establish specific personal jurisdiction.

> Even if ACC's call to Mr. Hood was not a direct result of its telemarketing efforts directed at Colorado, Mr. Hood was still injured there by activity essentially identical to activity that AAC directs at Colorado residents. If AAC places telemarketing calls to sell service contracts to Vermont and Colorado residents alike, it does not matter that they called Mr. Hood from a list of apparent

> Vermont residents rather than a list of apparent Colorado residents. We might not apply that proposition if there was a substantial relevant difference between calls placed to residents of the two states. But here Mr. Hood alleged that other Colorado residents received the same type of solicitation call that he did.

The Tenth Circuit recognized that *Ford* makes clear that specific jurisdiction is proper when a resident is injured by the very type of activity a nonresident directs at residents of the forum State—even if that activity that gave rise to the claim was not itself directed at the forum State. Accordingly, the Tenth Circuit reversed the District Court's dismissal.

Choice of Law

Gerson v. Logan River Academy, 20 F.4th 1263 (10th Cir. 2021)

A former student brought a diversity action in the U.S. District Court for the Central District of California against a residential treatment facility located in Utah, alleging that she was sexually abused by an employee at the facility. The case was transferred to the U.S. District Court for the District of Utah. The facility moved to dismiss for failure to state a claim, on ground that the suit was barred by Utah's statute of limitations. The student responded by claiming the suit was timely under California law. The District Court granted the facility's motion to dismiss. The student appealed.

The Tenth Circuit addressed whether Utah's or California's statute of limitations applied in the diversity action. The Tenth Circuit recognized the split in authority adopting the Restatement (Second) of Conflict of Laws, which applies the law from the state with "the most significant relationship". However, because the case was transferred from California, the Tenth Circuit applied California's choice of law rules to determine which State's law should apply.

The Tenth Circuit noted that California and Utah each had a "real and legitimate interest" in having its statute of limitations applied. California, recognizing the obstacles in bringing claims of childhood sexual abuse, provides a generous statute of limitations. In some respects, Utah has an even more generous statute of limitations period, but has a much shorter period for suits against entities that are not living persons. California applies a so-called governmental-interest analysis to resolve conflicts of laws arising from tort claims. As such, the Tenth Circuit highlighted that California's supreme court has made clear that a foreign state's interest in limiting liability for activity within its borders predominates over California's interest in facilitating recovery for its residents for out-of-state injuries. As such, the Tenth Circuit

held that Utah law governs the dispute and affirmed the district court's dismissal.

Article III Standing

Laufer v. Looper, 22 F.4th 871 (10th Cir. 2022)

The plaintiff, who was a self-described tester and advocate of the rights of similarly situated diabled persons, filed suit under the Americans with Disabilities Act (ADA) against the owners of a Colorado Inn for a violation of regulation requiring places of lodging to identify and describe accessible features in the hotels and guest rooms offered through its reservations service to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets their accessibility needs. The District Court for the District of Colorado granted the owners' motion to dismiss for lack of Article 3 standing. The plaintiff appealed.

The 10th Circuit Court of Appeals held that the plaintiff failed to show that she suffered concrete injury in fact as required to establish Article 3 standing to sue the inn owners for a violation of the ADA. The plaintiff's mere status as an ADA tester, by itself, did not automatically confer Article 3 standing to sue. The ruling of the district court was affirmed.

Rule 56(F) Requests for Discovery and/or Leave to Amend

Adams v. C3 Pipeline Constructions Inc., 17 F.4th 40 (10th Cir. 2021)

A pipeline construction company employee filed suit against the company, C3 Pipeline Constructions, Inc., and the pipeline operators successor-in-interest, asserting claims for sexual harassment, discrimination, and retaliation under Title VII, New Mexico Human Rights Act, and related state tort law claims. Upon removal, the District Court for the District of New Mexico denied the employee's request to defer to summary judgment in order to conduct additional discovery, construed the employee's opposition to summary judgment as an implied request for leave to amend the complaint to add a claim for premises liability, denied the claim, and granted the successor's motion for summary judgment. The district court adopted the report and recommendation and entered default judgment against the company. Employee appealed. Successor moved to dismiss the appeal as untimely.

The Tenth Circuit held that the order granting partial summary judgment to successor was not a final, appealable order. The successor was not an employer under the joint employer test within the meaning of Title VII. The successor was not an employer subject to liability under the New Mexico

Human Rights Act and New Mexico tort law. The district court did not abuse its discretion when it denied the employee's request to defer summary judgment in order to conduct discovery. The employee's allegations in the opposition to the summary judgment state a plausible claim for premises liability under New Mexico law. In construing the employee's opposition to summary judgment as an implied request to amend the complaint to add a claim for premises liability, the district court should have considered the allegations in the original complaint and memorandum in support of opposition in determining whether the amendment to the complaint would be futile. The motion to dismiss appeal was denied. The order granting summary judgment was affirmed. The order denying the implied request to amend the complaint was vacated.

Post-Trial Motions for New Trial or to Alter/Amend the Judgment

Hayes v. SkyWest Airlines, Inc., 12 F.4th 1186 (10th Cir. 2021)

A former employee brought claims for retaliation against the employer, SkyWest Airlines, under the Family and Medical Leave Act (FMLA) and for discrimination and retaliation under the Americans with Disabilities Act (ADA). The jury rendered a verdict in the employee's favor. The District Court for the District of Colorado denied the employer's motion for a new trial and awarded front pay. The employer appealed.

The Tenth Circuit held that the district court did not abuse its discretion in denying a mistrial based on an incident in which the paralegal gestured to a corporate representative while she was on the stand. The district court did not abuse its discretion in denying a mistrial based on an incident in which a juror and the employer's corporate representative spoke to each other in violation of the court's order. The district court did not abuse its discretion to deny the employer's motion for a new trial based on the claim that the employee failed to disclose evidence. The district court did not commit a clear error when it determined the employee was entitled to a front pay award and that the employer's successor would have continued the employee's term of employment until retirement age. The employee did not cut off entitlement to front pay when he left his first post-termination job for a lower paying job. The ruling of the district court was affirmed.

Osterhout v. Board of County Commissioners of LeFlore County, Oklahoma, 10 F.4th 978 (10th Cir. 2021)

An arrestee filed a Section 1983 action against the board of county commissioners and the deputy sheriff of LeFlore County alleging that the deputy used excessive force during a traffic stop. The District Court for the Eastern District of Oklahoma denied the board's motion for summary

judgment, granted the deputy's motion for remittitur, and denied the deputy's motion for a new trial. The defendants appealed.

The Tenth Circuit held that the arrestee had satisfied the Oklahoma Governmental Tort Claims Act (GTCA) requirement to include his contact information in his notice of a claim. The district court did not abuse its discretion in denying the deputy's motion for a new trial based on the arrestee's counsel's improper questions. The district court did not abuse its discretion in its determination that the arrestee's improper statement in his closing argument did not warrant a new trial. The district court did not abuse its discretion by using a verdict form that only contained one line for compensatory damages. The district court did not abuse its discretion in denying the deputy's motion for a new trial on the grounds that the jury's award of $3 million in compensatory damages was grossly excessive and unsupportive. The board's failure to file a renewed motion for judgment as a matter of law constituted a waiver of its challenge to the district court's denial of summary judgment. The ruling of the district court was affirmed.

U.S. Supreme Court Opinions

Intervention

Cameron v. EMW Women's Surgical Center, P.S.C., 142 S.Ct. 1002 (2022)

Abortion clinic and two of its doctors brought action against the Kentucky attorney general and the cabinet secretary of Kentucky Health and Family Services, seeking to enjoin the enforcement of a Kentucky law regulating an abortion procedure. After the claims against the attorney general were dismissed, the District Court for the Western District of Kentucky issued a permanent injunction against the law's enforcement. The Kentucky Cabinet Secretary appealed this bench trial. The Sixth Circuit Court of Appeals affirmed the district court. After the secretary decided not to seek any further review, the attorney general moved to withdraw as counsel and moved to intervene as party on behalf of the Commonwealth of Kentucky. The Sixth Circuit denied the motion and dismissed the petition for rehearing *en banc*.

The Supreme Court held that the jurisdictional requirement did not bar the Court of Appeals from considering a motion to intervene. The mandatory claims-processing rule did not bar the Court of Appeals from considering a motion to intervene. The Kentucky attorney general should be allowed to intervene in appellate proceedings to defend constitutionality of the Kentucky abortion law. The case was reversed and remanded.

Injunctions and Restraining Orders

Whole Woman's Health v. Jackson, 141 S.Ct. 2492 (2021)

The providers of abortion services filed action for declaratory and injunctive relief by challenging the constitutionality of the Texas abortion restriction legislation. The legislation would soon take effect and would be enforced by private individuals rather than government officials. The District Court for the Western District of Texas denied the defendants' motion to dismiss. Defendants appealed. The Fifth Circuit Court of Appeals stayed the district court proceedings. Plaintiffs then filed an application for injunctive relief or to vacate the stay.

The Supreme Court held that the application raised serious constitutional questions and the plaintiffs did not satisfy their burden of making a strong showing that the application is likely to succeed on the merits. It was unclear whether the named defendants could or would seek to enforce the state's law against challengers in a way that might allow the Supreme Court's intervention. It was also unclear if existing precedent would allow the Supreme Court to issue an injunction against state judges asked to decide a lawsuit under the state's law. The application was denied.