CIVIL PROCEDURE UPDATE
NEW MEXICO STATE BAR ANNUAL MEETING 2022[1]

Approved State Rule Amendments

Rule 1-003.3. Commencement of foreclosure action; certification of pre-filing notice required.

Rule 1-034 Production of documents and things and entry [~~upon~~] on land for inspection and other purposes.

Rule 1-054.2 Judgments in foreclosure actions; certification concerning [~~loan modification and~~] the absence of loss mitigation negotiations required. Related forms: 4-712; 4-227; 4-228; 4-229; 4-230

Rule 1-093 Criminal Contempt (Suspended)

Rule 1-145 Conservatorship proceedings; professional conservators; procedures and time limits for filing reports and financial statements.

LR2-603[2] Court-annexed Arbitration

UJI 13-215 Request for Admission

Changes due to Criminal Expungement

Rule 1-004. Process.

Rule 1-077.1 Expungement

Rule 1-079 Public inspection and sealing of court records.

Proposed State Rules/Amendments of Note

Rule 1-053.1 and 1-053.2 (see *Rawlings v. Rawlings*, below)

Rules 1-150, 1-151, 1-152, 1-153, 1-154, 1-155, and 1-156 NMRA- *Kinship Guardian Act*

UJI 13-110 Conduct of Jurors

[1] Many thanks to Professor Veronica Gonzales-Zamora and attorney Julio Romero for sharing their Civil Procedure materials from their CLE for the New Mexico Trial Lawyers Association.
[2] Local Rule Amendments can be found at https://supremecourt.nmcourts.gov/supreme-court/opinions-rules-and-forms/approved-amendments-to-rules-and-forms/2021-2/ and 2022-2.

Amendments to Federal Rules of Civil Procedure

Rule 7.1 Disclosure Statement

Proposed Amendments to Federal Rules of Civil Procedure

Rule 15 Amended and Supplemental Pleadings

Rule 72 Magistrate Judges: Pretrial Order

Rule 87 (New) Civil Rules Emergency

New Mexico Supreme Court Cases

Chavez v. Bridgestone Americas Tire Operations, LLC, **2022-NMSC-006** – *Personal Jurisdiction*

The Court considered whether a foreign corporation that registers to transact business and appoints a registered agent under Article 17 of New Mexico's Business Corporation Act (BCA), NMSA 1978 §§ 53-17-1 to -20 (1967, as amended through 2021), thereby consents to the exercise of general personal jurisdiction in New Mexico.

The Court declined to reach the constitutional challenges (Due Process, Dormant Commerce Clause) presented and held, as a matter of statutory construction, that the BCA does not require a foreign corporation to consent to general personal jurisdiction in New Mexico, overruling *Werner v. Wal-Mart Stores, Inc.*, 1993-NMCA-112.

None of the specific products involved in the consolidated lawsuits was designed or manufactured in New Mexico. The Manufacturers also did not directly sell the products to Plaintiffs in New Mexico. It does appear, however, that the Manufacturers have actively marketed and distributed identical or nearly identical products in our state.

The Supreme Court noted that pre-*International Shoe* authority (*Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93 (1917)) finding general jurisdiction on the grounds of consent by registration take an expansive view of general personal jurisdiction would appear inconsistent with the "at home" standard for general personal jurisdiction in recent U.S. Supreme Court precedent. "*Pennsylvania Fire* is at odds with the current approach to personal jurisdiction and the expectations created by the expansion of interstate and global commerce."

However, despite these considerations, the New Mexico Supreme Court recognized that the United States Supreme Court has not expressly overruled *Pennsylvania Fire* or directly revisited the issue of consent by registration since *International Shoe*. "Familiar principles of stare decisis instruct that *Pennsylvania Fire* should be followed if the circumstances so demand."

> Foremost to our decision, we conclude that the plain language of the BCA does not require a foreign corporation to consent to jurisdiction. At no point does the BCA state that a foreign corporation consents to general personal jurisdiction by registering and appointing a registered agent under the Act. We will not graft a requirement of this consent onto the language of the statute, as we conclude that the Legislature has not clearly expressed an intent to require foreign corporations to so consent.

Chavez, 2022-NMSC-006, ¶ 41. Thus, we conclude that any legislative intent to require a foreign corporation to consent to general personal jurisdiction should be "clearly, unequivocally[,] and unambiguously express[ed]" in the statutory text.

***Ridlington v. Contreras*, 2022-NMSC-002** – *Summary Judgment*

In 2015, Alvino Contreras (Father) signed twenty-six quitclaim deeds conveying nearly 1900 acres of property to Bobby Contreras (Son). A year later, Linda Contreras Ridlington (Daughter) filed suit to void the deeds, alleging in part that they were obtained through undue influence. Son filed a motion for summary judgment, relying on the presumption that a duly executed conveyance is valid and arguing that Daughter's claim of undue influence therefore required dismissal.

Of the six "undisputed facts" provided in support of the motion for summary judgment, only one bore on the outcome of this case. It read, "The properties were transferred in writing, with the property sufficiently described, consideration noted, signed by the grantor, and witnessed by a neutral third party." This "undisputed fact" was that, "[a]s a matter of law, [Daughter's] complaint fails due to the statutory requirements of conveyance of title having been met by [Father] in properly conveying land to ... [S]on." After procedural delays, Daughter filed a response that largely addressed challenges to her standing and did not attach any evidence to counter Son's proffered legal presumptions.

Son maintained that Daughter had a duty to rebut the motion for summary judgment by attaching evidence to the response, arguing that "all [Daughter has] done is restate the complaint." Daughter responded that asserting a presumption of the deeds' validity alone is not sufficient to prevail on summary judgment. On rebuttal, Son returned to his contention that the deeds all facially complied with the statutory requirements for a valid conveyance and that without contrary evidence, the motion for summary judgment must be granted.

The district court found for Son on his motion for summary judgment. It concluded that Son met his prima facie showing of entitlement to summary judgment on Daughter's undue influence claim in part because "[he] met his burden of proving the execution of the deeds is valid." The district court also determined that by the simple act of producing deeds that met all statutory requirements, the burden to present evidence contradicting the deeds' presumed validity shifted to Daughter, and that Daughter failed to meet that burden. The Court of Appeals affirmed the district court in a split decision, reasoning that statutorily proper deeds are presumptively valid and that the evidentiary burden had therefore shifted to Daughter to rebut the presumption of validity.

Ultimately, a nonmoving party does not need to "establish all elements of the claim" in order to prevail on summary judgment. *Bartlett v. Mirabal*, 2000-NMCA-036, ¶¶ 3, 17, 39 (holding that the United States Supreme Court decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), had not been adopted by New Mexico courts and declining to adopt *Anderson*'s higher evidentiary burden of proof). All that is required is that the nonmoving party presents evidence "sufficient to give rise to several issues of fact." *Bartlett*, 2000-NMCA-036, ¶ 17 (internal quotation marks and citation omitted). "Summary judgment should not be granted when material issues of fact remain or when the facts are insufficiently developed for determination of the central issues involved." *Id.* (internal quotation marks and citation omitted).

Summary judgment in New Mexico is "a drastic remedial tool which demands the exercise of caution in its application." Generally, "New Mexico courts ... view summary judgment with disfavor, preferring a trial on the merits." In reviewing a district court's summary judgment decision, the appellate court will conduct a whole-record review of "the facts in the light most favorable to the party opposing summary judgment" and "draw all reasonable inferences in support of a trial on the merits."

The burden was on defendants to show an absence of a genuine issue of fact, or that they were entitled as a matter of law for some other reason to a summary judgment in their favor. However, once defendants had made a prima facie showing that they were entitled to summary judgment, the burden was on plaintiff to show that there was a genuine factual issue and that defendants were not entitled as a matter of law to summary judgment. In other words, the moving party has the burden to "make a prima facie showing that there is no genuine issue of fact as to one or more of the requisite elements in non-movant's claim." If this prima facie showing is made, "it is then the burden of the nonmoving party to present a concise statement of all of the material facts as to which the moving party contends no genuine issue exists."

"[O]nce a presumption of undue influence is raised, the contestant's burden of going forward with the evidence is satisfied and he or she is not susceptible to a motion for judgment as a matter of law." This turns in large part on an understanding of Rule 11-301 NMRA governing presumptions in civil cases, which states that "unless a state statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." The Supreme Court made clear that Rule 11-301 "eliminated the 'bursting bubble' theory of presumptions, and a presumption now retains evidentiary effect throughout the trial, so as to permit the fact finder to draw an inference of the presumed fact from proof of the basic or predicate fact."

"Evidence sufficient to rebut the presumption must *at least* balance the prima facie showing of undue influence. If sufficient evidence is not presented to rebut the presumption, the fact finder may find the presumption of undue influence established." Son's testimony regarding how the transaction took place may be sufficient to rebut the presumption of undue influence. However, the Supreme Court concluded that the simple introduction of a deed–with its own established presumption of validity–is not a magic needle that bursts the bubble of presumption that Daughter has rightly established. It certainly does not remove from this dispute the factual

allegations upon which the undue influence claim is grounded. This is true at trial and thus is certainly true at summary judgment.

Here, there were sufficient circumstances in the record demonstrating "a confidential or fiduciary relation" and "suspicious circumstances" surrounding the deed conveyances. In addition to Daughter raising allegations of duress and coercion in her complaint, Son admitted that he prepared the deeds himself, that the conveyances were "given" to him without consideration, and that he and Father "have all their lives had a close and open relationship, and lived next door to one another." The district court also had record of the fact that Father was declared legally incapacitated approximately one year after conveyance of the deeds. All of these facts directly implicate the elements of undue influence.

New Mexico courts have recognized that, in order to meet the initial burden on summary judgment, the movant (Son) had the burden of "negating at least one of the essential elements upon which the plaintiff's [Daughter's] claims are grounded."

Son alleged, and the district court and Court of Appeals agreed, that he met the movant's summary judgment burden by asserting presumptions of the deeds' validity. However, the presumption of the facial validity of the deeds within Son's motion for summary judgment does not negate or even address any of the elements of undue influence. *See Ridlington,* A-1-CA-37029, mem. op. ¶ 23 (Duffy, J., dissenting) ("[N]either [Son] nor the majority explain[s] how the presumptions attached to a facially valid deed apply within the contours of an undue influence claim. Because the presumptions do not address or negate the elements of undue influence, they are insufficient to establish [Son's] prima facie showing.").

The Court noted that it had previously recognized that undue influence may nullify an otherwise statutorily proper deed conveyance.

"Thus, in light of New Mexico's strong presumption in favor of trial on the merits, we hold that the district court erred in finding that Son met his initial prima facie burden to negate Daughter's claims of undue influence."

<u>New Mexico Court of Appeals Cases</u>

***Sandoval v. Gurley Properties Ltd.*, 2022-NMCA-004 *cert. denied* (Dec. 27, 2021) -** *Bifurcation*

Arthur Chavez died in the care of a skilled nursing facility nineteen 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 initially taken to a hospital in Gallup, where doctors diagnosed him with a complex left hip socket fracture. Mr. Chavez was airlifted to UNMH in Albuquerque that evening, where he remained for seven days until he was discharged to Paloma Blanca Health and Rehabilitation, LLC. Mr. Chavez died twelve days later from a pulmonary embolism.

Mr. Chavez's daughter, Plaintiff Debra Sandoval, and his wife, Plaintiff Gloria Chavez, filed suit against Gurley Properties Limited, which owned the apartment complex where Mr. Chavez fell, UNMH, Paloma Blanca, and other individual medical providers for negligence and wrongful death. After a four-week trial, the jury found in favor of Plaintiffs on all matters and awarded

Plaintiffs over $18 million for the wrongful death, of which it determined UNMH to be twenty-five percent responsible.

UNMH argued that the district court erred in failing to bifurcate the trial after the court determined that Mr. Chavez had suffered separate and distinct injuries, and thus, that Gurley and UNMH are successive tortfeasors. According to UNMH, an original tortfeasor and a successive tortfeasor should not be tried together in a single trial unless there is some question of who caused the first injury. UNMH maintained that because it played no role in causing the original injury in this case—the hip fracture—it should have been excused from the trial, and Plaintiffs should have been compelled to litigate against Gurley alone for the entirety of the harm.

Rule 1-042(B) NMRA, states in relevant part that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim [or issue.]"

The Court of Appeals held that the law does not categorically require bifurcation under the circumstances presented. On the contrary, the Uniform Jury Instructions that followed on the heels of our Supreme Court's holding in *Payne v. Hall*, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599, specifically contemplate that a plaintiff may litigate against both the original tortfeasor and the successive tortfeasor(s) in a single action. *See* UJI 13-1802D NMRA; *see also* UJI ch. 18, app. 1 (stating that the appendix includes a sample set of instructions for "those cases where suit is brought against both the potential original and successive tortfeasors").

UNMH also 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 Court held that this fell short of establishing that a single trial against all tortfeasors is improper or should be bifurcated as a matter of law, and overlooks the myriad reasons why a plaintiff may seek to obtain a judgment against all parties liable for the second injury. "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."

Denying the motion to bifurcate was not an abuse of discretion, since Plaintiffs' complaint alleged alternative theories of successive tortfeasor liability and concurrent tortfeasor liability and there was conflicting evidence about the divisibility of the injury—the key issue in determining which theory applied.

***Central Market, Ltd., Inc. v. Multi-Concept Hospitality, LLC*, No. A-1-CA-38131, 2022 WL 168797 (N.M. Ct. App. Jan. 19, 2022)** – *Notice Pleading of Affirmative Defenses or Counterclaims*

This case was brought by landlord Central Market Ltd., Inc. (Central Market) to recover rent and maintenance fees it claimed were owed to it under the terms of a commercial lease agreement with tenant Multi-Concept Hospitality, LLC (MCH). Central Market sued MCH for breach of the Lease, and sued Sham Naik and Peter Gianopoulos (Guarantors), the owners of MCH, for breach of their personal guaranty of MCH's obligations under the Lease. Following a bench trial, the district court concluded that the amounts Central Market failed to pay MCH for work performed

under the terms of the Lease exceeded the amount MCH owed in rent and maintenance fees. The district court entered judgment for MCH, awarding MCH the amount of its overpayment and awarding Guarantors attorney fees and costs as the prevailing parties.

Naik and Gianopoulos started a restaurant business, forming MCH, a limited liability company. In November 2010, MCH entered into a seven-year commercial lease agreement with Central Market to rent a commercial space in downtown Albuquerque, New Mexico. The Lease included, as an addendum, a personal guaranty (Guaranty Agreement) under which Gianopoulos and Naik guaranteed MCH's payment under the Lease. The Guaranty Agreement provided that Guarantors' personal liability "shall not be in any way affected by ... any claim, defense, counterclaim or setoff which the Tenant [MCH] may have or assert."

A procedural note

The Court of Appeals noted that Central Market failed to include in its statement of proceedings a single citation to the trial transcript. More importantly, both in its statement of proceedings and in its argument, Central Market described only the evidence that supports its claims, while failing to bring to attention and provide citation to the evidence supporting the district court's findings. Several times in its brief, for example, Central Market alleged that "[t]here was no substantial evidence" adduced at trial, when, in fact, the Court's review showed direct support in the record for the district court's finding. The testimony of a single witness, if found credible by the district court, is sufficient to support a finding, and, under the rules of this Court governing briefing, such supporting testimony must be brought to the Court's attention. *See* Rule 12-318(A)(3) NMRA(providing that a contention that a finding of fact is not supported by the substantial evidence "shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing on the proposition"); *see also Mountain States Tel. & Tel. Co. v. Suburban Tel. Co.* 1963-NMSC-120, ¶ 7, 72 N.M. 411, 384 P.2d 684 (holding that the Court does not disturb the trial court's findings when the appellant's brief points to contrary evidence but neglects to point out supporting evidence).

The Setoff

Central Market argued that the district court erred in offsetting amounts owed to MCH under the Lease for tenant improvements against the amount Central Market proved remained unpaid in rent. Central Market argued that "setoff" is either an affirmative defense or a counterclaim, which must be specifically pleaded in the answer to the complaint or in the pretrial order. Central Market claimed that it was prejudiced in the preparation of its case by MCH's failure to specifically plead setoff.

This issue arose in the district court when Central Market, near the end of the second (and last) day of trial, objected for the first time to testimony introduced earlier in the trial supporting MCH's claim that it had never been paid the full amount of a promised $30,000 reimbursement by Central Market for "tenant improvements" required by the Lease. The shortfall claimed by MCH was $22,500.

Central Market objected to testimony on this issue on the basis that MCH was seeking a setoff for tenant improvements; setoff was an affirmative defense; and affirmative defenses not pleaded with specificity in the answer to the complaint or in the pretrial order are barred. The district court rejected Central Market's claim that the word "setoff" must specifically be used, or the label "affirmative defense" or "counterclaim" specifically affixed, and found that the contentions in the pretrial order adequately put Central Market on notice of MCH's claim for credits or setoff based on tenant improvements.

The Court of Appeals assumed, without deciding, that a claim for a setoff under the circumstances of this case is an affirmative defense or a counterclaim, as Central Market contends. It noted that because Rule 1-008(C) NMRA allows the district court to treat an affirmative defense as a counterclaim, or a counterclaim as an affirmative defense, it need not distinguish between the two kinds of claims.

Even where a claim is an affirmative defense or a counterclaim, the district court's rules of civil procedure are not rigidly applied to bar a claim based on a technical error in the pleadings. *See* Rule 1-008(E)(1) ("No technical forms of pleading ... are required."). "The theory of pleadings is to give the parties fair notice of the claims and defenses against them, and the grounds on which they are based." Contrary to Central Market's contention that an affirmative defense or counterclaim must be specifically labelled as such, "notice pleading does not require that every theory be denominated in the pleadings—general allegations of conduct are sufficient, as long as they show that the party is entitled to relief and ... [are sufficient so that] the parties and the court will have a fair idea of the action about which the party is complaining."

Consistent with this approach to pleading, which focuses on whether the objecting party was prejudiced by a failure to receive earlier notice of a claim, our rules of procedure allow omissions in the pleadings to be cured by inclusion of a new contention, affirmative defense, or counterclaim in the pretrial order, *see* Rule 1-016 NMRA, or by amendment of the pleadings to conform to the evidence at trial, Rule 1-015(B) NMRA. So long as the inclusion of a contention in the pretrial order or the litigation of the issue at trial is with the consent or implied consent of the opposing party the pleadings will be deemed amended, Rule 1-015(B). Finally, "[e]ven if the [opposing] party has not consented to amendment, a trial court is required to allow it freely if the objecting party fails to show he will be prejudiced thereby."

The pretrial order entered by the district court in this case, without objection by Central Market, and without any subsequent request for modification of the order, included the following claim in MCH's list of contentions: "There are unpaid tenant improvements, which should be credited to [MCH and Guarantors]." In its list of contested issues of fact, the pretrial order included the following issue: "Whether Plaintiff [Central Market] compensated Defendants [MCH and Guarantors] for the improvements that were completed." The contested issues of law included "those implicit in the foregoing issues of fact." Central Market did not object to the pretrial order and never sought its amendment. As our Supreme Court has noted, "[t]he principle is well established that a pretrial order, made and entered without objection, and to which no motion to modify has been made, controls the subsequent course of action."

The pretrial order, under the circumstances of this case, was adequate to put Central Market on notice of MCH's affirmative defense or counterclaim of setoff of money owed MCH under the

Lease for tenant improvements. Although Central Market claimed both undue surprise and undue prejudice from the failure of MCH to plead setoff as an affirmative defense or counterclaim in its answer, asserting that it "was denied the opportunity to prepare to defend," Central Market offered no explanation of how the preparation of its defense was impacted and described no additional evidence it could have offered if it had earlier notice of the setoff claim. *See Schmitz*, 1990-NMSC-002, ¶ 17, 109 N.M. 386, 785 P.2d 726 ("The test of prejudice is whether the party had a fair opportunity to defend and whether it could offer additional evidence on the new theory.").

The Court of Appeals found no evidence of prejudice in our review of the record. Although setoff was not pleaded in MCH's answer to the complaint, it was specifically pleaded in Naik's answer, thereby putting Central Market on notice of the claim from the outset of the proceedings. In its opening remarks at trial, Central Market acknowledged that the dispute about payment for improvements made by MCH had been ongoing throughout the term of the Lease. Central Market also acknowledged at trial that the parties had met before trial in an attempt to resolve MCH's claim that it was owed money for tenant improvements. The trial record thus establishes that Central Market was aware of MCH's claim for setoff and was prepared to defend against MCH's allegation that Central Market had underpaid them for tenant improvements. *See Charley v. Rico Motor Co.*, 1971-NMCA-004, ¶¶ 18-19, 82 N.M. 290, 480 P.2d 404 (holding that even though the defendant's claim of setoff was not pleaded as a counterclaim, the district court did not error in crediting the amount of a repair bill, where there was a debt, the plaintiff was aware there was an issue about payment of the bill, and the matter was fully litigated).

***Deutsche Bank Nat'l Tr. Co. as Tr. for New Century Home Equity Loan Tr. 2004-3 v. Valerio,* 2021-NMCA-035** - *Rule 1-060(B) NMRA*

In light of our Supreme Court's recent jurisprudence holding that standing in mortgage foreclosure cases is prudential and not jurisdictional because such causes of action are derived from the common law, rather than statutory in origin, this case required the Court of Appeals to determine the scope of relief from judgments provided by Rule 1-060(B) NMRA in mortgage foreclosure cases.

The question was whether a homeowner may raise standing as a meritorious defense when seeking to reopen a default judgment under Rule 1-060(B)(6), and whether the district court has discretion to grant the motion under those circumstances.

In August 2004, Christine and Lucy Valerio (Mortgagors) executed a promissory note (Original Note) secured by a mortgage on their home. On May 2, 2012, Deutsche Bank brought a foreclosure complaint against Mortgagors. Lucy Valerio died prior to the filing of Deutsche Bank's complaint. On May 30, 2012, Deutsche Bank filed its first amended complaint. Both of Deutsche Bank's complaints stated that it was "the holder in due course of the note and the mortgagee of the mortgage" and included a copy of the Original Note, which listed New Century Mortgage Corporation as the original holder. Seven months later, however, Deutsche Bank filed an affidavit of lost Original Note, stating that it was "the legal holder of a Promissory Note ... executed by [Mortgagors]" but that the Original Note "has been lost or cannot be located." It further indicated that the Original Note had been lost since September 4, 2004, at the latest,

though Deutsche Bank's complaints indicate that the mortgage was not assigned to Deutsche Bank until some years later. The notice of filing did not reflect whether the affidavit was served on Mortgagors.

On January 29, 2014, Deutsche Bank moved under Rule 1-055 NMRA for a default judgment. In support of its motion, Deutsche Bank asserted Appellant "failed to appear, plead or otherwise answer in this action[.]" The following month, the district court entered an order granting the motion, along with a decree of foreclosure and appointment of a special master. Later that year, Deutsche Bank purchased the home at a judicial foreclosure sale. Christine Valerio died shortly after the sale. The district court entered an order confirming the sale on March 24, 2015.

Appellant, who is Christine Valerio's son and Lucy Valerio's brother, as a successor in interest to Mortgagors, sought relief from the default judgment pursuant to Rule 1-060(B). Appellant advanced two arguments in support of his motion. First, he argued that the judgment was void under Rule 1-060(B)(4) because Deutsche Bank lacked standing to bring a foreclosure complaint against Mortgagors. Specifically, Appellant maintained that the indorsement on the copy of the Original Note attached to Deutsche Bank's first amended complaint failed to establish the requirements necessary for enforceability, as did the lost note affidavit. Second, Appellant argued that the "[j]udgment should be set aside pursuant to Rule 1-060(B)(6) [b]ecause [Appellant] [h]as [m]eritorious [d]efenses and [c]ounterclaims[.]" The district court granted Appellant's motion but did not specify the grounds on which it based its ruling.

Deutsche Bank moved the district court to reconsider its order setting aside default judgment. Deutsche Bank argued that *Deutsche Bank Nat. Tr. Co. v. Johnston,* 2016-NMSC-013 does not permit a district court to grant relief from judgment pursuant to Rule 1-060(B) for lack of standing in mortgage foreclosure cases. Upon reconsideration, the district court granted the motion to reconsider.

The issue central to both parties' arguments on appeal was whether the principle articulated in *Johnston,* i.e., that final judgments in mortgage foreclosure actions cannot be declared void for lack of prudential standing, also prohibits the district court from reopening a default judgment under Rule 1-060(B)(6) and allowing a defendant to attack prudential standing on the merits. "A judgment is void only if the court rendering it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law."

John Valerio (Appellant) contended that the district court erred when it determined that it could not grant relief from its entry of default judgment under Rule 1-060(B) because our Supreme Court has held that "a final judgment on ... an action to enforce a promissory note ... is not voidable under Rule 1-060(B) due to lack of prudential standing." *Johnston*, 2016-NMSC-013, ¶ 34. Appellant asked the Court of Appeals to hold that *Johnston* and its progeny apply exclusively to efforts to void a foreclosure judgment due to lack of prudential standing, but do not preclude district courts from reopening foreclosure judgments "on any other ground set forth in Rule 1-060(B)[(6)]." Conversely, Deutsche Bank argued that our Supreme Court did not confine its holding in *Johnston* to void judgments alone, and thus a defendant's waiver of an attack on prudential standing cannot be overcome by a Rule 1-060(B)(6) motion to reopen a default judgment.

Although final judgments in mortgage foreclosure cases cannot be declared void under Rule 1-060(B) for lack of prudential standing, the Court of Appeals held that district courts, in their discretion, may set aside a default judgment in a mortgage foreclosure case under Rule 1-060(B)(6) if a party demonstrates grounds for reopening the judgment and a meritorious defense, even when the meritorious defense is that the plaintiff lacked standing.

There is a marked and clearly recognized distinction between the vacation of a judgment and the [re]opening of a judgment. A judgment which is vacated is destroyed in its entirety upon the entry of the order that the judgment be vacated, while a judgment which is merely [re]opened does not lose its status as a judgment, but is merely suspended so far as concerns the present right to maintain further proceedings based upon it. In the latter case, if the party who obtained the [re]opening of the judgment is afterwards defeated in his attempt to obtain relief, the result is to restore the judgment to full force and effect, while if he prevails in his attempt, the judgment is then vacated and a new judgment entered.

As these principles relate to mortgage foreclosure cases, our Supreme Court has held that mortgage foreclosure actions are a product of the common law rather than a statutory creation.

These cases do not speak to whether litigants may raise lack of standing as a meritorious defense when seeking to have a default judgment reopened under Rule 1-060(B)(6). Given the clear distinction between void judgments, which must necessarily be set aside by our district courts, and the reopening of judgments, which lies within our district courts' discretion, the Court found that *Johnston*'s holding concerning Rule 1-060(B) did not extend any farther than its clear language: "[A] final judgment on ... an action to enforce a promissory note ... is not *voidable* under Rule 1-060(B) due to lack of prudential standing." *Johnston*, 2016-NMSC-013, ¶ 34 (emphasis added).

The Court of Appeals noted that, if it were to hold that under *Johnston* and similar precedent that district courts could not reopen a default judgment under Rule 1-060(B) in mortgage foreclosure cases to allow a homeowner to challenge standing under any circumstance, that would lead to the absurd result of stripping litigants of meritorious defenses that they were previously unaware of and divest the district court of discretion to grant warranted relief, effectively rendering sections of the rule a nullity.

***Hernandez v. Parker,* No. A-1-CA-38635, 2022 WL 336419 (N.M. Ct. App. Feb. 1, 2022)**

Collateral Estoppel

Plaintiff, as the personal representative of Irisema Hernandez's wrongful death Estate, brought an action in the United States District Court for the District of New Mexico (federal court) against Sheriff Parker, the Roosevelt County Board of County Commissioners, and the Roosevelt County Sheriff's Department (collectively, Defendants). Plaintiff alleged deprivations of Irisema's rights under the Fourth and Fourteenth Amendments through § 1983, as well as causes of action under the TCA. Sheriff Parker asserted qualified immunity as a defense to Plaintiff's § 1983 claims. The federal court granted Sheriff Parker's motion, dismissed Plaintiff's federal

claims against all Defendants, and declined to exercise supplemental jurisdiction over Plaintiff's state law claims.

Shortly thereafter, Plaintiff filed a complaint in the state district court against the same Defendants and alleged claims for negligence and aggravated assault and battery under the TCA. Defendants moved to dismiss the TCA claims and argued that because the federal court had already determined that Sheriff Parker acted reasonably, Plaintiff was precluded from litigating the TCA claims. The district court agreed, determined that the issues decided by the federal court and raised in state court were "identical," and applied collateral estoppel to grant Defendants' motion to dismiss. Plaintiff appealed.

In order for collateral estoppel to apply, four elements must be met:

> (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.

Once the movant "has produced sufficient evidence to meet all four elements, the district court must determine whether the party to be estopped had a full and fair opportunity to litigate the issue in the prior litigation."

In *Deflon v. Sawyers*, our New Mexico Supreme Court gave two reasons why an issue was not actually litigated and necessarily decided in a prior federal proceeding. One reason was that the "threshold showing" for the federal claims was "different from what [was] needed to establish" the state claims. 2006-NMSC-025, ¶ 17. Another reason was that "a substantial portion of [the p]laintiff's evidence was excluded in federal court but would not be excluded in state court."

In the present case, a Fourth Amendment claim under § 1983 and a negligence claim pursuant to NMSA 1978, Section 41-4-5 require different threshold showings. The relevant Fourth Amendment inquiry considers whether a police officer used excessive force. The issue of excessive force turns on whether the officer's actions were "objectively reasonable." For a TCA claim, the question is whether an officer exercised "the care that a reasonably prudent and qualified officer would exercise in the same situation." Despite similar phrasing, the standard of care for police pursuits, informed by the Law Enforcement Safe Pursuit Act, is broader than the Fourth Amendment standard applied to allegations of excessive force in effectuating a seizure. The federal court balances the nature of the crime committed by the suspect, the threat posed by the suspect, and whether the suspect is fleeing. The negligence claim, on the other hand, considers the conduct in the context of the professional standard of care for police pursuits.

The "general rule" for civil assault and battery in this context include both an objective and a subjective test. The Fourth Amendment is famously a strictly objective test. The traditional defenses for law enforcement to assert in response to civil assault and battery claims are not the same as the "objectively reasonable officer" standard that is at the root of Fourth Amendment analysis.

Generally, the Court does not reach whether the parties had an opportunity to fully and fairly litigate if it determines that the other four elements of collateral estoppel were not met. However, in weighing whether there was a full and fair opportunity to litigate the issue, the differences between the federal and the state proceedings merit attention. Countervailing factors include, but are not limited to, the incentive for vigorous prosecution or defense of the prior litigation; procedural differences between the prior and current litigation, including the presence or absence of a jury; and the possibility of inconsistent verdicts.

First, in state court, the question of reasonableness is generally reserved for the jury, while the federal court decides the constitutional "reasonableness" question as a matter of law in the excessive force context.

Second, the federal and state causes of action allocate the burden of proof differently. The federal qualified immunity analysis shifts the entire burden of proof to the plaintiff.

Third, the federal court explicitly did not consider the facts in the context of the state claims. The federal court stated: "[t]he facts set forth here are those critical to the qualified immunity analysis and the background of the case, not to the state law claims that may well permit the parties to consider [Driver's] state of mind as well as Sheriff Parker's." With this comment, the federal court appeared to be referring to the tort concept of comparative fault, in which those that contribute to an injury are held liable for only their own portion of the fault.

***Sipp v. Buffalo Thunder, Inc.*, 2022-NMCA-015 *cert. granted* (Feb. 8, 2022).**
Tribal Sovereign Immunity

Sipp (also known as Sage Rader) was an employee of Dial Electric, a vendor that sold lights to Buffalo Thunder for the facility's parking lot. Sipp delivered the lights and alleged that while he was moving in and out of a receiving area, a Buffalo Thunder employee abruptly lowered a garage door, causing Sipp to hit his head. Sipp claimed that he was knocked unconscious and suffered severe injuries, including a cervical spine injury that required major surgery.

Sipp and his wife, Hella Rader, filed a complaint for damages in state district court, naming Buffalo Thunder, Inc., Buffalo Thunder Development Authority, the Pueblo of Pojoaque, the Pueblo of Pojoaque Gaming Commission, and Pojoaque Gaming, Inc. as Defendants. Plaintiffs sought damages for Sipp's injuries and for Hella Rader's derivative tort claims. Defendants filed a motion to dismiss for lack of subject matter jurisdiction under Rule 1-012(B)(1) NMRA, arguing that the Pueblo's sovereign immunity precluded the district court from hearing the suit and that the limited waiver of sovereign immunity in Section 8(A) of the Compact was inapplicable in the present case. The district court granted the motion.

Defendants argued that Section 8(A) does not permit the district court to exercise jurisdiction in this case for two reasons. First, Defendants asserted that the termination clause at the end of Section 8(A) was triggered by two federal court decisions, *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013) (memorandum and order), and *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018), such that Section 8(A) no longer provides for state court jurisdiction. Second, Defendants claim that Sipp does not qualify as a visitor to a gaming facility under

Section 8(A) because (1) he had a business purpose for visiting Buffalo Thunder and not a gaming purpose, and (2) he was not injured in a "gaming facility."

The Court of Appeals found the termination clause had not been triggered by the two referenced opinions, which were limited to their facts. Secondly, Plaintiffs' amended complaint alleged that Sipp was on the premises with the permission of Defendants. Thus, consistent with the Court's precedent, Sipp's status as a visitor was well-pleaded and should have withstood Defendants' motion for dismissal.

***Rawlings v. Rawlings*, 2022-NMCA-013, *cert. granted* (Jan. 13, 2022)**

Nature of Review under Rule 1-053.2(H)(1)(b) NMRA – Objections to Domestic Relations Hearing Officer

*In addition to being at the Supreme Court on certiorari, this case involves an issue that is the subject of a pending proposed Rule Amendment.

The dispute in this appeal centers on the nature of the review required by Rule 1-053.2(H)(1)(b) NMRA, which states that "[i]f a party files timely, specific objections to the recommendations [of a domestic relations hearing officer], the court shall conduct a hearing appropriate and sufficient to resolve the objections. The hearing shall consist of a review of the record unless the court determines that additional evidence will aid in the resolution of the objections." Michelle Rawlings (Mother) argued that the district court erred in failing to hold a hearing on her objections to the domestic relations hearing officer's recommendations before entering the final decree of dissolution of marriage and division of assets, debts, and custody. The Court of Appeals agreed and reversed.

The district court referred the case to a domestic relations hearing officer for hearing and adjudication pursuant to Rule 1-053.2. The hearing officer conducted a day-long hearing on the merits and submitted his recommendations to the district court. Of note, the hearing officer recommended joint legal custody, but that the children should reside primarily with Father in New Mexico. Mother timely filed objections to the hearing officer's recommendations and requested a hearing on three issues, including child custody. Father filed a response to Mother's objections and asked the district court to adopt the hearing officer's recommendations.

Without conducting a hearing, the district court entered a final decree that adopted the hearing officer's recommendations in full. The final decree made no reference to Mother's objections. Mother initially filed a motion to reconsider, arguing that the district court violated Rule 1-053.2(H) by entering the final decree without conducting a hearing and without making an independent determination of Mother's objections. Two days later, however, Mother withdrew the motion and filed a notice of appeal instead. Mother also submitted an emergency motion to stay enforcement of judgment pending appeal.

The district court held a hearing on Mother's emergency motion to stay approximately three weeks later. The district court began the hearing by addressing the issue of Mother's objections, stating that it wanted to make a record with regard to the objections. The district court stated that it viewed the hearing requirement in Rule 1-053.2(H)(1)(b) as discretionary and had made a

determination that a hearing was not necessary to resolve the objections in this case. The court stated that it adopted the hearing officer's recommendations after reviewing the record and the parties' filings.

After Mother's attorney made a brief record of why he believed a hearing was required, Father's attorney argued that the district court had, in fact, conducted a hearing pursuant to Rule 1-053.2(H)(1)(b) because the court had reviewed the record and made an independent determination to adopt the hearing officer's recommendations. Father characterized the omission as a clerical mistake and made an oral motion to amend the final decree pursuant to Rule 1-060(A) NMRA to reflect that the court had reviewed the objections, made an independent review of the record, and determined that an evidentiary hearing was not necessary. The district court agreed and granted Father's oral motion.

The district court entered an amended final decree, which differed from the original decree only in that it stated the district court had "conducted an independent review hearing under [Rule] 1-053.2(H)(1)(b), which included proper review of [Mother's] Objections, an independent review of the record, an independent determination that an additional evidentiary hearing and oral argument was unnecessary," and that it "made an independent determination to approve and adopt the Recommendations of the Hearing Officer." The amended final decree also expressly denied Mother's objections. Mother appealed.

Rule 1-053.2 sets forth the procedure a district court must follow after receiving a domestic relations hearing officer's recommendations. The subsection of the rule at issue in this appeal was added in 2006 following the Court's decision in *Buffington v. McGorty*, 2004-NMCA-092, ¶¶ 29-30, which held that due process requires that parties be given an opportunity to submit objections to a hearing officer's report and recommendations and outlined the procedure for addressing them.

The New Mexico Supreme Court subsequently amended Rule 1-053.2 and codified the common law requirements announced in *Buffington* as express provisions in the rule. Rule 1-053.2 now provides a comprehensive procedure for district court proceedings after the court receives the domestic relations hearing officer's recommendations.

> (b) If a party files timely, specific objections to the recommendations, *the court shall conduct a hearing appropriate and sufficient to resolve the objections.* The hearing shall consist of a review of the record unless the court determines that additional evidence will aid in the resolution of the objections.

The Court agreed with Mother that the common understanding of the phrase is that parties are afforded an opportunity to appear before the judge and present argument.

The Court stated that the Father's interpretation would lead to an absurd result. If it were to construe the second sentence of Rule 1-053.2(H)(1)(b) to mean that a district court "conducts a hearing" by "conducting a review of the record," then the mandatory language in that sentence—"The hearing *shall* consist of a review of the record *unless* the court determines that additional evidence will aid in the resolution of the objections"—would mean that the district court cannot

conduct anything other than a record review unless the court determines that an evidentiary hearing is necessary.

When *Buffington* articulated that parties have a right to raise objections to the hearing officer's recommendations with the district court, the Court also provided that the district court must conduct a hearing on the objections, thus ensuring that the parties have an opportunity to appear before the district judge at least once before the court reaches a final decision on contested matters.

Construing Rule 1-053.2(H)(1)(b) to require a hearing, rather than a file review, on objections to a hearing officer's recommendations in domestic relations cases is not unreasonable. Indeed, this sort of judicial session is precisely what this Court described in *Buffington* when it said that "[t]he district court must then *hold a hearing* on the merits" and that "*the record of the hearing held before the district court* must demonstrate that the court in fact considered the objections and established the basis for the court's decision"—statements that indicate a party's objections would be addressed on the record in a judicial proceeding. 2004-NMCA-092, ¶ 31 (emphases added).

Judge Bogardus filed a dissent, disagreeing with the majority's reading of the Rule and of the analysis in *Buffington*.

U.S. SUPREME COURT CASES

***Kemp v. United States*, 142 S. Ct. 1856 (2022)** – *Rule 60(b)*

Federal Rule of Civil Procedure 60(b)(1) allows a party to seek relief from a final judgment based on, among other things, a "mistake." The question presented was whether the term "mistake" includes a judge's error of law. The Court concluded that, based on the text, structure, and history of Rule 60(b), that a judge's errors of law are indeed "mistake[s]" under Rule 60(b)(1).

The Court rejected the Government's argument that only "obvious legal errors" by a judge were covered. It rejected Kemp's argument that Rule 60(b)(1) was limited to non-legal or non-judicial errors. Because Kemp's basis for re-opening judgment fell under 60(b)(1), it fell under the 1-year deadline.

***Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191 (2022)** - Intervention

In 2018, North Carolina amended its Constitution to provide that "[v]oters offering to vote in person shall present photographic identification." To implement the constitutional mandate, the General Assembly approved S. B. 824. The Governor vetoed the bill, the General Assembly overrode the veto, and S. B. 824 went into effect. The state conference of the NAACP then sued the Governor and members of the State Board of Elections (collectively, Board), a state agency whose members are both appointed and removable by the Governor. The NAACP alleged that S. B. 824 offends the Federal Constitution. The Board was defended by the State's attorney general, who, like the Governor, is an independently elected official. The attorney general at the time was a former state senator who voted against an earlier voter-ID law and filed a declaration in support

of a legal challenge against it. The speaker of the State House of Representatives and president pro tempore of the State Senate ("legislative leaders") moved to intervene, arguing that, without their participation, important state interests would not be adequately represented in light of the Governor's opposition to S. B. 824, the Board's allegiance to the Governor and its tepid defense of S. B. 824 in parallel state-court proceedings, and the attorney general's opposition to earlier voter-ID efforts. The District Court denied intervention and the Court of Appeals affirmed. The Supreme Court reversed.

> States possess "'a legitimate interest in the continued enforce[ment] of [their] own statutes,' " . . . and States may organize themselves in a variety of ways. When a State chooses to allocate authority among different officials who do not answer to one another, different interests and perspectives, all important to the administration of state government, may emerge. Appropriate respect for these realities suggests that federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law. Nor are state interests the only interests at stake. Permitting the participation of lawfully authorized state agents promotes informed federal-court decisionmaking and avoids the risk of setting aside duly enacted state law based on an incomplete understanding of relevant state interests.

Berger, 142 S. Ct. at 2194–95.

The Supreme Court held that the District Court and the en banc Court of Appeals improperly applied a "presumption" that the Board adequately represented the legislative leaders' interests. "But Rule 24(a)(2)'s test in this regard presents proposed intervenors with only a minimal challenge: It promises intervention to those who bear an interest that may be practically impaired or impeded 'unless existing parties adequately represent that [same] interest.'" *Id*. at 2195-96.

***Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022)** – Intervention

This case concerns a state attorney general's attempt to intervene in a federal appellate proceeding for the purpose of defending the constitutionality of a state law. An 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. The claims against the attorney general were dismissed without prejudice, with the attorney general agreeing to be bound by the district court judgment, but the attorney general specifically "reserve[d] all rights, claims, and defenses ... in any appeals arising out of this action," 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 newly-elected secretary decided not to seek any further review, the newly-elected 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 abortion clinic and doctors made a "complicated" argued that because the Attorney General's office, when dismissed as a party, had agreed to be bound by the judgment they should have appealed the judgment instead of later seeking to intervene. The Supreme Court rejected that argument. "Respondents cite no provision of law that 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." *Cameron*, 142 S. Ct. at 1009.

The Court next addressed whether intervention was appropriate. The Court found that the Sixth Circuit had "failed to account for the strength of the Kentucky attorney general's interest in taking up the defense of HB 454 when the secretary for Health and Family Services elected to acquiesce." *Cameron*, 142 S. Ct. at 1012. The Court rejected the Sixth Circuit's application of other factors as well. "Here, the most important circumstance relating to timeliness is that the attorney general sought to intervene "as soon as it became clear" that the Commonwealth's interests "would no longer be protected" by the parties in the case." Additionally, the intervention posed no unfair prejudice to the plaintiff clinic/doctors.

TENTH CIRCUIT CASE

***Hood v. American Auto Care*, LLC, 21 F.4th 1216 (10th Cir. 2021)** - *Specific Personal Jurisdiction*

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.