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Civil Procedure Update 2023

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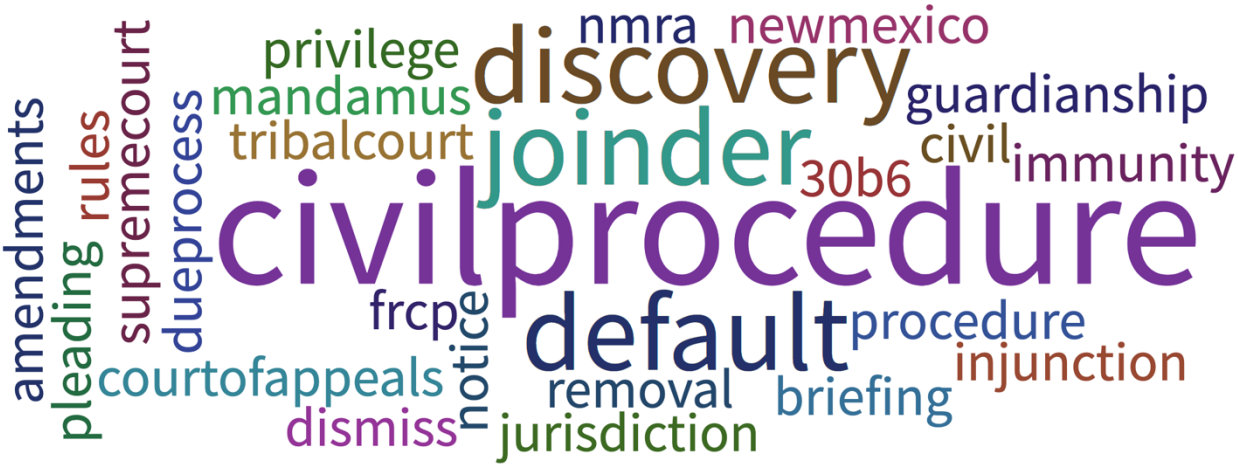
CIVIL PROCEDURE UPDATE 2023



New Mexico Trial Lawyers 42nd Annual Tort Update
April 28, 2023

Associate Prof. Verónica C. Gonzales, *UNM School of Law*
Julio C. Romero, *Martinez, Hart, Sanchez & Romero, P.C.*

PRESENTER BIOGRAPHIES

Verónica C. Gonzales is an Associate Professor teaching civil procedure, ethics, poverty law, and appellate decision-making. She previously taught in the Southwest Indian Law Clinic and Community Lawyering Clinic as part of UNM's top-ranked Clinical Law Program (#9, U.S. News & World Report, 2022).

Gonzales previously clerked for New Mexico Supreme Court Justice P. Jimenez Maes (ret.) and for New Mexico Court of Appeals Judge M. Zamora (ret.). Gonzales then worked on complex litigation at David Walther Law and Brownstein Hyatt Farber Schreck. Currently, she works with Fadduol Cluff Hardy & Conaway P.C and Bernalillo County Code of Conduct Review Board.

She currently serves on the New Mexico Chapter of the Federal Bar Association Board. In 2022-2023, she received the Faculty of Color Award for All-Around Support from the NM Project for Graduates of Color, recognizing faculty who mentor graduate students of color.

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 serves as a special prosecutor for the Second Judicial District Attorney's Office to prosecute cases in the rape kit backlog. Julio has also contributed to amicus curiae briefs filed on behalf of the New Mexico Trial Lawyers Association and its members.

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 Professor of Law Librarianship **Ernesto A. Longa** for researching and compiling the cases and rules, and third-year law student **Angelica Aragon**, for summarizing the updates before edits by the presenters. All materials included in this handout were released between May 1, 2022 and April 1, 2023.

CIVIL PROCEDURE UPDATE 2023

New Mexico State Rules of Civil Procedure

NMRA STATE COURT RULE CHANGES

- **Rule 11-404 NMRA**, Pretrial notice; other crimes, wrongs or acts: The Supreme Court has approved amendments to Rule 11-404 NMRA based on the 2020 amendment to Federal Rule of Evidence 404(b). Under the amended rule, the prosecution must provide reasonable notice in writing before trial that the prosecution intends to offer evidence of crimes, wrongs, or other acts. In that notice, the prosecution must articulate "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 Supreme Court has approved amendments to Rule 11-803(16) NMRA based on a 2017 amendment to Federal Rule of Evidence 803(16). Under the amended rule, the definition of ancient document has changed from a document "that is at least twenty (20) years old" to one "that was prepared before January 1, 1998."

- **UJI 13-110 NMRA**, Conduct of Jurors: The Supreme Court has approved the UJI-Civil Committee's proposal to amend the introductory instruction given in civil jury trials to enhance the jury's comprehension of permitted conduct during trial. In particular, the amended UJI 13-110 NMRA contains a more detailed and explicit seventh paragraph, 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: The Supreme Court has approved the UJI-Civil Committee's proposal to adopt 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 instruct on the statutory affirmative defense,

NMSA 1978, § 10-16C-4. The general introduction to UJI Chapter 23 (Employment), UJI 13-2300 NMRA, has been amended accordingly.

- **Rule 1-145 NMRA**, Financial filings in conservatorship proceedings: On recommendation of the Guardianship and Conservatorship Steering Committee, the Supreme Court provisionally approved new Rule 1-145 NMRA, governing the filing of reports by a professional conservator in a conservatorship proceeding under NMSA 1978, § 45-5-409 (2021), (effective Mar. 16, 2022).

- **First Judicial District Court Local Rules – New Rules LR1-117, LR1-406, LR1-407, LR1-408, LR1- 409, LR1-410, and LR1-411 NMRA; Amended Rules LR1-102, LR1-104, LR1-106, LR1-108, LR1-111, LR1-112, LR1-113, LR1-114, LR1-201, LR1-202, LR1-302, LR1-401, LR1-403, and LR1-404 NMRA; Amended and Recompiled Rule LR1-116 NMRA; New Forms LR1-Form 701, LR1-Form 702, LR1-Form 703, LR1-Form 704A, and LR1-Form 704B NMRA**: On recommendation of the First Judicial District Court, the Supreme Court has adopted new rules and forms and has approved amendments to the local rules of the First Judicial District concerning various subject matters and procedural requirements.

- **Second Judicial District Court Local Rules - Amended Rule LR2-603 NMRA**, Court-annexed arbitration in the Second Judicial District Court: The Supreme Court approved amendments to Rule LR2-603 NMRA to increase the arbitration limit from $25,000 or $50,000. Under the amended rule, all civil cases filed in the Second Judicial District shall be referred to arbitration when no party seeks relief other than a money judgment and no party seeks an amount in excess of $50,000 (effective June 1, 2022).

PROPOSED NM STATE RULE CHANGES

- **Proposal 2023-017: Rule 11-513 NMRA**, Fifth Amendment Invocation: The Rules of Evidence Committee recommends amendments to Rule 11-513 NMRA to clarify that the prohibition of a comment on the invocation of the privilege against self-incrimination would not apply in non-criminal proceedings.

- **Proposal 2023-018: Chapter 17 Introduction and UJIs 13-1701, 13-1702, 13-1703A, 13-1703B, 13-1704, 13-1705, 13-1706, 13-1707, 13-1708, 13-1709, 13-1710, 13-1711, 13-1712, 13-1713, 13-1714, 13-1715, 13-1716, 13-1717, and 13-1718 NMRA,** Bad

Faith Duty to Defend: The Uniform Jury Instructions – Civil Committee has recommended amendments to the Uniform Jury Instructions in Chapter 17, the adoption of 13-1703A, to recompile 13-1703 as 13-1703B, and the withdrawal of 13-1717 NMRA. This proposal is intended to implement changes in the law and provide a thorough review and revision of substantive instructions, use notes, and committee commentary throughout the chapter.

Federal Rules of Civil Procedure

FRCP RULE CHANGES EFFECTIVE DEC. 1, 2022

- **FRCP 7.1**, Disclosure Statement: Requires a disclosure statement by a nongovernmental corporation that seeks to intervene in the federal action. Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor.

- **Supplemental Rules for Social Security Actions under 42 U.S.C. § 405(g)**: Actions to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g) have been governed by the Rules of Civil Procedure. The supplemental rules, however, establish a simplified procedure that recognizes the essentially appellate character of actions that seek only review of an individual's claims on a single administrative record, including, for example, a single claim based on the wage record of one person for an award to be shared by more than one person. These rules apply only to final decisions actually made by the Commissioner of Social Security. They do not apply to actions against another agency under a statute that adopts § 405(g) by considering the head of the other agency to the Commissioner.
    - **FRCP Rule 1**, Applicability of Federal Rules of Civil Procedure.
    - **FRCP Rule 2**, Pleading requirements for commencing action.
    - **FRCP Rule 3**, Service requirements on Commissioner to the appropriate office within the Social Security Administration's Office of General Counsel and to the U.S. Attorney for the district where the action is filed.
    - **FRCP Rule 4**, Procedures and Deadlines for Answering and filing Motions under Civil Rule 12.
    - **FRCP Rule 5**, Requirement for presenting brief in support of action for decision, including assertions of fact by citation to the particular parts of the record.

- **FRCP Rule 6**, Filing and service deadline for Plaintiff's brief.
- **FRCP Rule 7**, Filing and service deadline for Commissioner's brief.
- **FRCP Rule 8**, Filing and service deadline for Plaintiff's reply brief.

PROPOSED FRCP RULE CHANGES *PROJECTED* TO GO INTO EFFECT NO EARLIER THAN DEC. 1, 2023

- **FRCP Rule 87**, Civil Rules Emergency; and **Federal Appellate Rule 2**, Suspension of Rules

  Proposed Civil Procedure Rule 87 is part of the package of proposed emergency rules. Rule 87(b)(1)(B) provides that the Judicial Conference's emergency declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." Rule 87 would authorize emergency service rules under Rule 4 that would allow the court to authorize service of process by a means reasonably calculated to give notice. Rule 87 also authorizes Emergency Rule 6(b)(2), which would permit otherwise-prohibited extension of the deadlines for post-judgment motions.

  Similarly, the proposed amendment to Appellate Rule 2 is part of the package of proposed emergency rules. It would come into operation when the Judicial Conference declares an Appellate Rules emergency and would empower a court of appeals broadly to "suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2)."

- **FRCP Rule 6**, Computing and Extending Time; Time for Motion Papers; **Appellate Rule 26(a)(6)(A)**, Computing and Extending Time; and **Appellate Rule 45(a)(2)**, Clerk's Duties

  The proposed technical amendments to the rule will now include Juneteenth National Independence Day in the list of legal holidays.

- **FRCP Rule 15**, Amended and Supplemental Pleadings: The amendment to Rule 15(a)(1) would substitute "no later than" for "within" to measure the time allowed to amend a pleading once as a matter of course, to avoid uncertainty about when the period begins.

- **FRCP Rule 16.1**, Multidistrict Litigation Management: The goal of Rule 16.1 is to have a freestanding rule prompting and governing meet-and-confer sessions among counsel before the initial post-transfer case management conference with the court in multidistrict litigation (MDL)

cases. The rule is designed to address concerns expressed by judges and practitioners alike about the lack of guidance in place for structuring and launching MDL proceedings—particularly early case management procedures. The proposed Rule 16.1 provides flexible considerations for case management, rather than specific rules. For example, the rule states that the transferee court and parties "may" consider a number of factors during the meet-and-confer session, including the appointment and structuring of leadership counsel, the identification of key legal and factual issues, the early exchange of information about the factual bases for claims, and whether the to consider measures to facilitate settlement. The proposed rule also provides that the transferee court may designate coordinating counsel to aid in the initial case management process and prepare the report.

- **FRCP Rule 72**, Magistrate Judges; Pretrial Order: The proposed amendment to Rule 72(b)(1) would update the existing rule's requirement that a copy of the magistrate judge's findings and recommendations be mailed to the parties; instead the rule would require that a copy be served on the parties as provided in Rule 5(b).

PROPOSED FRCP RULE CHANGES *PROJECTED* TO GO INTO EFFECT NO EARLIER THAN DEC. 1, 2024

- **FRCP Rule 12(a)**, Time to serve Responsive Pleading: The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).

PROPOSED FRCP RULE CHANGES *RECOMMENDED* TO BE PUBLISHED FOR PUBLIC COMMENT IN AUG. 2023

- **FRCP Rule 16(b)(3)(B)(iv)**, Pretrial Conferences, Scheduling, Management; and **FRCP Rule 26(f)(3)(D)**, Duty to Disclose; General Provisions Governing Discovery: The proposed amendments would add about nine words to each of those rules, calling for the parties to discuss and report to the court on their intended method for complying with Rule 26(b)(5)(A), the "privilege log" provision added in 1993. [Note: the Discovery Subcommittee did not endorse adding a rule change to the amendment package for Rule 26(b)(5)(A).]

PROPOSED FRCP RULE CHANGES FOR *CONSIDERATION* BY RULES COMMITTEE

- At its October 2022 meeting, the Advisory Committee also discussed potential amendments to:
    - **FRCP Rule 5(d)(3)(B)(i),** Pro Se Filing regarding allowing pro se electronic filing only by court order or local rule which has not been uniformly applied by district courts;
    - **FRCP Rule 7.1**, Disclosure Requirement regarding expanding the provisions for disclosures designed to flag potential conflicts of interest that may require recusal of the judge assigned to the case such as stock holdings by family members of judges and grandparent corporations;
    - **FRCP Rules 38, 39, and 81**, Jury Demand regarding requirements for removal from state courts, based on a concern dating back to June 2016 that the demand procedure at times leads to inadvertent forfeiture of the right to a jury trial and the theory that making jury trials automatically available in all cases with a right to jury trial might increase the number of cases actually tried to juries;
    - **FRCP Rule 41(a)**, Dismissal of Actions regarding whether an action is dismissed if plaintiff wants to dismiss fewer than all claims against a single defendant, but not all claims or parties without prejudice and without court order;
    - **FRCP Rule 45(b)(1)**, Subpoena regarding methods for "delivering" and serving a subpoena to the named person which most courts interpret "delivering" to mean in-hand service but other courts accept mail (or commercial carrier or means of service of a summons and complaint under Rule 4) as a means of "delivery" under the rule; and
    - **FRCP Rule 55**, Default Judgment regarding the directive that in some circumstances the clerk "must" enter a default or a default judgment but not all districts adhere to this directive.

PROPOSED **FRCP RULE CHANGES** ***NO LONGER UNDER CONSIDERATION*** **BY RULES COMMITTEE**

- **FRCP Rule 6(a)(4)(A),** Time for Filing regarding the end of the last day for electronic filing being defined as "midnight in the court's time zone," and a concern for that requirement being inhumane and requiring young associates to work late, disrupting personal and family life. A study was initiated but lost momentum during the pandemic, during a time when flexibility was important. The committee declined to initiate any changes to the rule.

- **FRCP Rule 63** provides that when a judge conducting a hearing or trial is unable to proceed, another judge may proceed on determining that the case may be completed without prejudice to the parties; and that the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again at a hearing or trial without undue burden. Discussion of this proposal at the March 2022 meeting expressed some concern that
  Rule 63 may unduly limit a successor judge's ability to decide that a witness need not be recalled but additional research revealed that an amendment was not necessary.

- **FRCP Rule 42(a),** Consolidation and Appeal Finality: The Supreme Court, in *Hall v. Hall*, 138 S. Ct. 1118 (2018), ruled that complete disposition of all claims among all parties in what began as an independent action is an appealable final judgment, even though further work remains to be done in another action that was consolidated with the now-concluded action. At the same time, the Court suggested that if problems emerge from this approach, improvements could be made through the Rules Enabling Act process. A subcommittee was convened out of caution, however a study by the Federal Judicial Center from 2015-2017 and 2019-2020 concluded that there was no evidence that opportunities to appeal had been lost for ignorance of the rule established by *Hall v. Hall*. The uncertainty about the character of many consolidations makes it difficult to consider the possibility that the parties, district court, and appellate court could gain by a rule that brings consolidated actions into the partial final judgment provisions of FRCP Rule 54(b). The Committee concluded without dissent to recommend to the Standing Committee that the joint subcommittee be dissolved without further work due to the risks of stirring undue complications and confusing appeal doctrine.

New Mexico State Appellate Opinions

DAMAGES

Morga v. FedEx Ground Package Sys., Inc., 2022-NMSC-013, 512 P.3d 774

In a wrongful death action against FedEx and other Defendants arising from a motor vehicle crash, the jury returned a verdict of $165 million for the four Plaintiffs. Plaintiffs sought compensatory damages, including noneconomic damages, and punitive damages for their injuries and Marialy's and Ylairam's wrongful deaths. At the close of the evidence, the jury was instructed to consider economic damages in the form of funeral and burial costs, lost value of household services and earning capacity considering their respective "health, habits, and life expectanc[ies]" for the loss of two family members, as well as noneconomic damages for the value of their lives "apart from ... earning capacity" and the loss of parental guidance and counseling from the mother to her son. With respect to damages to two other members, the jury was instructed to consider economic damages for "medical care, treatment and services received and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future[, t]he nature, extent and duration of the injury," and any exacerbation of a prior injury. In awarding noneconomic damages, the jury was also instructed to consider the past and future pain and suffering, loss of enjoyment of life, and emotional distress suffered as a result of the accident.

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

Following the entry of the verdict, the district court judge recused herself after participating in an ex-parte communication with Plaintiffs' counsel. A successor judge was appointed pursuant to Rule 1-063 NMRA. Defendants timely filed a motion for a new trial or remittitur on the ground that the verdict was excessive, arguing that it was not supported by substantial evidence and was tainted by passion or prejudice. The successor judge heard argument on this motion and ultimately denied the motion, finding that substantial evidence supported the verdict and that the verdict was not tainted by passion or prejudice. Defendants appealed the verdict as excessive, contending it was not supported by substantial evidence and was tainted by passion or prejudice. The Court of Appeals affirmed in *Morga v. FedEx Ground Package Sys., Inc.*, 2018-NMCA-039, 420 P.3d 586, and Defendants appealed to the NM Supreme Court.

The NM Supreme Court granted certiorari to consider whether the Court of Appeals erred by (1) applying an abuse of discretion standard to review the district court's denial of the defendants' motion for a new trial because the ruling was made by a successor judge who did not oversee the trial, and (2) affirming the district court's denial of the defendants' motion for a new trial on grounds that the verdict was excessive.

First, the New Mexico Supreme Court reiterated that they review claims of excessive verdicts de novo (as a matter of law) and denials of motions for a new trial under an abuse of discretion standard. Defendants argued that because the successor judge did not oversee the trial, the denial of their motion for a new trial should be reviewed de novo. Defendants argued that the decision of a successor judge is not entitled to deference reasoning that deference should be reserved for the judge who participated in the trial and had the opportunity to observe the witnesses and the jury. Defendants asked the Court to adopt a de novo standard of review for decisions of a successor judge, and contend that under this standard the verdict here is excessive. The Court disagreed, and declined to adopt a different standard of review under the circumstances.

Second, the Court held that substantial evidence supported the verdict and the record did not reflect that the verdict was tainted by passion or prejudice. The Court acknowledged the "inherently difficult task of assigning monetary value to nonmonetary losses and the proper roles that the jury and the district court judge play in making this determination," characterizing it as an "inexact undertaking at best." Given the difficulty, as
well as the lack of a fixed standard, in assessing noneconomic loss, it is well settled that this valuation is left to the jury.

Specifically, the Court held that substantial evidence supported the $165 million award for noneconomic damages. Also, based on the substantial evidence presented, the fact that the jury awarded a greater amount than Plaintiffs requested was insufficient to infer passion or prejudice tainted the award of $165 million. In addition, the statements by Plaintiffs' counsel regarding the company's refusal to accept responsibility were not so inflammatory or egregious as to exceed the bounds of ethical conduct and require a new trial. Finally, the Court held that the cumulative effect of the husband's emotional testimony, photographs of the wrecked vehicle, and counsel's statements was insufficient to infer that passion or prejudice tainted the jury's verdict. The award was affirmed.

POST-TRIAL MOTIONS

Collado v. Fiesta Park Healthcare, LLC, 2023-NMCA-014, 525 P.3d 378
Plaintiff, the personal representative of the wrongful death estate of Esther Collado sued Defendants Fiesta Park Healthcare, LLC d/b/a Medical Resort at Fiesta Park (the Medical Resort), Enchanted Health Development, LLC (Enchanted), and WW Management, LLC (WWM), asserting that they were negligent in the care they provided for Mrs. Collado. The jury found that each of the Defendants were negligent and caused injury or damages to Mrs. Collado and allocated a percentage of the negligence to each Defendant. The jury also found that Defendants were engaged in a joint venture.

After entry of judgment on the jury's verdict, Defendants filed a renewed motion for judgment as a matter of law (JMOL), or in the alternative a new trial, on the joint venture claim. The district court determined that the evidence did not support the jury instruction on joint venture and granted Defendants' motion. The district court did not, however, order a new trial. Instead, the district court amended the judgment "to eliminate the provisions imposing joint and several liability on Defendants for Plaintiff's claims against them."

Plaintiff and Defendants each appealed the district court's ruling on the posttrial JMOL. Plaintiff argued that the district court erred in granting the motion for JMOL, while Defendants argue that the district court erred in not also ordering a new trial. Defendants additionally appealed the district court's admission of expert testimony and the evidence supporting aspects of the jury's verdict. The Court of Appeals reversed the district court's order granting the JMOL, affirming all other aspects of district court's rulings, and remanded for entry of judgment reflecting the jury's verdict.

STATUTES OF LIMITATION

Garrity v. Driskill, 2022-NMCA-054, 517 P.3d 928
In a medical malpractice action, the district court granted the defendants' Rule 1-012(B)(6) NMRA motion to dismiss the parents' loss of consortium claim, concluding the parents brought their claim outside the three-year limitations period under both the Medical Malpractice Act's (MMA) statute of repose, NMSA 1978, § 41-5-13 (1976, amended 2021), and the general statute of limitations for personal injuries, NMSA 1978, § 37-1-8 (1976). The parents appealed.

The Court of Appeals held that a parent's claim for loss of consortium in a medical malpractice case is tolled under minority tolling provisions alongside a minor's tort claim from which it is derived when such claims are brought in

the same cause of action. Also, the Court held the tolling of a parent's claim for loss of consortium alongside the minor's medical malpractice claim does not undermine the Medical Malpractice Act's (MMA) benefits for qualified health care providers, nor is it contrary to the purpose of the MMA. The Court of Appeals construed the statute of limitations periods in view of the both the precedent requiring joinder of a parent's loss of consortium claims with the child's negligence action and the public policy of interpreting laws carefully to safeguard minors. Based on this analysis, the Court held that a claim for loss of consortium in a medical malpractice case is tolled alongside the minor's claim from which it is derived, pursuant to the minority tolling provisions of NMSA 1978, Sections 41-5-13 and 37-1-10. Accordingly, the Court reversed the district court's dismissal.

SUBJECT MATTER JURISDICTION

Sipp v. Buffalo Thunder, Inc., 2022-NMCA-015, 505 P.3d 897

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 and oral arguments on the case were held on March 30, 2022, so **STAY TUNED!**

Federal District and Appellate Opinions

DIVERSITY ACTIONS - PROCEDURAL VS. SUBSTANTIVE LAW

Banner Bank v. Smith, 30 F.4th 1232 (10th Cir. 2022)
Banner Bank provided a multimillion-dollar loan to James and Loree Smith. As collateral, James Smith pledged several properties and Banner Bank later contracted to release Loree Smith from all actions associated with the loan. When the loan defaulted, Banner Bank named Loree Smith in a diversity action to foreclose on the collateral. Loree Smith brought a successful breach of contract counterclaim and recovered attorneys' fees through Utah's bad-faith-litigation-fee-shifting statute, where attorney fees are awarded against a party who asserted meritless claims in bad faith. The district court issued a judgment awarding $105,550 in attorney's fees to Loree Smith. Banner Bank appealed to the Tenth Circuit.

The Tenth Circuit reversed the fee award by holding that Utah's bad-faith-fee-shifting statute is a procedural statute, so it cannot be used to recover fees when a federal court sits in diversity. The *Erie* doctrine requires federal courts to apply federal procedural law and state substantive law. The Court distinguished substantive fees from procedural fees, where the former are "are those which are tied to the outcome of the litigation, whereas procedural fees are generally based on a litigant's bad faith conduct in litigation." The Court reasoned the Utah statute conflicts with exceptions to the American Rule–sanctions under Rule 11 and a federal court's inherent power to punish bad faith by shifting fees–by imposing a rival regime for bad-faith fee-shifting

that is governed by the Utah Supreme Court's definition of bad faith. Accordingly, the Court reversed the statutory fee-shifting award but held that on remand the district court remains able to award fees pursuant to the bad-faith exception to the American Rule, the sanctioning mechanism of Rule 11, *or* through arguments below for attorney's fees as breach of contract damages.

Ramirez v. San Miguel Hosp. Corp., 591 F.Supp.3d 1028 (D.N.M. 2022)
A lawsuit alleging medical malpractice and products liability claims was removed to federal court. The plaintiff had named various out-of-state defendants, such as Pfizer, Inc. and Greenstone, LLC, but also named two in-state citizens, a medical provider and local hospital. On removal, the defendants argued the medical provider and the local hospital were fraudulently joined in the lawsuit because the plaintiff failed to exhaust the mandatory administrative procedures under the New Mexico Medical Malpractice Act. The defendant argued the plaintiff had no possibility of recovery against those defendants because the plaintiff did not first present her claims against the in-state defendants to the New Mexico Medical Review Commission ("NMMRC"). *See* NMSA 1978, § 41-5-15(A) (1976) ("No malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered.").

The U.S. District Court for the District of New Mexico analyzed two New Mexico state court cases to rule that a remand was warranted: *Rupp v. Hurley*, 2002-NMCA-023, 131 N.M. 646, and *Belser v. O'Cleireachain*, 2005-NMCA-073, 137 N.M. 623. The U.S. District Court recognized that in *Rupp*, the New Mexico Court of Appeals emphasized "a decision by the NMMRC is not a jurisdictional prerequisite to the filing of a complaint in court" and that the New Mexico Supreme Court has held the New Mexico Medical Malpractice Act could not control or affect the subject matter jurisdiction or procedure in the courts. From *Belser*, the U.S. District Court recognized that the trial court only dismissed the plaintiff's claim *after* granting a stay for the NMMRC to complete a review of the claim but the plaintiff never took any action to file an application with the NMMRC during that stay. Accordingly, the U.S. District Court ruled that the defendant failed to meet its burden to show the plaintiff fraudulently joined the in-state defendants, and remanded the action to state court.

PLEADING STANDARDS

Hennessey v. Univ. of Kansas Hosp. Auth., 53 F.4th 516 (10th Cir. 2022)

A patient alleged a radiology technician sexually assaulted her during her visit to the University of Kansas hospital for emergency care. The patient brought a civil action for negligent supervision against the University of Kansas Hospital Authority ("Authority"), which is a separate entity that oversees the operation of the hospital. The Authority moved to dismiss claiming it was sovereign immunity by arguing it was an arm of the state of Kansas and therefore entitled to the same immunities as the state. The district court granted the motion to dismiss by relying on the state statutory scheme creating the Authority and reasoned the Authority was entitled to sovereign immunity because the Authority is not autonomous from the state and the Authority concerns itself with state-wide rather than local functions.

The Tenth Circuit evaluated four primary factors to determine whether the Authority was an arm of the state: (1) the character ascribed to the entity under state law; (2) the degree of control the state exercises over the entity; (3) the amount of state funding the entity receives and whether the entity has the ability to issue bonds or levy taxes on its own behalf; and (4) whether the entity in question is concerned primarily with local or state affairs. The Court also acknowledged that if any of these factors are in conflict or point in different directions, then the Court moves to public policy concerns on loss of funds to the state: "Where it is clear that the state treasury is not at risk, then the control exercised by the state over the entity does not entitle the entity to Eleventh Amendment immunity." *Id*. at 529 (citations omitted).

Applying this standard of review, the Court first determined as a matter of first impression that it is the defendant who carries the burden of establishing it is an arm of the state entitled to sovereign immunity. The Court held the Authority failed to meet its burden because: (1) the Authority's control of its own funding weighed against an arm-of-the-state conclusion and (2) any uncertainty regarding the finances weighed against the Authority given it bore the burden of persuasion.

PREEMPTION

Thornton v. Tyson Foods, Inc., 28 F.4th 1016 (10th Cir. 2022)

Consumers who purchased beef from various retail stores filed a class-action complaint in state court against meat processors, alleging that their labels deceived consumers into paying higher prices for beef based on the mistaken belief that it originated from cattle born and raised in the United States. New Mexican ranchers filed a separate class-action complaint in state court, alleging similarly situated ranchers were paid less for their domestic cattle as a result of meat processors' conduct. The two class actions were consolidated. After removing the cases, the meat processors filed motions to dismiss, which

were granted on federal preemption grounds. The trial court also denied motions to amend the complaint to replace New Mexico UPA claims with claims under the New Mexico Antitrust Act as futile claims. The consumers and ranchers appealed, arguing the Tenth Circuit should apply the presumption favoring state police powers against the preemption doctrine.

The Tenth Circuit in a 2-1 majority opinion, held that express preemption provision of the Federal Meat Inspection Act preempted the state law claims. The Court reasoned that each one of the plaintiffs' state-law labeling claims– unjust enrichment, breach of warranty, violation of the UPA, and violation of state antitrust law–attempt to establish a labeling requirement different than that imposed and approved by federal law. As such, the Tenth Circuit affirmed the district court's dismissal and held the claims were preempted by federal law.

The dissenting opinion focused on the history and purposes of the legislative history rather than the text of the Federal Meat Inspection Act. Connecting the legislative history to Upton Sinclair's famous novel, The Jungle, Judge Lucero reasoned the Federal Meat Inspection Act had not only a clear intent to protect consumer safety and market integrity, but also to provide state and federal cooperation to protect consumers. Judge Lucero also focused attention on the text of the Act and reasoned competing clauses within the Act suggest that states are free to regulate meat labels so long as such regulations are consistent with the Federal Meat Inspection Act and do not add to the requirements imposed by the Act. In this case, Judge Lucero concluded that the plaintiffs' claims neither deviate nor add to the Act because they merely invoke New Mexico law consistent with the Act's express prohibition on misleading labels.

STATUTES OF LIMITATIONS/DEADLINES TO FILE

Cameron v. EMW Women's Surgical Center, P.S.C., 142 S.Ct. 1002 (2022)
An abortion clinic and two doctors filed a federal suit against Kentucky attorney general and cabinet secretary for health and family services, seeking to enjoin the enforcement of a Kentucky law regulating an abortion procedure. The plaintiffs later dismissed without prejudice the claims against the attorney general through a stipulated dismissal reserving the attorney general's rights, claims, and defenses if any appeals arose out of the action. After a bench trial, the trial court held the Kentucky law unconstitutionally burdens a woman's right to an abortion and issued a permanent injunction against the law's enforcement.

The cabinet secretary appealed. While the appeal was pending, Kentucky elected a new attorney general and a new cabinet secretary. Prior to oral argument before the Sixth Circuit, the newly elected attorney general entered an appearance as counsel for the new secretary. After the Sixth Circuit affirmed the district court's judgment, the attorney general withdrew his appearance on behalf of the cabinet secretary and sought to intervene as a party on behalf of Kentucky and filed a petition for rehearing en banc within the 14-day deadline for an existing party to seek rehearing. The Sixth Circuit denied the attorney general's motion to intervene as untimely because it was not filed until years after litigation had passed. The Supreme Court granted certiorari on the limited question whether the Sixth Circuit should have permitted the attorney general to intervene as a party.

The U.S. Supreme Court held the Sixth Circuit erred in denying the motion to intervene. The Court acknowledged that no provision of law deprives a court of appeals of jurisdiction to entertain a motion for intervention that is filed by a non-party who is bound by the judgment that is appealed. The Court held that resolution of a motion for permissive intervention is committed to the discretion of the appellate court, but that the court fails to exercise its discretion soundly when it bases its ruling on an erroneous view of the law, such as not accounting for the strength of the party's interest in issue as opposed to mere timeliness of an appeal.

Herrera v. City of Espanola, 32 F.4th 980 (10th Cir. 2022)

The Court vacated an order granting motion to dismiss on statute of limitations by distinguishing continuing violation doctrine and repeated violation doctrine.

Homeowners brought a federal action against the City of Espanola and city employees, raising claims under 42 U.S.C. § 1983 and the New Mexico Tort Claims Act based on the city's refusal to provide the homeowners water service due to unpaid water and sewer bills. The U.S. District Court for the District of New Mexico granted the City's motion to dismiss on statute of limitations grounds, and the homeowners appealed.

The Tenth Circuit affirmed in part, but reversed the dismissal in part by distinguishing between the applications of the continuing violation doctrine and the repeated violation doctrine to a statute of limitations defense. The continuing violation doctrine is an equitable principle that applies when the plaintiff's claim seeks redress for injuries resulting from a series of separate acts that *collectively constitute one lawful act*, as opposed to conduct that is a discrete unlawful act. If any acts occurred within the statute of limitations, the continuing violation doctrine provides that the entire course of conduct can be pursued in the action. The repeated violation doctrine is a variation of

the continuing violation doctrine, but differs in that the plaintiff must identify a discrete act occurring within the statute of limitations period and not just the continuing effect of, or continuing harm from, a discrete act that occurred outside the limitations period. Under the repeated violation doctrine, each new violation restarts the statute of limitations, but damages are available only for the violations occurring within that limitations period.

The Tenth Circuit recognized that the continuing violation doctrine is available to a § 1983 litigant and a litigant raising New Mexico Tort Claims Act violations, but held the doctrine did not apply to the plaintiff's claims because their contention was that each time the City denied one of their requests, the denial constituted a separate violation. Under the repeated violation doctrine, the Court held the plaintiffs could pursue § 1983 claims against the city to the limited extent the claims were based on the City's alleged policy of conditioning water service to a new owner on the payment of outstanding bills for which a prior owner is responsible, and enforcement thereof, for the three years predating the homeowner's commencement of their action. Within the context of challenging the City's policy, so long as service, program, or activity remains noncompliant, and so long as the plaintiff is aware of that and remains impacted, the plaintiff may pursue the claim, but the plaintiff has no cause of action for injury that occurred outside the limitations period.

Kemp v. U.S., 142 S.Ct. 1856 (2022)

The Court affirmed a dismissal of motion for relief from judgment as untimely by holding relief from judgment on grounds of mistake was subject to a one-year limitations period. The U.S. Supreme Court considered whether judicial error in a ruling on timeliness of a post-judgment motion was properly addressed under the one-year period specified by Rule 60(b)(1) for "mistake, inadvertence, surprise, or excusable neglect," or whether such errors could also be addressed "within a reasonable time" under the catch-all exception set forth in Rule 60(b)(6). Proceeding from the definition of the term "mistake," the Court concluded that "Rule 60(b)(1) covers all mistakes of law made by a judge." *Id*. at 1862. Accordingly, the Court rejected the Government's argument that Rule 60(b)(1) pertained only to "obvious" legal errors, while also rejecting the petitioners argument that the subsection was limited to "non-judicial, non-legal errors." *Id*. at 1862-63.