Civil Procedure Update

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Presenter Biography:

George Bach teaches constitutional law, evidence, federal jurisdiction, trial practice, and clinic at the University of New Mexico School of Law.

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

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

CIVIL PROCEDURE UPDATE[1]
Judicial Conclave 2019

Rule Changes

Please see the attached amendments to Rule 1-047 NMRA regarding the handling of juror questionnaires. Similar amendments were adopted in the magistrate and metropolitan court rules (Rules 2-603 and 3-603 NMRA).

New Mexico Supreme Court Cases

State ex rel. CYFD v. Mercer-Smith, 2019-NMSC-005

Contempt Power

A consent decree was entered in a child abuse case. CYFD first sought to reconcile the children with the parents and, failing that, then placed them in independent living situation. The court did not approve of the independent living arrangement CYFD came up with and ordered that it be changed. CYFD made an alternative arrangement about which the court said CYFD "found a way to get around my ruling" and declared "quite disturbing the efforts [CYFD] made to circumvent [my] decisions."

In 2004, the parents filed a motion to initiate both criminal and civil contempt proceedings against CYFD. The district court dismissed the criminal contempt motion and proceeded to a bench trial on the civil contempt proceeding. The court found that CYFD "was in direct violation of the court's order" and held CYFD in civil contempt.

After bench trial to determine damages, the court concluded that the parents were entitled to a total of $3,800,000 in damages for emotional distress, loss of enjoyment of life, attorney fees and costs. The Court of Appeals affirmed.

The Supreme Court held that though damages are available in civil contempt in order to compel compliance with a court order, in this case there was no outstanding order to be complied with at the time of the contempt proceedings and thus there was no basis for civil contempt to enforce compliance.

Civil contempt is remedial in nature and serves "to preserve and enforce the rights of private parties to suits and to compel obedience to the orders, writs, mandates and decrees of the court." Civil contempt sanctions may be imposed after notice and an opportunity to be heard.

The intended purpose of these contempt proceedings was to preserve the parents' chance of reconciliation with the children that was allegedly undermined by CYFD's violation of the Placement Order. However, at the time that the contempt proceedings were initiated, the district court had already "accept[ed] ... as an uncontroverted fact" that CYFD had "no duty ... to support reconciliation." Thus, the contempt proceedings were not, in fact, instituted for the remedial purpose of preserving and enforcing the parent's chances of reconciliation. Therefore, the

[1] The cases summarized herein were compiled by Professor Ted Occhialino and edited by my research assistant, David March, and me. - GB

resulting contempt order and award of damages, attorney fees, and costs could not be upheld as a valid exercise of civil contempt power.

The Court concluded that the contempt proceedings in this case were not instituted either to preserve and enforce the rights of the parents or to compel obedience to the district court's Placement Order. Accordingly, the almost $4,000,000 award could not have been remedial and was, therefore, purely punitive in nature.

Once remedial sanctions were no longer available to the district court, the purpose of the award was "to punish [a] completed act of disobedience that ... threatened the authority and dignity of the court." Punitive sanctions, however, can only be imposed for criminal contempt of court and only if the alleged contemnors were afforded adequate due process. Accordingly, the district court's contempt order cannot be affirmed as a valid exercise of civil or criminal contempt power.

Lukens v. Franco, 2019-NMSC-002

Deficient Briefing

The Court commented on what it saw as the deficiencies in the brief before it. "No appellate court or district court should ever hesitate to return briefing or order rebriefing with a short deadline when briefing is unclear or lacks citations or is otherwise unprofessional. '[A]n order to rebrief provides a reasonable means for imposing a minimal level of quality control on the appellate briefing process.' Douglas E. Cressler, *Mandated Rebriefing: A Judicial Mechanism for Enforcing Quality Control in Criminal Appeals*, 44-JUL Res Gestae 20, 20."

"We remind counsel that we are not required to do their research, and that this Court will not review issues raised in appellate briefs that are unsupported by cited authority. When a criminal conviction is being challenged, counsel should properly present this court with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice and is in violation of our rules of appellate procedure. *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 (citations omitted)."

"Courts are not required to try and make sense of work product so flawed that its meaning cannot be discerned. We remind our courts and the New Mexico bar that the New Mexico Rules of Appellate Procedure and Rules of Professional Conduct empower courts to sanction lawyers, including by return of briefs and reassignment of counsel for 'failure to comply with an obligation or prohibition imposed by a rule.'"

New Mexico Court of Appeals

Mendoza v. Isleta Resort and Casino and Hudson Insurance, 2018-NMCA-038, *certiorari granted* May 25, 2018

Rule 19 Joinder of Immune Tribe

Mendoza worked at a casino and was hurt on the job. She filed in State District Court for workers' compensation, naming the Pueblo and its insurer, Hudson. In the gaming compact the Pueblo agreed to participate in the New Mexico Workers' Compensation system.

The trial court dismissed on the ground that the Pueblo enjoyed sovereign immunity. On appeal, the Court of Appeals ruled that it lacked a sufficient record to determine if the Pueblo had sovereign immunity but held that even if the Pueblo had sovereign immunity its insurance company and plan administrator did not.

The defendants argued that that the Pueblo was an indispensable party, so if it could not be joined under Rule 19 because of sovereign immunity, the case against the insurer had to be dismissed for absence of an indispensable party. The Court of Appeals held that the Pueblo was not an indispensable party.

Although there are cases holding that if a tribe is immune the case against insurance companies must be dismissed, they involved contract issues between the tribe and the insurer. Where the contract of insurance involved a contract with the tribe, the rule is in actions involving contract disputes, the parties to the contract are all indispensable, and that includes the tribe that has sovereign immunity. In such cases, because the tribe cannot be brought into state court, New Mexico holds the tribe is indispensable and the action must be dismissed in its absence.

In contrast, here the worker's lawsuit is based on a statutory right to workers' compensation. Filing the certificate of insurance rendered Hudson Insurance primarily liable to injured workers. Thus, the contract between the tribe and the insurer is not being construed or contested, so the Tribe is not an indispensable party.

And under applicable Workers' Compensation law, both the employer and the insurer are directly and primarily liable to the injured worker.

> "Allowing [the insurers] to deny Worker's claim by hiding behind Isleta's sovereign immunity renders the Pueblo's insurance policy illusory and inane and permits the [insurers] to arbitrarily evade judicial review of its determination in any forum."

So, assuming tribal immunity, the immunity does not extend to the insurer who provided the tribe with the Workers' Compensation protection policy.

State ex rel. Balderas v. ITT Educational Services, Inc., 2018-NMCA-044

Enforcement of an arbitration clause against the Attorney General under the Unfair Practices Act

ITT required that all student enrollees sign an arbitration agreement. It also requires an agreement that any information relating to an arbitration proceeding be kept confidential.

The Attorney General filed suit against the school, claiming violations of the New Mexico Unfair Practices Act due to alleged misrepresentations to students. ITT sought an order compelling arbitration in accord with the contracts signed by all students. ITT's argument was that the AG was filing a derivative action on behalf of the students and thus is bound by their agreement to arbitrate.

The Federal Arbitration Act encourages arbitration and seeks to reverse judicial hostility to arbitration by prohibiting state laws that forbid arbitration and also those that stand as an obstacle to accomplishing the goal of encouraging arbitration. But there is still room for state contract law governing the making of the arbitration agreement and its enforcement.

I. Was the Attorney General bound by the students' arbitration agreement?

The District Court denied the motion to compel arbitration. The Court of Appeals affirmed, holding that the Attorney General is free to litigate despite the arbitration agreements in the students' contracts. The Court found that to enforce arbitration on this ground would be contrary to the public policy allowing the Attorney General to pursue litigation in his own name.

II. Collateral Order Doctrine is not appropriate for review of discovery rulings

ITT obtained the district court's certification for an interlocutory appeal of its order compelling discovery of alleged privileged materials. Alternatively, ITT sought review through a writ of error. The Court of Appeals initially granted ITT's writ of error, but subsequently held that the collateral order doctrine and writ of error are not to be used to obtain an interlocutory appeal of discovery orders.

A writ of error is the procedural vehicle used to invoke the collateral order doctrine in New Mexico. *See Carrillo v. Rostro*, 1992-NMSC-054. The collateral order doctrine is generally disfavored, and as a result, courts have limited its application in an attempt to avert piecemeal appeals.

Pretrial orders concerning discovery, particularly orders compelling discovery, are not collateral orders warranting review under a Rule 12–503 NMRA writ of error. *King v. Allstate Ins. Co.*, 2004-NMCA-031, ¶ 19.

Because the matter was more properly raised by interlocutory appeal, the Court quashed the writ of error and granted ITT's application for interlocutory appeal.

Sloane v. Rehoboth McKinley Christian Health Services, 2018-NMCA-048

Class Actions and Collective Actions

Plaintiffs filed a lawsuit alleging violation of the New Mexico Minimum Wage Act. Plaintiffs joined a claim for restitution. The issue dealt with meal breaks that were unpaid unless the worker worked through the break and properly noted that in accordance with company procedures.

Plaintiffs sought certification as a "collective action" for violation of the MWA pursuant and also as a class action under Rule 1-023 for the unjust enrichment claim. The district court denied both the attempt to pursue a collective action and the Rule 23 class action.

The Court of Appeals reversed the denial of the "collective action" and affirmed the denial of the Rule 1-023 class action.

I. Collective Action Under MWA

NMSA 1978, § 50-4-26(D) allows one or more employees to sue for themselves and other employees "similarly situated."

The first New Mexico case to deal with MWA "collective actions" was *Armijo v. Wal-Mart*, 2007-NMCA-120. There the Court said "had the legislature wanted to apply Rule 1-023 standards to collective actions under the MWA it could have done so."

One difference from Rule 1-023 is that in a collective action, workers get notice of the action and must choose to opt in. In *Armijo*, the court adopted a "two-tiered ad hoc approach" to determine whether to allow a collective action.

In the first stage, the court makes an initial determination of whether there are potential collective action members who are similarly situated. This is not a certification of the collective action but a discretionary decision that determines whether to send notice to the other workers potentially similarly situated. Requirements for meeting this standard are minimal: just "substantial allegation that the putative class members were together the victims of a single decision, policy or plan."

In the second stage, a stricter standard of "similarly situated" applies, and considers if:

- the class members have disparate factual settings;
- the defenses to the claims are individual to each class member;
- there are fairness or procedural considerations that may impact the decision whether to certify the collective action.

Here the workers were all in one facility. There is no requirement of a common policy. In *Armijo* there was a great deal of discovery before the first stage issue was resolved and that discovery was used, but it is not essential that there be detailed discovery at the first stage.

The district court determined the workers were collectively discouraged from claiming they worked through lunch. The district court said this was not sufficient because there was no proof of illegal conduct by the defendant. But illegal conduct is not required. It sufficed that they workers sometimes were required to work through lunch and discouraged from notifying the employer via a "no lunch" button.

II. Rule 1-023 class certification

Plaintiffs sought to certify a Rule 1-023(B)(3) class action. A prerequisite for any class action is that there be questions of law or fact common to the class. And in a Rule 1-023(B)(3) class action, the plaintiff also must establish that the common issues predominate over any questions affecting only individual members.

The district court said neither was met. The Court of Appeals affirmed the denial of certification.

> The questions for the district court, then, were whether Plaintiffs' common allegations that the employees worked through their meal breaks because Rehoboth's staffing levels required them to and that the employees did not seek compensation for such work because of a culture that discouraged the use of the "no lunch" button were not only

susceptible to common proof, but also whether those issues predominated over issues subject to individualized proof.

The Court of Appeals said that the plaintiffs did not in any way describe *how* the common questions particular to this case will be proven, or indeed how Plaintiffs' nondescript proposed methods of proof compared with those in precedent. Plaintiffs presented no methodology or form for their claim of a method for presenting data to support common proof assertions.

Federal National Mortgage Assoc. v. Chiulli, 2018-NMCA-054

Dismissal with prejudice as a sanction in foreclosure action.

Sun Trust filed a foreclosure action. Chiulli filed an answer claiming that Sun Trust lacked standing to sue because it could not prove it was the assignee of the mortgage. Chiulli sought discovery relevant to the chain of assignments by which Sun Trust got the assignment of the mortgage. When Sun Trust did not timely respond, Chiulli obtained an order compelling a response. When Sun Trust did not timely comply with the order, Chiulli sought and obtained a sanction against Sun Trust.

The trial court granted a motion to dismiss "with prejudice." While the motion was being considered, Fannie Mae was substituted as Plaintiff and agreed to be bound by the prior order of dismissal (apparently with the intent of appealing, but it then abandoned the appeal).

Chiulli then filed a motion for post-judgment relief claiming that Fannie Mae was continuing to bill Chiulli and reporting him as delinquent to credit agencies. Chiulli sought an order enforcing the dismissal with prejudice and an injunction against continuing harassment.

Fannie Mae argued that it was free to pursue Chiulli for foreclosure for defaults that occurred after the dismissal with prejudice. The trial court ruled that it intended by the "with prejudice" dismissal to bar Sun Trust and Fannie Mae from thereafter pursuing foreclosure or any action on the note and entered an order to that effect against Fannie Mae. The Court of Appeals affirmed.

A court has inherent power to impose a variety of sanctions on both litigants and attorneys. When Fannie Mae abandoned its appeal it was bound to the court's sanction-dismissal "with prejudice" and should have continued the appeal if it believed that this was error.

When a trial judge dismisses "with prejudice" the court should explain the impact of the ruling on the parties and claims, both for appeal clarity and for determining later preclusion issues. Here, the language of the order was ambiguous as to the intended scope of "with prejudice."

But the trial judge clarified its meaning in the subsequent ruling. An appellate court grants substantial leeway to a trial court's interpretation of its own order, and the appellate court will not reverse the court's clarification of its originally ambiguous order unless the court's construction is manifestly unreasonable. It was not manifestly unreasonable to preclude Sun Trust and its successor, Fannie Mae, from pursuing any action on the mortgage and the note.

Dart v. Westall, 2018-NMCA-061

Whether a denial of summary judgment can be appealed after a trial on the merits.

Dart filed a multi-claim lawsuit against Officer Westall, the Police Department and the City claiming entitlement to damages under the Whistle Blower Protection Act. The trial court granted summary judgment as to several of the claims, leaving only one for trial. Summary judgment was denied on the remaining claim on the ground that there were disputed issues of fact requiring a jury determination.

A jury trial on the remaining issue resulted in a judgment for Dart. After post-trial motions failed, Defendants appealed. One issue raised was whether the trial court erred in denying summary judgment on the remaining WPA claim.

The Court of Appeals held that on these facts, denial of summary judgment is not reviewable after trial, final judgment and post-trial motions.

The general rule is that the denial of a summary judgment cannot be appealed after a trial and judgment. In New Mexico an exception exists if the denial of summary judgment was based entirely on the trial court's alleged erroneous construction of the law.

The general rule is stated in *Green v. Gen. Accident Ins. Co. of Am.*, 1987-NMSC-111, which holds that denial of a motion for summary judgment is not reviewable after final judgment on the merits and if a summary judgment motion is improperly denied, the ruling is merged in the subsequent trial and judgment. There is an exception to this general rule. In *Gallegos v. State Bd. of Educ.*, 1997-NMCA-040, the court stated that *Green* applies to permit post-trial appeal of denial of summary judgment, but only if "(1) the facts are not in dispute; (2) the only basis of the ruling is a matter of law which does not depend to any degree on facts to be addressed at trial; (3) there is a denial of the motion; and (4) there is an entry of a final judgment with an appeal therefrom").

The *Green* exception did not apply because the basis for the denial of summary judgment was that there were factual disputes that required a jury determination, rather than being based on an alleged error in the determination of the law to apply when resolving the motion.

Hernandez v. Grando's LLC, 2018-NMCA-072

"Admissions" of Conclusions of Law in Answer

Hernandez filed suit against Grando's alleging negligence, warranty, and strict product liability. Grando's filed an answer that admitted that it owed three specific duties to Hernandez. One month later Grando's retained new counsel. Grando's filed a summary judgment motion arguing that it owed no duties to Hernandez. Hernandez responded that Grando's was bound by its admissions in the answer. Grando's argued the admissions were made in error and said it would seek leave to amend to withdraw the admissions.

Grando's made the motion to amend but the court did not rule on the motion. Instead it granted summary judgment for Grando's.

The Court of Appeals held that legal propositions in pleadings and summary judgment briefs are not facts, and need not be admitted or denied. Whether a duty is owed is a question of law. The facts alleged in the complaint are accepted as true but not conclusions of law. Not only

did the court not have to accept the admission, it also had an independent obligation to determine the accuracy of the admissions of conclusions of law.

"On a motion for summary judgment, a court is not wed to a party's assertion of conclusions of law whether in a petition, complaint, or motion for summary judgment, even if the conclusions are admitted by the opposing party."

Rodriguez v. Ford Motor Co., 2018 WL 6716038 (N.M. Ct. App.)

Edgar Rodriguez bought a used Ford vehicle in New Mexico from a private seller. He died in a one-car accident in New Mexico. His estate filed a wrongful death action against Ford alleging defective design. The vehicle was designed in Michigan, assembled in Kentucky and initially sold by an independent dealer in Arizona.

Personal Jurisdiction

Plaintiff asserted specific jurisdiction because the tortious act occurred in New Mexico, and general jurisdiction because Ford was registered to transact business in New Mexico. The district court found specific jurisdiction but not general jurisdiction. The Court of Appeals affirmed the existence of jurisdiction but based it on general jurisdiction under the registration statute. The Court analyzed if recent Supreme Court holdings had overruled the traditional consent to jurisdiction by registration rules and concluded that this theory of jurisdiction was still viable.

Therefore, a foreign corporation that has registered to transact business in New Mexico is subject to general personal jurisdiction in New Mexico for any cause of action including those where the events leading to the lawsuit took place entirely outside of New Mexico.

But, a foreign corporation not registered to transact business in New Mexico is not subject to general personal jurisdiction in New Mexico for a cause of action where all the events take place outside of New Mexico unless New Mexico is the principal place of business of the corporation.

CHANGES TO RULE 1–047 NMRA. JURORS

A. Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

B. Alternate jurors. In any civil case, the court may direct that not more than six (6) jurors in addition to the regular jury be called and empaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one (1) peremptory challenge in addition to those otherwise allowed by law if one (1) or two (2) alternate jurors are to be empaneled, two (2) peremptory challenges if three (3) or four (4) alternate jurors are to be empaneled, and three (3) peremptory challenges if five (5) or six (6) alternate jurors are to be empaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

C. Juror qualification and questionnaire forms; retention schedule; certification of compliance with privacy requirements. Prior to the examination of prospective jurors under this rule, the court shall require each prospective juror to complete a juror qualification and questionnaire forms as approved by the Supreme Court, which shall be subject to the following protections:

(1) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court ~~as well as in the possession of others~~, ~~including~~ attorneys, parties, and any other individual or entity shall be kept confidential unless ordered unsealed under the provisions in Rule 1–079 NMRA;

(2) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity shall be destroyed according to the following deadlines:

(a) All copies in the possession of the court shall be destroyed ninety (90) days after expiration of the term of service of the juror or prospective juror unless an order has been entered directing ~~the~~ their retention ~~of the form~~ for a longer period of time; and

(b) All copies in the possession of the attorneys, parties, and any other individual or entity shall be destroyed within one hundred twenty (120) days after final disposition of the proceeding for which the juror or prospective juror was called unless permitted by written order of the court to retain the copies for a longer period of time, in which case the court's order shall set the deadline for destruction of those copies; and

(3) On or before the destruction deadline required under this rule, all attorneys and parties shall file a certification under oath in a form approved by the Supreme Court that they have complied with the confidentiality and destruction requirements set forth in this paragraph.

D. Supplemental questionnaires. The court may order prospective jurors to complete supplemental questionnaires. Unless otherwise ordered by the court, the party requesting

supplemental questionnaires shall be required to pay the actual costs of producing and mailing the supplemental questionnaires. The confidentiality and destruction protections in Subparagraphs (C)(1), (2), and (3) of this rule shall apply to any supplemental questionnaires ordered under this paragraph.

[As amended by Supreme Court Order No. 13–8300–042, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 18–8300–008, effective December 31, 2018.]

2018 NEW MEXICO COURT ORDER 0011 (C.O. 0011)