

APPENDIX

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1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2
3 **June 15, 2026**

4
5 **NO. S-1-SC-41354**

6
7
8 **BOBACK SABEERIN,**

9
10 **Plaintiff-Petitioner,**

11 **v.**

12
13 **ALBUQUERQUE POLICE DEPARTMENT,**
14 **APD DETECTIVE TIM FASSLER, in his**
15 **individual capacity, APD DETECTIVE**
16 **JOHN DEAR, in his individual capacity,**
17 **CITY OF ALBUQUERQUE,**

18
19 **Defendants-Respondents.**
20

21 **ORDER**

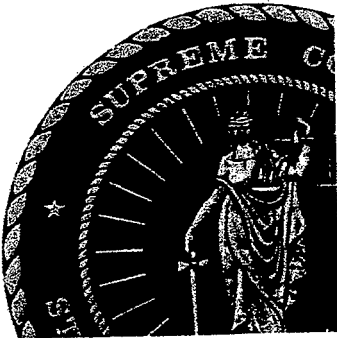
22 **WHEREAS,** this matter came on for consideration by the Court upon
23 petitioner's motion for rehearing filed under Rule 12-502 NMRA, and the Court
24 having considered foregoing pleadings and being sufficiently advised, Justice
25 Michael E. Vigil, Justice C. Shannon Bacon, Justice David K. Thomson, and
26 Justice Briana H. Zamora concurring, Chief Justice Julies J. Vargas recused;

27 **NOW, THEREFORE, IT IS ORDERED** that the motion for rehearing is
28 **DENIED;** and

29 **IT IS FURTHER ORDERED** that the Court of Appeals may proceed in
30 *Sabeerin v. City of Albuquerque*, Ct. App. No. A-1-CA-41777 in accordance with

1 the Rules of Appellate Procedure.

2 IT IS SO ORDERED.



WITNESS, the Honorable Julie J. Vargas, Chief Justice
of the Supreme Court of the State of New Mexico, and
the seal of said Court this 15th day of June, 2026.

Elizabeth A. Garcia, Clerk of Court
Supreme Court of New Mexico

I CERTIFY AND ATTEST:

A true copy was served on all parties
or their counsel of record on date filed.

Zelda Abate

Clerk of the Supreme Court
of the State of New Mexico

By

Zelda Abate

Deputy Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Mark Reynolds

BOBACK SABEERIN,

Plaintiff-Appellant,

v.

No. A-1-CA-41777

Bernalillo County

D-202-CV-2023-06588

**ALBUQUERQUE POLICE DEPARTMENT,
APD DETECTIVE TIM FASSLER, in his
individual capacity, APD DETECTIVE JOHN
DEAR, in his individual capacity, CITY OF
ALBUQUERQUE,**

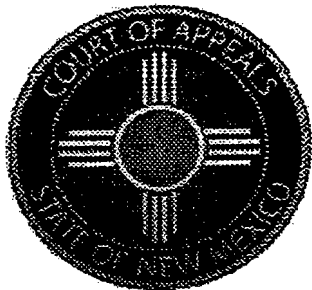
Defendants-Appellees.

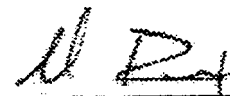
MANDATE TO DISTRICT COURT CLERK

Applicable items are indicated by an "X" below.

1. X Attached is a true and correct copy of the original decision/order entered in the above-entitled cause.
2. X This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision/order.
3. Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.
4. Cost Bill is assessed as follows:

By direction of and in the name of the Chief Judge of the Court of Appeals, this 8th day of July, 2026.





Mark Reynolds

Chief Clerk of the Court of Appeals

cc: Counsel w/out attachments

[Signature]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

May 05, 2026

NO. S-1-SC-41354

BOBACK SABEERIN,

Plaintiff-Petitioner,

v.

**ALBUQUERQUE POLICE DEPARTMENT,
APD DETECTIVE TIM FASSLER, in his
individual capacity, APD DETECTIVE
JOHN DEAR, in his individual capacity,
CITY OF ALBUQUERQUE,**

Defendants-Respondents.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari and response filed under Rule 12-502 NMRA, and the Court having considered foregoing pleadings and being sufficiently advised, Justice Michael E. Vigil, Justice C. Shannon Bacon, Justice David K. Thomson, and Justice Briana H. Zamora concurring; Chief Justice Julie J. Vargas is recused.

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is DENIED; and

IT IS FURTHER ORDERED that the Court of Appeals may proceed in

1 *Sabeerin v. City of Albuquerque*, Ct. App. No. A-1-CA-41777 in accordance with
2 the Rules of Appellate Procedure.

3 IT IS SO ORDERED.



WITNESS, the Honorable Julie J. Vargas, Chief Justice
of the Supreme Court of the State of New Mexico, and
the seal of said Court this 5th day of May, 2026.

Elizabeth A. Garcia, Clerk of Court
Supreme Court of New Mexico

By *Mycole Vigil*
Deputy Clerk

4 I CERTIFY AND ATTEST:
A true copy was served on all parties
or their counsel of record on date filed

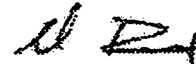
Mycole Vigil
Clerk of the Supreme Court
of the State of New Mexico

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

Filed 2/23/2026 12:27 PM


Mark Reynolds

BOBACK SABEERIN,

Plaintiff-Appellant,

v.

No. A-1-CA-41777

ALBUQUERQUE POLICE

DEPARTMENT, APD

DETECTIVE TIM FASSLER,

in his individual capacity,

APD DETECTIVE JOHN DEAR,

in his individual capacity,

CITY OF ALBUQUERQUE,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Nancy J. Franchini, District Court Judge

Boback Sabeerin

Kissimmee, FL

Pro Se Appellant

City of Albuquerque Legal Department

Lauren Keefe, City Attorney

Kristin J. Dalton, Special Counsel

Albuquerque, NM

for Appellee City of Albuquerque

YLAW, P.C.

Sean E. Garrett

Albuquerque, NM

for Appellee John Dear

1
2 **MEMORANDUM OPINION**

3 **YOHALEM, Judge.**

4 (1) Plaintiff Boback Sabeerin¹ appeals, without the assistance of counsel, from
5 the district court's dismissal of his civil rights and torts complaint against the City
6 of Albuquerque, the Albuquerque Police Department (APD), and two detectives
7 employed by APD (collectively, Defendants), as time-barred by the statute of
8 limitations. Not persuaded that the district court erred, we affirm the dismissal.

9 **BACKGROUND**

10 (2) On August 18, 2023, Sabeerin filed the complaint at issue in this appeal in
11 Bernalillo County (the Second Judicial District Court) alleging violations of his
12 federal constitutional rights, including his Fourth Amendment right prohibiting
13 unreasonable search and seizure and his Eighth Amendment right to be free from
14 cruel and unusual punishment, relying on 42 U.S.C. § 1983, and alleging similar
15 violations of New Mexico constitutional provisions as well as tort claims under the
16 New Mexico Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 to -27, -30 (1976, as
17 amended through 2020). Sabeerin's 2023 Bernalillo County complaint alleged
violations of his civil rights and tortious conduct by APD officers dating back to a

¹ Plaintiff's minor daughter and his domestic partner are also named as plaintiffs. They allege loss of consortium. Because the civil rights and tort claims all arise out of conduct involving Sabeerin, we refer only to Sabeerin in describing the claims and proceedings.

1 search of his business in August 2009 leading to his arrest and conviction for
2 multiple felonies. *See State v. Sabeerin*, 2014-NMCA-110, ¶¶ 1-2, 5, 336 P.3d 990.
3 Sabeerin attempted to suppress the evidence from the search in each of the criminal
4 prosecutions relying on that evidence, arguing that there was no probable cause for
5 the search and that it violated his rights under the Fourth Amendment to the United
6 States Constitution and Article II, Section 10 of the New Mexico Constitution.
7 *Sabeerin*, 2014-NMCA-110, ¶¶ 2, 7. The district court denied Sabeerin's motion to
8 suppress in each of the criminal proceedings, and he was tried and convicted based
9 on the evidence seized from his business. *Id.* ¶ 2. Sabeerin appealed his convictions
10 to this Court. *Id.* ¶ 1.

11 (3) In 2014, after Sabeerin had served six years in prison, this Court concluded
12 on appeal that his Fourth Amendment rights had been violated and his motions to
13 suppress were erroneously denied, and reversed his convictions. *Id.* ¶¶ 1-2.
14 Following a delay during which the State sought a writ of certiorari in our Supreme
15 Court on November 17, 2015, the district court dismissed the criminal charges
16 against Sabeerin and released Sabeerin from prison. The State relies on the
17 November 17, 2015, date as the date the statute of limitations on Sabeerin's torts and
18 constitutional claims began to run. We accept this date as well for purposes of this
19 opinion.

1 {4} Sabeerin filed his Bernalillo County complaint—the complaint at issue in this
2 appeal—on August 18, 2023. It is the third complaint that Sabeerin has filed, and
3 Sabeerin asserts that it alleges the same federal and state constitutional violations
4 and tort causes of action against Albuquerque law enforcement alleged in Sabeerin’s
5 first complaint in federal court on May 27, 2016. That case was pending in federal
6 court until April 1, 2021, when the federal district court dismissed Sabeerin’s federal
7 claims on qualified immunity grounds, without reaching the merits of those claims.
8 The federal court declined to exercise supplemental jurisdiction over Sabeerin’s state
9 law claims, and dismissed the state constitutional and tort claims without prejudice.

10 {5} On May 5, 2021, a month after the federal court dismissed his first complaint,
11 Sabeerin filed the identical complaint, including his federal law claims, in state
12 district court in Valencia County. Because Sabeerin included federal claims that had
13 been dismissed with prejudice by the federal court, Defendants removed the case to
14 federal court. The federal court again dismissed Sabeerin’s federal claims on
15 September 19, 2021, this time without prejudice on res judicata grounds, and granted
16 Sabeerin’s motion to remand the state law claims back to Valencia County district
17 court. Sabeerin appealed the federal court’s dismissal to the Tenth Circuit Court of
18 Appeals.

19 {6} When the case returned to Valencia County District Court after the Tenth
20 Circuit affirmed the dismissal of the federal claims, *see Sabeerin v. Albuquerque*

1 *Police Dep't*, No. 21-2046, 2022 WL 1013809, at *7 (10th Cir. Apr. 5, 2022),
2 Defendants filed a motion to dismiss without prejudice for improper venue, which
3 was granted. Sabeerin then appealed the dismissal of his Valencia County complaint
4 to this Court. This Court affirmed in July 2023. *See Sabeerin v. Albuquerque Police*
5 *Dep't*, A-1-CA-40338, mem. op. (N.M. Ct. App. July 24, 2023) (nonprecedential).

6 {7} On August 18, 2023, Sabeerin filed the complaint at issue in this appeal in
7 state district court, this time in Bernalillo County (the correct venue), and again
8 pleaded both his federal and state law claims. Defendants filed a motion to dismiss
9 with prejudice pursuant to Rule 1-012 NMRA, asserting that Sabeerin's state law
10 claims were barred by both the two-year statute of limitations for claims under the
11 TCA, Section 41-4-15, and by the three-year statute of limitations for personal injury
12 actions, NMSA 1978, § 41-4A-7 (2021), if that statute applied.²

13 {8} Defendants argued in support of their motion to dismiss that the events
14 complained of in Sabeerin's complaint—the search of his business and his arrest
15 without probable cause—occurred on August 19, 2009, fourteen years before the
16 Bernalillo County complaint was filed. Defendants argued that, even applying the
17 November 17, 2015, date of the dismissal of the criminal charges and Sabeerin's
18 release from prison as the date the statute of limitations commenced to run, his

²Defendants argued again that Sabeerin's federal claims were barred by res judicata. The parties agree that res judicata bars these claims, and their dismissal is not at issue on appeal.

1 Bernalillo County complaint was filed seven years later—well beyond even the
2 three-year statute of limitations.

3 {9} Sabeerin responded to Defendants' motion to dismiss on statute of limitations
4 grounds by arguing that he had proceeded expeditiously in pursuing each of his
5 lawsuits. Sabeerin claimed that Defendants' tactics were responsible for the long
6 delay in properly filing his state claims in Bernalillo County. Sabeerin argued that
7 Defendants were required to have raised their objection to venue in Valencia County
8 before the case was dismissed by the federal court so that he could have correctly
9 filed in Bernalillo County. Sabeerin also claimed that the dismissal of his Valencia
10 County complaint by the district court was improper because he had been ordered
11 by the federal court to file in Valencia County and the federal court order controlled
12 the place of filing under the Supremacy Clause of the United States Constitution.

13 {10} At the hearing on Defendants' motion to dismiss before the district court,
14 Defendants argued that the statute of limitations had expired due to the passage of
15 more than seven years between the date Sabeerin was released from prison—the
16 latest date that could be viewed as triggering the statute of limitations—and the filing
17 of Sabeerin's Bernalillo County complaint. Sabeerin argued in response, as he did
18 in his written memorandum, that Defendants' tactics were responsible for delaying
19 the progress of his prior lawsuits. Sabeerin claimed that Defendants should have
20 raised their objection to venue in Valencia County before the state claims were

1 dismissed by the federal court, so that he could have correctly filed in Bernalillo
2 County.

3 (11) In its decision, the district court stated that it found Defendants' motion to
4 dismiss well taken because Sabeerin's claims were not brought within any applicable
5 statute of limitations. On this basis, the district court granted Defendant's motion
6 and dismissed with prejudice. Sabeerin appealed.

7 DISCUSSION

8 (12) We understand Sabeerin to raise four issues on appeal: (1) Defendants failed
9 to raise either their venue or their statute of limitations concerns in their motion to
10 dismiss the federal claims in federal court; (2) venue was proper in Valencia County
11 because the federal district court ordered the case remanded to Valencia County; (3)
12 Sabeerin's second Valencia County complaint was wrongly dismissed on venue
13 grounds; and (4) Sabeerin's first lawsuit was timely filed on May 27, 2016 in federal
14 district court and, under the New Mexico savings statute, NMSA 1978, § 37-1-14
15 (1880), his Bernalillo County complaint must be viewed as a timely-filed
16 continuation of that lawsuit.

17 (13) Defendants respond by arguing on appeal that it is readily apparent that after
18 more than seven years Sabeerin's Bernalillo County complaint is barred by the
19 statute of limitations. In response to Sabeerin's claim on appeal that the savings
20 statute applies, and that his filing of his third complaint in Bernalillo County after

1 the dismissal of his first two complaints dates back to the filing of his federal lawsuit
2 in 2016, Defendants argue that Sabeerin failed to preserve this issue in the district
3 court. Defendants contend that this Court should not consider the savings statute on
4 appeal given the absence of preservation. In the alternative, if this Court addresses
5 the merits of Sabeerin's savings statute argument, Defendants contend that, by its
6 plain language, the savings statute does not apply to the filing of a third complaint.

7 {14} We note again that Sabeerin represented himself in the district court and is
8 representing himself in this Court as well. We apply the same standards of conduct
9 and compliance with court rules, procedures, and orders to self-represented litigants
10 as we apply to members of the bar. *See In re Camino Real Env't Ctr., Inc. v. N.M.*
11 *Dep't of Env't*, 2010-NMCA-057, ¶ 21, 148 N.M. 776, 242 P.3d 343. This includes
12 our rules and precedent governing preservation.

13 {15} We also note that this Court is not required to review arguments that are
14 unclear, undeveloped or unsupported by any authority in a party's briefing on appeal.
15 *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53.
16 Nonetheless, we will review the arguments of a self-represented litigant to the best
17 of our ability. In conducting this review, we employ a presumption of correctness in
18 the rulings of the district court, and place the burden on the appellant to clearly
19 demonstrate error. *See Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 1990-
20 NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d 1063.

1 (16) Applying these standards, we address each of Sabeerin's claims in turn.

2 **I. Defendants' Alleged Failure to Object or Notify Sabeerin of Venue and**
3 **Statute of Limitations Violations Earlier in the Case**

4 (17) Sabeerin, as he did in the district court, blames Defendants for slowing the
5 litigation in federal court and for failing to inform him and the federal court of the
6 proper venue on remand. Sabeerin cites no authority for his claim that Defendants'
7 counsel owed him a duty to alert him to the proper venue or to the peril of a statute
8 of limitations bar. We are aware of no authority that would support such an
9 obligation. "Historically, our court system has always been adversarial in nature.
10 The role of the attorney therein is to represent and advocate a client's cause of action
11 as vigorously as the rules of law and professional ethics will permit." *Garcia v.*
12 *Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-014, ¶ 14, 106 N.M. 757,
13 750 P.2d 118. There is no duty to the client's adversary to provide legal guidance or
14 to assist the adversary in avoiding pitfalls in the litigation. Sabeerin's argument is
15 therefore unavailing.

16 **II. The Federal District Court Did Not Order the Valencia County Court to**
17 **Accept Jurisdiction or Venue**

18 (18) Sabeerin's argument that the federal district court ordered the Valencia
19 County Court to hear his case arises from a misunderstanding by Sabeerin of the
20 federal court procedure when a case has been removed from a state court to a federal
21 court. When a state court case is removed to federal court, the federal court is not

1 free to send the case to a new and different state court; it must remand to the district
2 court where the case originated. The very meaning of the word “remand” is: “The
3 act or an instance of sending something (such as a case, claim, or person) back for
4 further action.” *Remand*, *Black’s Law Dictionary* (12th ed. 2024). The district court
5 remand order, therefore, did not direct the Valencia County district court to decide
6 the case; the district court simply returned the case to the state court where Sabeerin
7 had filed it, allowing that court to pick up where it left off upon removal.
8 Determining whether venue was proper was well within the authority of the Valencia
9 County District Court once the case was returned to it on remand.

10 (19) Sabeerin’s brief on appeal also misunderstands the federal district court’s
11 instruction in its August 17, 2021, proposed findings and recommended disposition,
12 filed before it entered its final order remanding Sabeerin’s suit back to Valencia
13 County. Sabeerin appears to rely on a boilerplate notice at the end of the proposed
14 findings and recommended disposition, signed by the federal judge, that instructed
15 the parties that they must object to that court’s proposed findings and recommended
16 disposition within fourteen days of service, or the court would enter a final order.
17 This standard notice references the time to object to the federal court’s findings
18 supporting its res judicata dismissal. The federal court order remanding to the state
19 district court did not set any requirement or time limit governing the proceedings on

1 remand in state court. Defendants were free to object to venue by filing a motion to
2 dismiss once the case returned to Valencia County.

3 (20) We, therefore, are not persuaded that there was any error.

4 **III. The Valencia County Complaint Was Properly Dismissed for Improper**
5 **Venue**

6 (21) To the extent Sabeerin argues on appeal that venue was proper in Valencia
7 County and the district court erred in dismissing his second complaint, this claim
8 was previously resolved by this Court in *Sabeerin*, A-1-CA-40338. This Court
9 agreed with the district court that venue was improper and affirmed the district
10 court's dismissal of the complaint without prejudice. *Id.* ¶ 3. This is a final decision;
11 the issue cannot be relitigated in this appeal. We, therefore, do not consider this
12 claim further.

13 **IV. Sabeerin Did Not Preserve His Savings Statute Argument**

14 (22) Sabeerin argues on appeal that the New Mexico savings statute, Section 37-
15 1-14, applies to his third-filed complaint in Bernalillo County, and that the savings
16 statute requires that the Bernalillo County district court treat his complaint as a
17 continuation of the federal lawsuit he filed in 2016—arguably within the applicable
18 statute of limitations. Defendants respond that Sabeerin failed to preserve his savings
19 statute claim in the district court, and argue that this Court should refuse to consider
20 this unpreserved claim, raised for the first time on appeal.

1 {23} Rule 12-321 NMRA, governing preservation, requires that in order "[t]o
2 preserve an issue for review, it must appear that a ruling or decision by the trial court
3 was fairly invoked." "The party claiming error must have raised the issue below
4 clearly and have invoked a ruling by the court." *Diversey Corp. v. Chem-Source*
5 *Corp.*, 1998-NMCA-112, ¶ 12, 125 N.M. 748, 965 P.2d 332 (citations omitted). In
6 order to invoke a ruling, a party must assert a legal principle and develop the facts
7 to support the issue. *See State v. Adame*, 2020-NMSC-015, ¶ 13, 476 P.3d 872. "In
8 order to preserve an error for appeal, it is essential that the ground or grounds of the
9 objection or motion be made with sufficient specificity to alert the mind of the trial
10 court to the claimed error or errors." *State v. Varela*, 1999-NMSC-045, ¶ 25, 128
11 N.M. 454, 993 P.2d 1280 (internal quotation marks and citation omitted).

12 {24} Our review of the record shows that Sabeerin did not mention the savings
13 statute either in his written response to Defendant's motion to dismiss as barred by
14 the statute of limitations or at the hearing on Defendants' motion to dismiss. The
15 district court's ruling plainly shows that the court was not put on notice that the
16 savings statute was in issue, let alone presented with an argument on its application.
17 We note that Defendants mentioned the savings statute in a few sentences in their
18 motion to dismiss. When Sabeerin did not mention the savings statute in his written
19 response, or at the hearing on the motion, Defendants argued only that the Bernalillo
20 County complaint was barred by the passage of time.

1 {25} As noted above, “[t]he party claiming error must have raised the issue below
2 clearly and have invoked a ruling by the court.” *Diversey Corp.*, 1998-NMCA-112,
3 ¶ 12 (citations omitted). Where the opposing party has raised an issue in a few
4 sentences in a motion or brief and the issue has not been brought to the attention of
5 the district court, that is not sufficient to preserve the argument for appeal. *See Azar*
6 *v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 25, 133 N.M. 669, 68 P.3d 909
7 (“An appellant cannot rely on the argument of the opposing party to establish
8 preservation.”).

9 {26} The three primary purposes of the preservation rule are:

10 (1) to specifically alert the district court to a claim of error so that any
11 mistake can be corrected at that time, (2) to allow the opposing party a
12 fair opportunity to respond to the claim of error and to show why the
13 district court should rule against that claim, and (3) to create a record
14 sufficient to allow this Court to make an informed decision regarding
15 the contested issue.

16 *Gerke v. Romero*, 2010-NMCA-060, ¶ 18, 148 N.M. 367, 237 P.3d 111 (internal
17 quotation marks and citation omitted). In this case, the court’s oral ruling at the
18 conclusion of the hearing on the motion to dismiss and the court’s final written
19 judgment rely only on the time that passed between Sabeerin’s release from prison,
20 when the statute of limitations began to run, and the filing of Sabeerin’s Bernalillo
21 County complaint—a period which Sabeerin admits exceeded the period allowed by
22 the statute of limitations. The district court was plainly not alerted to a savings statute
23 issue, Defendants did not have the opportunity to present a full response, and the

1 record on appeal concerning the complex procedural history of the three complaints
2 in this case does not include the relevant documents, and is otherwise undeveloped.
3 Where the purposes of the preservation rule have not been served, we will not review
4 an argument that is made for the first time on appeal. *See Vigil v. Taintor*, 2020-
5 NMCA-037, ¶ 8; 472 P.3d 1220.

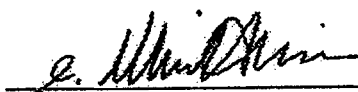
6 **CONCLUSION**

7 {27} We affirm the district court's order dismissing this case with prejudice as
8 barred by the statute of limitations.

9 {28} **IT IS SO ORDERED.**

10 
11 JANE B. YOBALEM, Judge

12 **WE CONCUR:**

13 
14 J. MILES HANISEE, Judge

15 
16 MEGAN P. DUFFY, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

April 14, 2026

NO. S-1-SC-41354

BOBACK SABEERIN,

Plaintiff-Petitioner,

v.

ALBUQUERQUE POLICE DEPARTMENT,
APD DETECTIVE TIM FASSLER, in his
individual capacity, APD DETECTIVE
JOHN DEAR, in his individual capacity,
CITY OF ALBUQUERQUE,

Defendants-Respondents.

NOTICE

To: Clerk of the New Mexico Court of Appeals

NOTICE is hereby given, in compliance with Rule 12-502 NMRA of the Rules of Appellate Procedure, that a petition for writ of certiorari has been filed in the above entitled cause. Please recall any mandate which you may have issued in the case of *Sabeerin v. City of Albuquerque*, Ct. App. No. A-1-CA-41777.



WITNESS, the Honorable Julie J. Vargas, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of April, 2026.

Elizabeth A. Garcia, Clerk of Court
Supreme Court of New Mexico

I CERTIFY AND ATTEST:

A true copy was served on all parties
or their counsel of record on date filed.

Zelda Abate

Clerk of the Supreme Court
of the State of New Mexico

By

Zelda Abate

Deputy Clerk

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

BOBACK SABEERIN,
S.S et.al [SIC]

Plaintiffs,

v.

No. D-202-CV-2023-06588

ALBUQUERQUE POLICE DEPARTMENT
DETECTIVE TIM FASSLER, in his individual capacity,
ALBUQUERQUE POLICE DEPARTMENT,
DETECTIVE JOHN DEAR, in his individual capacity,
CITY OF ALBUQUERQUE,

Defendants.

**ORDER GRANTING DEFENDANT CITY OF ALBUQUERQUE'S MOTION TO
DISMISS PLAINTIFF'S COMPLAINT, WITH PREJUDICE, IN LIEU OF AN ANSWER**

THIS MATTER, having come before the Court on Defendant City of Albuquerque's ("Defendant") Motion to Dismiss, with Prejudice, in Lieu of an Answer ("Motion to Dismiss"), filed September 27, 2023, with Defendant John Dear having joined in same on September 28, 2023, the Court having reviewed the pleadings, having heard argument by parties at a hearing held January 11, 2024, and the Court being otherwise fully advised in the premises,

FINDS that Defendant's Motion to Dismiss is well taken and should be granted.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED: That Defendant's Motion to Dismiss is hereby **GRANTED** and Plaintiff's Complaint is hereby dismissed with prejudice.

IT IS SO ORDERED.


NANCY J. FRANCHINI
DISTRICT COURT JUDGE

SUBMITTED BY:

CITY OF ALBUQUERQUE
Lauren Keefe, City Attorney

/s/ Kristin J. Dalton

Kristin J. Dalton
Managing City Attorney
P.O. Box 2248
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Attorney for Defendant City of Albuquerque

APPROVED BY:

Electronically Approved 01/12/24

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-and-

Electronically Approved 01/15/2024

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bobacksabeerin@gmail.com

Plaintiff Pro Se

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 7/24/2023 8:49 AM

BOBACK SABEERIN, et al,

Plaintiffs-Appellants,



Mark Reynolds

v.

No. A-1-CA-40338

**ALBUQUERQUE POLICE DEPARTMENT;
DETECTIVE TIM FASSLER, in his individual
capacity; DETECTIVE JOHN DEAR, in his
individual capacity; and CITY OF
ALBUQUERQUE,**

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY

James L. Sanchez, District Court Judge

Boback Sabeerin
Los Lunas, NM

Pro Se Appellants

Kristin J. Dalton
Albuquerque, NM

for Appellees

MEMORANDUM OPINION

IVES, Judge

(1) Plaintiffs appeal the district court's order dismissing this case without prejudice for improper venue. In this Court's notice of proposed disposition, we proposed to summarily affirm. Plaintiffs filed a memorandum in opposition, which we have duly considered. Remaining unpersuaded, we affirm.

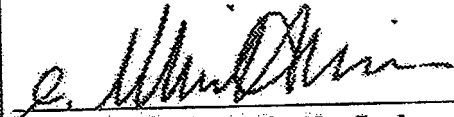
1 {2} In the memorandum in opposition, Plaintiffs maintain that the district court
2 was incorrect in dismissing this complaint for lack of proper venue, particularly in
3 light of the federal district court order remanding this case to the Thirteenth Judicial
4 District Court following the dismissal of the federal claims. [MIO PDF 5] Plaintiffs'
5 memorandum in opposition appears to reiterate the same points made in this
6 docketing statement without addressing the specific analysis responding to the
7 arguments contained in this Court's notice of proposed disposition. As such,
8 Plaintiffs have failed to assert any new facts, law, or argument that persuade this
9 Court that our notice of proposed disposition was erroneous. *See Hennessy v.*
10 *Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have
11 repeatedly held that, in summary calendar cases, the burden is on the party opposing
12 the proposed disposition to clearly point out errors in fact or law."); *State v.*
13 *Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that "[a]
14 party responding to a summary calendar notice must come forward and specifically
15 point out errors of law and fact," and the repetition of earlier arguments does not
16 fulfill this requirement), *superseded by statute on other grounds as stated in State v.*
17 *Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374. We therefore refer Plaintiffs to our
18 analysis therein.

19 {3} Accordingly, for the reasons stated in our notice of proposed disposition and
20 herein, we affirm.

1 (4) IT IS SO ORDERED.

2 
3 ZACHARY A. IVES, Judge

4 WE CONCUR:

5 
6 J. MILES HANISEE, Judge

7 
8 KRISTINA BOGARDUS, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BOBACK SABEERIN, et al.,

Plaintiffs-Appellants,

v.

**ALBUQUERQUE POLICE DEPARTMENT;
DETECTIVE TIM FASSLER, in his individual
capacity; DETECTIVE JOHN DEAR, in his
individual capacity; and CITY OF
ALBUQUERQUE,**

Defendants-Appellees.

No. A-1-CA-40338

Valencia County

D-1314-CV-2021-00374

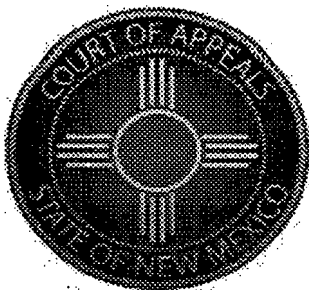
Mark Reynolds
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13th JUDICIAL DISTRICT COURT
Valencia County
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CLERK OF THE COURT

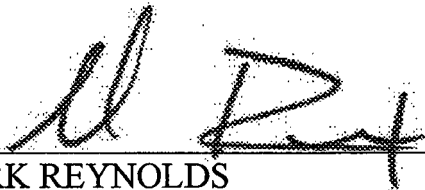
MANDATE TO DISTRICT COURT CLERK

Applicable items are indicated by an "X" below.

1. X Attached is a true and correct copy of the original decision/order entered in the above-entitled cause.
2. X This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision/order.
3. _____ Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.
4. _____ Cost Bill is assessed as follows:

By direction of and in the name of the Chief Judge of the Court of Appeals, this 27th day of September, 2023.




MARK REYNOLDS
Chief Clerk of the Court of Appeals

cc: Counsel w/out attachments

AB

FILED
13th JUDICIAL DISTRICT COURT
Valencia County
2/23/2022 9:17 AM
PHILLIP ROMERO
CLERK OF THE COURT

STATE OF NEW MEXICO
COUNTY OF VALENCIA
THIRTEENTH JUDICIAL DISTRICT COURT

BOBACK SABEERIN, s.s., et. al.
Plaintiffs

vs.

D-1314-CV-2021-374

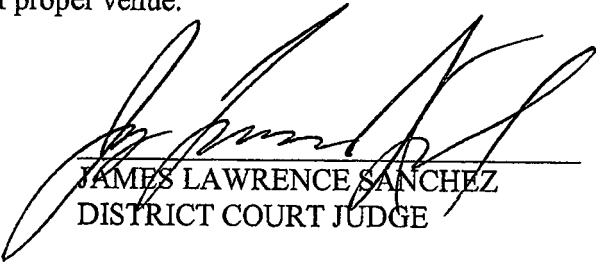
ALBUQUERQUE POLICE DEPARTMENT,
DETECTIVE TIM FASSLER, in his individual capacity(A.P.D.),
DETECTIVE JOHN DEAR, in his individual capacity(A.P.D.),
CITY OF ALBUQUERQUE,
Defendants.

ORDER GRANTING
DEFENDANT CITY OF ALBUQUERQUE'S MOTION TO DISMISS
PLAINTIFFS' COMPLAINT FOR IMPROPER VENUE PURSUANT TO
RULE 1-012(B)(3)

THIS MATTER having come before the Court on Defendant, City of Albuquerque's Motion to Dismiss Plaintiffs' Complaint for Improper Venue Pursuant to Rule 1-012(B)(3) in Lieu of an Answer, filed by Kristin J. Dalton, attorney for the Defendant, City of Albuquerque. The Court having reviewed the Motion to Dismiss Plaintiffs' Complaint for Improper Venue Pursuant to Rule 1-012(B)(3) in Lieu of an Answer, filed by Kristin J. Dalton, attorney for defendant City of Albuquerque, the Response filed by Boback Sabeerin, plaintiff pro se, and the Reply filed by Kristian J. Dalton, attorney for defendant City of Albuquerque. The Court FINDS that the Motion is well taken and should be granted.

IT IS THEREFORE ORDERED ADJUDICATED AND DECREED, that the Motion to Dismiss Plaintiffs' Complaint for Improper Venue Pursuant to Rule 1-012(B)(3) in Lieu of an

Answer is hereby granted, that Bernalillo County is the proper venue and the complaint is hereby dismissed without prejudice for lack of proper venue.



JAMES LAWRENCE SANCHEZ
DISTRICT COURT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

BOBACK SABEERIN, et al.,

Plaintiffs,

vs.

Civ. No. 21-cv-00512 MV/JFR

**ALBUQUERQUE POLICE DEPARTMENT
DETECTIVE TIM FASSLER, in his individual capacity,
ALBUQUERQUE POLICE DEPARTMENT
DETECTIVE JOHN DEAR, in his individual capacity,
CITY OF ALBUQUERQUE,**

Defendants.

**MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

THIS MATTER comes before the Court on United States Magistrate Judge John F. Robbenhaar's Proposed Findings and Recommended Disposition ("PFRD"), filed August 17, 2021 (Doc. 25), recommending that the Court grant in part Defendants' motion to dismiss and grant Plaintiffs' motion to remand (Docs. 7, 9). Objections were due by no later than August 31, 2021, with three additional days permitted for mailing. *See* Doc. 25. The parties have not filed any objections, and all deadlines have expired. The failure to make timely objections to the Magistrate Judge's Proposed Findings and Recommended Disposition waives appellate review of both factual and legal questions. *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1059 (10th Cir. 1996).

IT IS THEREFORE ORDERED that the Magistrate Judge's Proposed Findings and Recommended Disposition (Doc. 25) is adopted.

IT IS FURTHER ORDERED that Defendants' motion to dismiss (Doc. 7) is **GRANTED IN PART** as to Plaintiffs' federal claims only. The federal law claims are

DISMISSED WITH PREJUDICE. That motion (Doc. 7) is **DENIED** as to Plaintiffs' state law claims. Those state law claims are **DISMISSED WITHOUT PREJUDICE.**

IT IS FURTHER ORDERED that Plaintiffs' motion to remand (Doc. 9) is **GRANTED.** The state law claims shall be remanded to the Thirteenth Judicial District Court, Valencia County, State of New Mexico.

IT IS FURTHER ORDERED that this case is dismissed, and judgment shall enter in Defendants' favor only as to the federal law claims. The Court will remand the state law claims by separate order.



MARTHA YAZQUEZ
United States District Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

**BOBACK SABEERIN, MICHELLE
ROYBAL, J.R. and S.S.**

Plaintiffs,

v.

No. 1:16-cv-00497 JCH-LF

**ALBUQUERQUE POLICE DEPARTMENT
DETECTIVE TIMOTHY FASSLER, in his individual capacity,
ALBUQUERQUE POLICE DEPARTMENT
DETECTIVE JOHN DEAR, in his individual capacity,
CITY OF ALBUQUERQUE,
STATE OF NEW MEXICO,
SECRETARY GREGG MARCANTEL, in his official and
individual capacity,
NEW MEXICO CORRECTIONS DEPARTMENT,**

Defendants.

MEMORANDUM OPINION AND ORDER

Boback Sabeerin was convicted in state-court of automobile theft and similar charges after police officers allegedly found stolen vehicles on his property while executing a search warrant. An appeals court later ruled that the affidavit used to obtain the search warrant was invalid for lack of probable cause. Sabeerin and his family, proceeding *pro se*, bring state-law tort and constitutional claims and federal constitutional claims under 42 U.S.C. § 1983 against Timothy Fassler, the officer who wrote the search warrant affidavit, and other Defendants.¹

¹ Although the Court construes Plaintiffs' *pro se* filings liberally, the Court does not act as their lawyer or excuse them from "follow[ing] the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

After considering Defendants' motion for summary judgment (ECF No. 158), the Court holds that Defendants are entitled to qualified immunity and dismisses with prejudice Plaintiffs' federal claims. The Court declines to exercise supplemental jurisdiction over Plaintiffs' state-law claims and instead dismisses them without prejudice. Finally, Plaintiffs' objections to the magistrate judge's order staying discovery (ECF Nos. 184, 185, 186) are overruled and their request for discovery under Federal Rule of Civil Procedure 56(d) is denied.

1. Background

a. Factual Background

At the summary judgment stage a court must "view facts in the light most favorable to the non-moving party and draw all reasonable inferences in [his] favor." *Leone v. Owsley*, 810 F.3d 1149, 1153 (10th Cir. 2015). In 2009, Detective Fassler was investigating a man named Anjum Tahir for driving a vehicle with a stolen Vehicle Identification Number (VIN). Test. of Timothy Michael Fassler, 11:19-12:1-19, ECF No. 158-1 (Fassler Test.). Fassler learned that Tahir had a shop on 108 Rhode Island in Albuquerque. *Id.* at 13:5-7. On August 19th, Fassler obtained a warrant to search Tahir's property and allegedly found more stolen vehicles on Tahir's property. *Id.* at 18:3-13. Fassler also learned that Tahir was "doing business with" Sabeerin and that Sabeerin's address was 112 General Arnold. *Id.* at 18:14-17. Fassler sent other officers to watch the General Arnold location to see if Tahir would "show up." *Id.* at 18:17-19. Tahir did show up and officers arrested him. *Id.* at 18:19-20.

Fassler went to the General Arnold location, which was a "body shop" Sabeerin owned. Second Am. Compl. ¶ 17, ECF No. 69. Although the circumstances are not clear from the record, Fassler was apparently familiar with Sabeerin. When Fassler arrived at the shop he brought up Sabeerin's prior criminal charges and told him that "the two officers that worked on your case 20

years ago they work for me now we are going to make sure you don't get out this time." Affidavit of Boback Sabeerin, 3, ECF No. 172 (Sabeerin Aff.). Detective John Dear told Sabeerin's domestic partner, Michelle Roybal, that officers had been "looking for Sabeerin for twenty years" and that when they "found out Sabeerin was part of the investigation [the officers] came out of retirement" to ensure that Sabeerin did "not get out this time." *Id.* at 4.

According to Fassler, he asked Sabeerin "if Tahir had any vehicles on his property that would tie into all this altering stuff" and Sabeerin answered affirmatively that Tahir had several vehicles on the General Arnold property. Fassler Test. at 18:21-25. However, according to Sabeerin's affidavit, which the Court must credit as true, Sabeerin "never made any statement or admit [sic] to having or being involved in Tahirs [sic] criminal activity." Sabeerin Aff. at 4 (capitalization omitted).

Later that day, August 19th, officers applied for a search warrant for Sabeerin's General Arnold property. Most of the affidavit that Fassler wrote in support of the warrant focused on officers' investigation of Tahir and Tahir's VIN-switching activities. The only references Fassler made to Sabeerin's property was that Fassler observed on the property "numerous vehicles visible through the fence that have been, or are being dismantled," and that Fassler "learned that ... Tahir also did business at 112 General Arnold NE. [Fassler] sent a unit to watch that address and [Tahir] was taken into custody walking around the business. Several suspicious vehicles can also be seen on that lot." Affidavit for Search Warrant, ECF No. 158-2, 1, 2 (Search Warrant Aff.).

At 4:40 pm on August 19th a state-judge approved the warrant. Search Warrant, ECF No. 158-2 at 4. According to Fassler, officers discovered stolen vehicles on the 112 General Arnold property, although Sabeerin contends that the vehicles were not stolen.

On October 1, 2009, Sabeerin was indicted for receiving or transferring a stolen motor vehicle and similar charges. Defendants' Undisputed Material Fact, ¶ 14, ECF No. 158 (Defs.' UF). He moved to suppress evidence on the ground that Fassler's search warrant affidavit did not provide sufficient probable cause, which the court denied. On December 7, 2010 Defendant was tried and convicted and sentenced to 24 years of imprisonment. Defs.' UF ¶ 14.

He appealed the trial court's denial of his motions to suppress evidence. In 2014, the New Mexico Court of Appeals, over the dissent of one judge, held that Fassler's affidavit in support of a search warrant for Sabeerin's place of business at the General Arnold property failed to establish probable cause. *State v. Sabeerin*, 2014-NMCA-110, ¶ 2, 336 P.3d 990, 992 (2-1 decision). The court held that probable cause was lacking because: (1) Fassler's affidavit was "copied directly" from the search warrant affidavit used for Tahir's Rhode Island property, *id.* at ¶ 16, (2) Fassler's statement that "[he] learned that ... Tahir also did business at 112 General Arnold" failed to establish "the source and substance of such information[.]" and "whether the information was obtained through a" reliable tipster, *id.* at ¶ 18, (3) Fassler noted "suspicious vehicles" on Sabeerin's property without explaining why they were suspicious or ruling out innocent activity, *id.* at ¶¶ 20-25, and (4) the affidavit did not particularize the items to be seized. *Id.* at ¶ 26.

The dissenting judge believed that Fassler's search warrant affidavit established probable cause because it "included details regarding Detective Fassler's investigation into Tahir's VIN-switching operation at the Rhode Island property," and "surveillance of the General Arnold property revealed an apparently similar operation." *Id.* at ¶ 36. The dissent believed that Fassler's investigation of the Rhode Island property combined with his independent observations of

Sabeerin's General Arnold property sufficiently established the unknown tipster's reliability and therefore the dissent would have affirmed the trial court. *Id.* at ¶ 34.

Without evidence for another prosecution, Sabeerin was released from prison in 2015. Second Am. Compl. at ¶ 32.

b. Procedural Background

The only remaining Plaintiffs are Sabeerin and his child "S.S." Former Plaintiffs Michell Roybal and "J.R." voluntarily dismissed all claims. *See* ECF Nos. 122, 124, 126. Former Defendants the State of New Mexico, the New Mexico Corrections Department, and Secretary of Corrections Gregg Marcantel have either been dismissed as parties or had the claims against them voluntarily withdrawn. *See* ECF No. 83. The only remaining claims are asserted against the City of Albuquerque and APD Detectives Fassler and Dear in their individual capacities.

2. Plaintiffs' Objections to the Magistrate Judge's Stay-Order

Defendants moved for a stay of discovery based on their defense of qualified immunity, which the Court granted on November 13, 2020. ECF No. 177. Plaintiffs filed objections, amended objections, and second amended objections to the magistrate judge's stay-order on November 30, December 7, and December 8, respectively.

Pretrial matters involving discovery, such as a stay-order, are generally considered non-dispositive since they do not resolve the substantive claims for relief alleged in the pleadings. *See Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir. 1997). Under Federal Rule of Civil Procedure 72(a) a party may serve and file objections to a magistrate judge's order on a non-dispositive motion within 14 days after being served with a copy of the order. Fed. R. Civ. P. 72(a). If a party timely objects to the magistrate judge's non-dispositive rulings on pretrial matters, the district judge must modify or set aside any part of the disputed order that is "clearly erroneous or

contrary to law.” Fed. R. Civ. P. 72(a). “[I]t is extremely difficult to justify alteration of the magistrate judge’s non-dispositive actions by the district judge.” *Quarrie v. Wells*, No. CV 17-350 MV/GBW, 2020 WL 7385730, at *2 (D.N.M. Dec. 16, 2020) (citation and quotation marks omitted).

Plaintiffs state that the magistrate judge did not “pay attention to the schedule considering that it had been agreed to, did not pay attention to the fact that we have a pro se plaintiff and did not give any attention at all to the discovery that would be required to show how much time it would take and how expensive it would be.” ECF No. 186 at 13-14. However, the magistrate judge properly focused on the fact that in § 1983 litigation “a qualified immunity defense ‘protects the official both from liability as well as from the ordinary burdens of litigation, including far-ranging discovery.’” ECF No. 177 at 2 (quoting *Workman v. Jordan*, 958 F.2d 332, 335 (10th Cir. 1992)). It is well established that discovery does not normally begin until the question of whether the defendant’s conduct violated clearly established law is resolved. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The magistrate judge correctly applied these principles. Plaintiffs’ objections are overruled.

The remainder of Plaintiffs’ arguments, although styled as Rule 73(a) “objections,” are functionally an unauthorized sur-reply because Plaintiffs made rebuttal arguments to Defendants’ summary judgment arguments. Leave of court is required to file a sur-reply. D.N.M.LR-Civ. 7.4(b). “Courts generally do not grant a party leave to file a sur-reply unless the opposing party’s reply brief includes new information that the responding party needs an opportunity to address.” *Casias v. Distribution Mgmt. Corp., Inc.*, No. CV 11-00874 MV/RHS, 2014 WL 12710236, at *2 (D.N.M. Mar. 31, 2014). Plaintiffs did not seek permission to file a sur-reply and Defendants’ summary judgment reply brief contains no new information that would necessitate the filing of a

sur-reply. The portions of Plaintiffs' second amended objections that are not Rule 73 focused are an unauthorized sur-reply that will not be considered in ruling on the summary judgment motion.

3. Plaintiffs' Rule 56(d) Request

Federal Rule of Civil Procedure 56(d) allows a court to deny or defer considering a motion for summary judgment where the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). Here, Plaintiffs seek discovery of "police and city policy guidelines specification to how and when search warrants and arrest warrants should be issued," the "identity and story" of the informant mentioned in Fassler's affidavit and other similar material. ECF No. 168 at 1, 7. However, Plaintiffs do not require this discovery to answer the purely legal question of whether officers had arguable probable cause, *see infra*, to search the General Arnold property. Plaintiffs' Rule 56(d) request is denied.

4. Analysis of Plaintiffs' Federal Claims

Defendants moved for summary judgment.² "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff, who must clear two hurdles in order to defeat the defendant's motion." *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009). That burden requires a plaintiff to show that the state official "(1) [] violated a federal statutory or constitutional right, and (2) the unlawfulness of [the official's] conduct was clearly

² Defendants correctly note that only Boback Sabeerin responded to the summary judgment motion and that S.S. filed no responsive pleading. Construing Plaintiffs' *pro se* filings liberally, the Court assumes that S.S. joined the summary judgment opposition given Sabeerin's explanation in another pleading that S.S. wanted to "join in the Sabeerin response." ECF No. 186 at 3.

established at the time.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks and citation omitted).

a. Count I: Violation of U.S. Const. amend. IV and XIV

1. Detective Fassler

“Officers must have probable cause to initiate a search ... under the Fourth Amendment.” *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014). “[P]robable cause to search ... exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” *Ornelas v. United States*, 517 U.S. 690, 696 (1996). “A neutral magistrate judge’s issuance of a warrant is the clearest indication that the officers acted in an objectively reasonable manner” unless “the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Stonecipher*, 759 F.3d at 1141, 1142 (citation and quotation marks omitted). If “it is obvious that no reasonably competent officer would have concluded that a warrant should issue,” the warrant offers no protection. *Id.* at 1142 (citation and quotation marks omitted).³

“The burden is on the plaintiff to make a substantial showing of deliberate falsehood or reckless disregard for truth by the officer seeking the warrant.” *Id.* (internal quotation marks omitted). Proof of “reckless disregard in the presentation of information to a ... judge [requires] evidence that the officer in fact entertained serious doubts as to the truth of [her] allegations.” *Id.*

³ Plaintiffs state that the New Mexico Court of Appeals decision is “binding” and they raise the issue of collateral estoppel, ECF No. 169 at 8, 39-41, which “bars a party from relitigating an issue once it has suffered an adverse determination on the issue[.]” *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009). However, the Court lacks from Plaintiffs sufficient argument to meaningfully analyze whether the four elements of collateral estoppel are met. *See id.* (listing elements). The Court therefore concludes that Plaintiffs have not established that collateral estoppel is met.

(internal quotation marks omitted). "The failure to investigate a matter fully, to exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence rarely suggests a knowing or reckless disregard for the truth. To the contrary, it is generally considered to betoken negligence at most." *Id.* (brackets and internal quotation marks omitted).

Plaintiffs fail to make a substantial showing that Fassler's affidavit contained deliberate falsehoods or recklessly disregarded the truth. To the contrary, the affidavit provided truthful details about Fassler's investigation into Tahir's alleged VIN-switching operation. He described how his investigation led him to believe that Tahir purchased totaled vehicles from insurance auctions; that a tipster reported that Tahir did business at the Rhode Island location; and that his surveillance of the Rhode Island property led him to believe that VIN-switching activities were afoot. He learned that Tahir did business at Sabeerin's General Arnold property, sent a unit there, and personally saw what he believed to be several suspicious vehicles at General Arnold.

Plaintiffs retort that the vehicles on Sabeerin's property were not, in fact, VIN-switched; that Sabeerin made no incriminating statements at the time of the search; that his relationship with Tahir was that of a lawful buyer-seller; that no dismantled vehicles were visible on the General Arnold property; that Fassler relied on a potentially unreliable tipster, etc. However, many of Plaintiffs' contentions are an evaluation of the evidence in hindsight, and not as it would appear when Fassler applied for the search warrant. Because Plaintiffs' evidence and contentions fail to establish that Fassler entertained doubts about the veracity of his statements when he applied for the search warrant, Plaintiffs have failed to demonstrate a Fourth Amendment violation.

Plaintiffs have also not met their burden with respect to the “clearly established” part of their case. A right is clearly established “if courts have previously ruled that materially similar conduct was unconstitutional, or if a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct at issue.” *Est. of Reat v. Rodriguez*, 824 F.3d 960, 964-65 (10th Cir. 2016) (quotation, emphases, and alteration omitted). “[A] plaintiff may satisfy this standard by identifying an on point Supreme Court or published Tenth Circuit decision; alternatively, the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.” *Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (quotation omitted).

“In the context of a qualified immunity defense on an unlawful search ... we ascertain whether a defendant violated clearly established law by asking whether there was ‘arguable probable cause’ for the challenged conduct.” *Stonecipher*, 759 F.3d at 1141 (citation and quotation marks omitted). “Arguable probable cause is another way of saying that the officers’ conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists.” *Id.* In “the § 1983 qualified-immunity context ... so long as the officer’s mistake is reasonable” he or she is entitled to qualified immunity. *A.M. v. Holmes*, 830 F.3d 1123, 1139 (10th Cir. 2016).

Here, given that several judges (the warrant judge, the two trial judges who denied Sabeerin’s suppression motions, and the dissenting appellate judge) believed that Fassler’s affidavit established probable cause, it is not obvious that the warrant affidavit lacked a sufficient basis. As the dissenting judge in Sabeerin’s appeal explained, Fassler’s affidavit could have sufficiently connected Tahir to criminal activity, and connected Tahir to Sabeerin such that probable cause existed “the moment [Fassler] saw Tahir at the General Arnold property with the

same sort of suspicious vehicles in sight that he discovered in his investigation of Tahir's activities at the Rhode Island property." *Sabeerin*, 2014-NMCA-110 at ¶ 34. The fact that several judges who carefully read Fassler's affidavit believed that probable cause existed is strong evidence that Fassler could have reasonably, even if mistakenly, believed that probable cause existed to search Sabeerin's property. In such circumstances, a government official can claim qualified immunity even if the official was mistaken about the facts or the law. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

The federal appellate cases that Plaintiffs cite did not involve the issue of arguable probable cause, so they would not have apprised Fassler that his conduct was unlawful. *See Pearson*, 555 U.S. at 223; *Groh v. Ramirez*, 540 U.S. 551 (2004); *Saucier v. Katz*, 533 US 194 (2001); *Kentucky v. Graham*, 473 U.S. 159, (1985); *Thomas v. Kaven*, 765 F.3d 1183 (10th Cir. 2014); *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006). None of these cases constitute previous rulings in which "materially similar conduct" was held unconstitutional, *Rodriguez*, 824 F.3d at 965, and therefore these cases would not have placed the constitutional question "beyond debate." *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1774 (2015) (internal citations, alterations and quotation marks omitted). Nor is it sufficient for Plaintiffs to meet their burden by relying so heavily on the New Mexico Court of Appeals' ruling that Fassler's affidavit was invalid for lack of probable cause. "Arguable probable cause, not the higher standard of actual probable cause, governs the qualified immunity inquiry." *A.M.*, 830 F.3d at 1140. The question is not whether Fassler had probable cause or not; the question is whether his "conclusions rest[ed] on an objectively reasonable, even if mistaken, belief that probable cause exist[ed]." *Stonecipher*, 759 F.3d at 1141.

Rather than citing on-point caselaw, Plaintiffs devoted the bulk of their summary judgment opposition brief and voluminous filings – about 300 pages all told – to essentially relitigating the state-court prosecution. However, Sabeerin’s professed innocence to the underlying criminal charges is not the focus of the § 1983 inquiry. “Pages and pages of facts are no substitute for citations to clearly established law. Nor can they meet [a plaintiff’s] burden on qualified immunity.” *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 532, 534 (10th Cir. 1998). Accordingly, Plaintiffs have not carried their burden to demonstrate that Fassler violated clearly established law. *See Cox*, 800 F.3d at 1247 (“Significantly, Ms. Cox has not directed our attention to any Supreme Court or Tenth Circuit decision (published or otherwise) that would indicate that this right was clearly established *On this basis alone*, we could hold that Ms. Cox has not properly laid the groundwork to defeat Sheriff Glanz’s assertion of qualified immunity.”) (emphasis added) (footnote, quotation marks, and citation omitted). Detective Fassler is entitled to judgment as a matter of law on Plaintiffs’ federal constitutional claim under the Fourth Amendment.

Plaintiffs’ second amended complaint also seemingly invokes the Due Process Clause of the Fourteenth Amendment, which prohibits a State from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. Plaintiffs appears to rely on the Clause’s “substantive due process” component, which prevents the government from engaging in action that “shocks the conscience” or “interferes with rights implicit in the concept of ordered liberty.” *United States v. Salerno*, 481 U.S. 739, 746 (1987). Plaintiffs’ cited caselaw does not clearly establish how Fassler’s conduct shocks the conscious sufficiently to violate the Fourteenth Amendment. Fassler is entitled to judgment as a matter of law on Plaintiffs’ Fourteenth Amendment claim.

2. Detective Dear

For substantially the same reasons discussed above, the Court holds that Plaintiffs failed to show that Detective Dear violated their clearly established rights. Detective Dear is entitled to summary judgment on Plaintiffs' federal Fourth and Fourteenth Amendment claims.

3. The City

"A § 1983 suit against a municipality for the actions of its police officers requires proof that (1) an officer committed a constitutional violation and (2) a municipal policy or custom was the moving force behind the constitutional deprivation that occurred." *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1264 (10th Cir. 2008) (citation omitted). To establish municipal liability under § 1983, Plaintiff must prove a constitutional violation by the individual officer. *See id.* ("without the predicate constitutional harm inflicted by an officer, no municipal liability exists.") (citing *City of Los Angeles v. Heller*, 475 U.S. 796 (1986)). "A challenged practice may be deemed an official policy or custom for § 1983 municipal-liability purposes if it is a formally promulgated policy, a well-settled custom or practice, a final decision by a municipal policymaker, or deliberately indifferent training or supervision." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013).

Here, because Plaintiffs have not established a predicate constitutional violation by an individual officer, the City is entitled to judgment as a matter of law on Plaintiffs' allegations against the City.

b. Count II: Conspiracy to Violate U.S. Const. amend. IV and XIV

"[A] conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law" pursuant to § 1983 is actionable. *Snell v. Tunnell*, 920 F.2d 673, 701 (10th Cir. 1990). To prevail on such a claim, the plaintiff "must plead and prove not only a conspiracy,

but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient.” *Id.* “A conspiracy requires the combination of two or more persons acting in concert.” *Salehpoor v. Shahinpoor*, 358 F.3d 782, 789 (10th Cir. 2004). “In order to plead a conspiracy claim, a plaintiff must allege, either by direct or circumstantial evidence, a meeting of the minds or agreement among the defendants.” *Id.* The plaintiff must show that there was “a single plan, the essential nature and general scope of which [was] know [sic] to each person who is to be held responsible for its consequences.” *Snell*, 920 F.2d at 702.

Plaintiffs have not shown that Fassler, Dear or the City deprived him of a constitutional right. Count II is dismissed.

c. Count VI: Abuse of Process

Plaintiffs bring a claim for what they call “abuse of process.” They do not state whether this count is brought under federal or state law. In their summary judgment motion, Defendants provided a federal standard for a “malicious prosecution” claim, which requires a showing that: “(1) the defendant caused the plaintiff’s continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages.” *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008). Plaintiffs did not offer a different standard for analyzing their “abuse of process” claim, so the Court will assume that they assert a “malicious prosecution” claim governed by the elements described in *Wilkins*.

Plaintiffs’ evidence fails to establish elements 3 and 4. Concerning the third element, even though this element uses the language of “probable cause,” the Tenth Circuit has suggested that either a probable cause or an arguable probable cause standard will suffice. *See Bailey v. Twomey*, 791 F. App’x 724, 734 (10th Cir. 2019). The Court has already explained how Fassler

had arguable probable cause to search Sabeerin's property. The fourth element, malice, "may be inferred if a defendant causes the prosecution *without* arguable probable cause." *Stonecipher*, 759 F.3d at 1146. But Plaintiffs' evidence does not generate such an inference because Fassler had arguable probable cause. Nor have Plaintiffs presented caselaw placing the alleged unlawfulness of the malicious prosecution "beyond debate," *Sheehan*, 135 S. Ct. at 1774, or controlling authority that "squarely govern[s]" the case. *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016) (citation omitted). Plaintiffs therefore have not met the second qualified immunity prong with respect to the malicious prosecution claim against Fassler, Dear and the City.

5. The Court Declines Supplemental Jurisdiction over Plaintiffs' State-Law Claims

Plaintiffs also brought state-law tort and constitutional claims against Defendants. Under 28 U.S.C. § 1367(c)(3), "[t]he district courts may decline to exercise supplemental jurisdiction over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction." "If federal claims are dismissed before trial, leaving only issues of state law, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 549 (10th Cir. 1997); *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims.") The Court has granted summary judgment on and dismissed the federal claims. Because the remaining claims for relief are predicated entirely on state law, dismissal of the state-law claims without prejudice is proper. Plaintiffs will not be prejudiced by the dismissal of their state-law claims because 28 U.S.C. 1367(d) tolls the statute

of limitations on those claims during the pendency of the federal proceeding plus 30 days beyond the dismissal.

IT IS THEREFORE ORDERED that Defendants Albuquerque Police Department Detective Timothy Fassler and City of Albuquerque's Motion for Summary Judgment Based on Qualified Immunity, *Inter Alia* (ECF No. 158), joined by Defendant John Dear (ECF No. 160) is **GRANTED**;

Plaintiffs' objections to the magistrate judge's order staying discovery (ECF Nos. 184, 185, 186) are **OVERRULED** and that Plaintiffs' request for discovery under Federal Rule of Civil Procedure 56(d) is **DENIED**;

Counts I, II, and VI of Plaintiffs' Second Amended Complaint against Defendants the City of Albuquerque, Timothy Fassler, in his individual capacity and John Dear, in his individual capacity are **DISMISSED with prejudice**. Counts III, IV, and V of Plaintiffs' Second Amended Complaint are **DISMISSED without prejudice**.

IT IS SO ORDERED.


HONORABLE JUDITH C. HERRERA
Senior United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**BOBACK SABEERIN, MICHELLE
ROYBAL, J.R. and S.S.**

Plaintiffs,

v.

No. 1:16-cv-00497 JCH-LF

**ALBUQUERQUE POLICE DEPARTMENT
DETECTIVE TIMOTHY FASSLER, in his individual capacity,
ALBUQUERQUE POLICE DEPARTMENT
DETECTIVE JOHN DEER, in his individual capacity,
CITY OF ALBUQUERQUE,
STATE OF NEW MEXICO,
SECRETARY GREGG MARCANTEL, in his official and
individual capacity,
NEW MEXICO CORRECTIONS DEPARTMENT,**

Defendants.

MEMORANDUM OPINION AND ORDER

On August 8, 2016 Secretary Marcantel and the New Mexico Corrections Department collectively filed a Motion to Dismiss (ECF No. 17) the claims against them. The Court, having reviewed the motion, briefs, relevant law, and otherwise being fully advised, finds that the motion should be granted. The Court also finds that Plaintiffs should be granted leave to file an amended complaint.

I. FACTUAL BACKGROUND

Plaintiff Boback Sabeerin is a national of Iran, but in 1986 he fled that country and came to this one as a political refugee. *See* Comp. ¶ 11, ECF No. 1. He obtained permanent residency soon after, and made a livelihood from working in and running auto repair and “body shops.” *Id.* ¶¶ 12-14. In 1991, Mr. Sabeerin had a run in with the law, and was criminally charged with two counts of vehicle theft. *Id.* ¶ 15. He pleaded no contest to those charges and it appears he avoided

jail time. *Id.* This infuriated the then-officer working on the case, Defendant Detective John Deer, so much that he told Mr. Sabeerin to “watch his back.” *Id.*

Nearly 20 years later, in 2009, another detective, Defendant Timothy Fassler executed a search warrant on the body shop that Mr. Sabeerin owned together with his “domestic partner,” Plaintiff Michelle Roybal. *Id.* ¶¶ 14-15. When Detective Fassler entered Plaintiffs’ shop to execute the warrant, he told Mr. Sabeerin, “the two detectives that worked on your case twenty years ago, work for me. Now we are going to make sure you don’t get out this time. Foreigners like you don’t belong in this country. I am going to do everything in my power to make sure you get deported this time.” *Id.* ¶ 18. Detective Deer, the officer from the 1991 incident, came out of retirement specifically to join the investigation against Mr. Sabeerin. *Id.* ¶ 17. The search turned up a number of stolen vehicles and evidence of a VIN-switching operation. *Id.* ¶ 23.

The State brought four charges against Mr. Sabeerin for auto theft and similar charges. *Id.* ¶ 19. In Mr. Sabeerin’s first case, he moved to suppress the evidence obtained as a result of the search of his business property, arguing that Detective Fassler lacked probable cause to support issuance of a warrant. *Id.* The state judge denied the motion, and Mr. Sabeerin was found guilty and jailed. *Id.* Before trial for his second charge, Mr. Sabeerin again moved to suppress the evidence, which the judge again denied. *Id.* While incarcerated, corrections officers subjected him to a number of humiliations, including dragging Mr. Sabeerin across the jail in his boxers, and refusing to let him shower before and during trial. *Id.* ¶ 20. Each time Mr. Sabeerin’s appearance was required at trial or a motions hearing, corrections officers placed him in solitary confinement. *Id.* ¶ 28. These stints in solitary confinement pressurized Mr. Sabeerin – who is bipolar and suffers from other mental illnesses – so much that he pleaded guilty to the remaining

charges to avoid further jail time. *Id.* ¶¶ 22, 90. His charges were consolidated and he was sentenced to a total of 27 years. *Id.* ¶¶ 21, 23.

Mr. Sabeerin was placed in solitary confinement throughout his incarceration. *Id.* ¶ 28. His mental disorders made him particularly vulnerable to the effects of being segregated. *Id.* ¶ 81. His mental health deteriorated and he went long periods without sleep. *Id.* ¶¶ 81-82. Corrections officers deprived him of recreation and blocked his access to group therapy sessions. *Id.* ¶ 86. Officers also withheld or delayed giving him his medications. *Id.* ¶ 81.

Meanwhile, Mr. Sabeerin appealed the trial court's denials of his motions to suppress. *Id.* ¶ 23. In August 2014 – after spending five years in prison – the New Mexico Court of Appeals reversed his conviction, holding that the property search of Plaintiffs' business was invalid for lack of probable cause. *Id.* ¶ 24. Without evidence for re-trial, the prosecution agreed to dismiss the charges against Mr. Sabeerin, and the state judge released him in November 2015. *Id.* ¶ 27. NMCD told him he would be deported, although it knew this was inaccurate because Mr. Sabeerin was a permanent resident. *Id.* ¶ 31. Instead of releasing Mr. Sabeerin, NMCD delivered him – nearly naked in a clear plastic jumpsuit – to U.S. Immigration and Customs Enforcement and intimated to ICE authorities that Mr. Sabeerin was “illegal.” *Id.* ¶¶ 31, 33, 41. ICE detected no problems, and released Mr. Sabeerin in less than an hour. *Id.* ¶ 31.

Mr. Sabeerin's incarceration effectively destroyed his family and business life. *Id.* ¶¶ 34-41. His and Ms. Roybal's body shop was shuttered, its inventory impounded and sold at auction, and the couple's family unit broke apart. *Id.* ¶¶ 29, 36, 40.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their Complaint in this Court against Defendants and asserted the following claims: (I) violation of Mr. Sabeerin's and Ms. Roybal's Fourth Amendment rights

and Mr. Sabeerin's Fourteenth Amendment rights under 42 U.S.C. § 1983; (II) conspiracy to violate Mr. Sabeerin's and Ms. Roybal's Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983; (III) violation of Mr. Sabeerin's right to be free from cruel and unusual punishment under the Eighth Amendment pursuant to 42 U.S.C. § 1983; (IV) violation of Mr. Sabeerin's and Ms. Roybal's rights to be free from unlawful searches under N.M. Const. art. II, § 10; (V) conspiracy to violate N.M. Const. art. II, § 10; (VI) false arrest or imprisonment under the New Mexico Tort Claims Act; (VII) tortious abuse of process; and three claims of loss of consortium for each of Ms. Roybal, J.R., and S.S. In their Complaint, Plaintiffs' pleaded all counts against "Defendants."

Defendants Secretary Marcantel and NMCD collectively moved to dismiss, arguing that Secretary Marcantel, in his official-capacity, and NMCD are entitled to Eleventh Amendment immunity. *See* Defs.' Mot. at 1, ECF No. 17. Secretary Marcantel additionally moved for dismissal in his individual capacity, asserting the defense of qualified immunity against Plaintiffs' federal claims. *Id.* Regarding Plaintiffs' state claims, Secretary Marcantel contends that the State of New Mexico has not waived immunity under the NMTCA for the claims asserted. *Id.* The parties agreed to drop Plaintiffs' claim against NMCD, but all other claims remain intact. *See* Pls.' Resp at 1, ECF No. 20; Defs.' Rep at 1-2, ECF No. 25.

In their response brief, Plaintiffs raised new allegations that were not contained in their Complaint. For example, they alleged that Secretary Marcantel and NMCD placed Mr. Sabeerin in solitary confinement to block his access to court to pursue post-conviction remedies. Defendants placed Mr. Sabeerin – who appealed his convictions *pro se* – in solitary confinement before and after each motions hearing, according to Plaintiffs, to pressure him to drop his appeals. Plaintiffs also amplified some of their allegations against Secretary Marcantel, detailing

his supervisory role in creating inmate discipline policies, including solitary confinement. Finally, Plaintiffs ask the Court to convert Defendants' Motion to a motion for summary judgment. Plaintiffs attached seven exhibits to their response brief that contest Defendants' version of events, and request limited discovery. Defendants oppose this request and ask the Court to ignore Plaintiffs' newly raised allegations.

III. LEGAL STANDARDS

A. Motion to dismiss based on qualified immunity

To survive dismissal, a complaint must set forth factual allegations that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When reviewing a plaintiff's complaint in ruling on a 12(b)(6) motion, the court must accept all well-pleaded allegations as true and construe them in a light most favorable to the plaintiff. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009).

Qualified immunity operates to protect officers from the "sometimes hazy border between excessive and acceptable force and to ensure that, before they are subjected to suit, officers are on notice that their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (internal citation and quotations omitted), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). "Officials who are mistaken about the lawfulness of their conduct may still be entitled to qualified immunity if the mistake is reasonable in light of the applicable law and the facts known to them at the time." *Gomes v. Wood*, 451 F.3d 1122, 1136 (10th Cir. 2006). If officials of reasonable competence could disagree about the lawfulness of the challenged conduct, then the defendant is entitled to qualified immunity. *Id.*

Although a plaintiff can overcome the defense without a favorable case directly on point, existing precedent must have placed the constitutional question “beyond debate.” *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016). “Clearly established law” must not be defined “at a high level of generality.” *White v. Pauly*, 137 S.Ct. 548, 552 (2017). “Once the qualified immunity defense is asserted, the plaintiff bears a heavy two-part burden to show, first, the defendant’s actions violated a constitutional or statutory right, and, second, that the right was clearly established at the time of the conduct at issue.” *Eckert v. Dougherty*, 658 F.App’x 401, 405 (10th Cir. 2016). “Asserting a qualified immunity defense via a Rule 12(b)(6) motion, however, subjects the defendant to a more challenging standard of review than would apply on summary judgment.” *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014).

B. Eleventh Amendment immunity

Claims against state officials in their official capacities are essentially claims against the state entity. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (“Official-capacity suits, in contrast, generally represented only another way of pleading an action against an entity of which an officer is an agent.”). It is well established that “the Eleventh Amendment precludes a federal court from assessing damages against state officials sued in their official capacities because such suits are in essence suits against the state.” *Hunt v. Bennett*, 17 F.3d 1263, 1267 (10th Cir. 1994). Absent an unmistakable waiver by a state of its Eleventh Amendment immunity, or an unmistakable abrogation of such immunity by Congress, the Eleventh Amendment provides absolute immunity from suit in federal courts for states and their agencies. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 785 – 86 (1991). Thus, an official capacity lawsuit is appropriate only where the claims could be sustained against the entity in its own name. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978).

Under the framework of *Blatchford*, Secretary Marcantel, in his official capacity, has not waived his Eleventh Amendment immunity. Nor has Congress abrogated such immunity. Thus, the Eleventh Amendment bars Plaintiffs' claims for money damages in Counts I, II, and VII against Secretary Marcantel in his official capacity, and accordingly, the Court will dismiss those claims. *See Ky.*, 473 U.S. at 169 (Eleventh Amendment bars federal jurisdiction over state official acting in official capacity in suit for money damages).

C. Documents outside of the pleadings

Before analyzing Plaintiffs' claims, the Court must determine if it can consider the seven exhibits that Plaintiffs attached to their responsive brief. Plaintiffs included: (i) an affidavit by Mr. Sabeerin; (ii) a blank "parole plan" issued by NMDC; (iii) e-mail correspondence between the parties' lawyers; (iv) Secretary Marcantel's biography taken from NMCD's website; (v) an NMCD regulation describing the duties of the Secretary of Correction and his subordinates; (vi) a notice of tort claim from Plaintiffs' lawyer to Secretary Marcantel; (vii) and an NMCD policy governing restrictive housing.

"Generally, a court considers only the contents of the complaint when ruling on a 12(b)(6) motion." *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013). However, the court can properly consider the following: "documents incorporated by reference in the complaint; documents referred to in and central to the complaint, when no party disputes its authenticity; and matters of which a court may take judicial notice." *Id.* The Court will not consider any of the above documents. None were incorporated by reference in the Complaint, nor did the Complaint refer to any of them or indicate their centrality.

IV. DISCUSSION

A. Count VII: Eighth Amendment violation

i. Whether Secretary Marcantel violated the Eighth Amendment

The Eighth Amendment prohibits the infliction of “cruel and unusual” punishment. *See* U.S. Const. amend. VIII. “[T]he unnecessary and wanton infliction of pain” constitutes cruel and unusual punishment. *See Whitley v. Albers*, 475 U.S. 312, 319 (1986). “Among unnecessary and wanton inflictions of pain are those that are totally without penological justification.” *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). In terms of solitary confinement, “the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.” *Hewitt v. Helms*, 459 U.S. 460, 468 (1983). “An inmate making an Eighth Amendment claim for constitutionally inadequate conditions of confinement must allege and prove an objective component and subjective component associated with the deficiency” claimed. *See Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001). “The objective component requires conditions sufficiently serious so as to deprive inmates of the minimal civilized measure of life’s necessities.” *Id.* “The subjective component is met if the prisoner shows the defendants knew he faced a substantial risk of harm and disregarded that risk by failing to take reasonable measures to abate it.” *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999).

Plaintiffs’ claim against Secretary Marcantel in his individual capacity amounts to a claim of direct supervisory liability. To establish such liability, Plaintiffs must show Secretary Marcantel’s “*direct personal responsibility*” for the claimed deprivation of Mr. Sabeerin’s Eighth Amendment right. *See Porro v. Barnes*, 624 F.3d 1322, 1327 (10th Cir. 2010) (emphasis in original); *see also Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760 768 (10th Cir. 2013). “Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated

the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). It is not enough that an official acted in a supervisory role when the plaintiff’s constitutional rights were violated. *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010). Rather, the plaintiff “must show an ‘affirmative link’ between the supervisor and the constitutional violation,” *Schneider*, 717 F.3d at 767, which requires proof of three interrelated elements: “(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.” *Dodds*, 614 F.3d at 1199.

Plaintiffs lodge two main complaints against Secretary Marcantel in connection with their Eighth Amendment claim: that he arbitrarily placed Mr. Sabeerin in solitary confinement, and that Mr. Sabeerin received inadequate medical care while incarcerated.

a. Solitary confinement

The first element that a § 1983 plaintiff must demonstrate against a defendant-supervisor is the defendant’s personal involvement in promulgating, creating, or implementing a constitutionally deficient policy. *Id.* at 1999. The parties center their analyses on the Tenth Circuit’s decision in *Dodds*, and the Court agrees that *Dodds* and its progeny are instructive to this case. There, the defendant-sheriff ignored numerous state laws requiring him to release the plaintiff, who was able to post bail and thus eligible for release. *Id.* at 1202-03. The sheriff had an informal policy of releasing a detainee only after being arraigned by a judge. *Id.* at 1202. In the plaintiff’s case, that meant he languished in jail for two extra days. *Id.* Those two days were not trivial. As the court explained, “[t]he right of an accused to freedom pending trial is inherent in the concept of a liberty interest protected by the due process clause of the Fourteenth Amendment.” *Id.* at 1192. The sheriff therefore could be held individually liable for the policy

even if he did not personally have contact with the plaintiff or “actually know[] of his subordinates’ enforcement of these policies with regard to [p]laintiff in particular.” *Id.* at 1202. The sheriff’s policy was, as the Tenth Circuit described in a later case, “constitutionally infirm in the overwhelming majority of its applications, if not on its face.” *Durkee v. Minor*, 841 F.3d 872, 877 (10th Cir. 2016). By way of contrast, in *Durkee*, the Tenth Circuit believed the lower court misread *Dodds* when it held a sheriff individually liable for a policy of unshackling detainees in a booking room that led to an inmate-on-inmate assault. 841 F.3d at 877. Where the policy was facially constitutional, and no other similar assaults occurred, the sheriff could not be individually liable. *Id.*

Here, Plaintiffs allege that in light of Mr. Sabeerin’s mental illnesses, placing him in solitary confinement was an Eighth Amendment violation. But the Tenth Circuit previously considered and rejected a similar claim in *Hill v. Pugh*, 75 Fed.Appx. 715, 720–21 (10th Cir. 2003). There, the plaintiff was subjected to extended periods of isolation and sensory deprivation. *Id.* at 717. He claimed that placing him in solitary confinement “in disregard of his history of mental illness” amounted to cruel and unusual punishment. *Id.* The Tenth Circuit disagreed: No Eighth Amendment violation occurred in the absence of allegations that the prisoner was deprived of “minimal physical requirements – food, shelter, clothing and warmth.” *Id.* at 721. This comports with the Supreme Court’s view that, with solitary confinement issues generally, “the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.” *Hewitt v. Helms*, 459 U.S. 460, 468 (1983). “To the extent that such conditions are restive and even harsh,” but not cruel and unusual, solitary confinement is permissible. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

In the face of such a permissible policy, Plaintiffs have not alleged that Secretary Marcantel, say, thwarted state law and ran a renegade policy, as the defendant in *Dodds* had. The *Durkee* court indicated that a supervisor is typically liable for his “promulgation of the sort of policy at issue in *Dodds*,” or “when he has actual knowledge of subordinates’ past constitutional violations but does nothing to stop future occurrences.” 841 F.3d at 878. Nothing in Plaintiffs’ Complaint indicates that occurred here. Plaintiffs therefore have failed to demonstrate Secretary Marcantel’s “direct personal responsibility,” *Porro*, 624 F.3d at 1327.

Because Plaintiffs have not demonstrated Secretary Marcantel’s personal involvement, the Court will not examine whether the next two elements, causation and culpable state of mind, are established.

b. Inadequate medical care

Plaintiffs also generally allege that Mr. Sabeerin received inadequate medical care while imprisoned. The problem with these allegations is their generality. Plaintiffs do allege in their Complaint that while in solitary confinement Mr. Sabeerin’s mental health declined, medications were withheld from him, his sleep worsened, his bi-polar disorder made him more vulnerable to the harsh effects of confinement, and that Secretary Marcantel knew all of this. But Plaintiffs pleaded no facts that tie Mr. Sabeerin’s alleged inadequate medical care to Secretary Marcantel’s role as supervisor. Supervisory liability based on inadequate medical care is typically predicated on a theory of deliberate indifference; for example, the plaintiff may allege that a supervisor-defendant failed to train or supervise his subordinates. *See Dodds*, 614 F.3d at 1212. Nowhere in the Complaint do Plaintiffs substantiate any facts that would support such a claim.

ii. **Whether Secretary Marcantel violated clearly established rights**

Because Plaintiffs have insufficiently alleged that Secretary Marcantel deprived Mr. Sabecrin of his Eighth Amendment rights, the Court proceeds no further in the qualified immunity analysis. *See A.M. v. Holmes*, 830 F.3d 1123, 1134-35 (10th Cir. 2016) (“if the plaintiff fails to establish either prong of the two-pronged qualified-immunity standard, the defendant prevails on the defense.”). The Court dismisses without prejudice Count VII.

B. Count I: Fourteenth Amendment violation

The Due Process Clause of the Fourteenth Amendment provides that no State may “deprive any person of life, liberty, or property, without due process of law....” The Due Process Clause protects individuals against two types of governmental action: (1) “substantive due process” prevents the government from engaging in action that “shocks the conscience” or “interferes with rights implicit in the concept of ordered liberty,” and (2) “procedural” due process ensures that government action is implemented in a fair manner. *See United States v. Salerno*, 481 U.S. 739, 746 (1987).

Under the Fourteenth Amendment, the “[s]tate does not acquire the power to punish ... until after it has secured a formal adjudication of guilt.” *Ingraham v. Wright*, 430 U.S. 651, 671 n. 40 (1977). Thus “the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.” *Graham v. Connor*, 490 US 386, 395 n. 10 (1989). In determining “what does and [does not] constitute ‘punishment[,]’” *Blackmon v. Sutton*, 734 F.3d 1237, 1242 (10th Cir. 2013), the Tenth Circuit has explained that “a restriction on a pretrial detainee does not constitute punishment unless it is (1) intended as punishment or (2) unrelated to a legitimate government objective.” *Cordova v. City of Albuquerque*, 816 F.3d 645, 655 n. 5 (10th Cir. 2016).

Plaintiffs' Complaint can be fairly read to allege that Mr. Sabeerin was placed in solitary confinement, as a pretrial detainee, more than once, and, that in one case he was confined for a month. Secretary Marcantel personally created and executed the policies that led to Mr. Sabeerin's confinement, Plaintiffs contend. This was tantamount to punishment, Plaintiffs argue, and therefore Secretary Marcantel's conduct shocks the conscious sufficiently to violate the Fourteenth Amendment.

It is Plaintiffs' burden to show that Secretary Marcantel violated a clearly established constitutional right. Mindful of this, the Court first examines whether Plaintiffs' Complaint sufficiently alleges a violation of clearly established law. *See A.M.*, 830 F.3d at 1135 (explaining that a court has discretion to address the sequence of the qualified immunity analysis). "Ordinarily, a plaintiff may show that a particular right was clearly established at the time of the challenged conduct by identifying an on-point Supreme Court or published Tenth Circuit decision; alternatively, the clearly established weight of authority from other courts must have found the law to be as [she] maintains." *Id.*

Here, Plaintiffs have not identified an on-point Supreme Court or Tenth Circuit case, or a case from another court. In fact, Plaintiffs have not cited a single case – at all – supporting Plaintiffs' position that placing Mr. Sabeerin in solitary confinement as a pretrial detainee violated the Fourteenth Amendment. The Court therefore dismisses without prejudice Plaintiffs' Fourteenth Amendment claim in Count I against Secretary Marcantel.

C. Count II: Conspiracy to violate the Fourth and Fourteenth Amendments

"[A] conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law" pursuant to § 1983 is actionable. *See Snell v. Tunnell*, 920 F.2d 673, 701 (10th Cir. 1990). In order to prevail on such a claim, the plaintiff "must plead and prove not only a

conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient.” *Id.* “A conspiracy requires the combination of two or more persons acting in concert.” *Salehpoor v. Shahinpoor*, 358 F.3d 782, 789 (10th Cir.2004). “In order to plead a conspiracy claim, a plaintiff must allege, either by direct or circumstantial evidence, a meeting of the minds or agreement among the defendants.” *Id.* The plaintiff must show that there was “a single plan, the essential nature and general scope of which [was] know [sic] to each person who is to be held responsible for its consequences.” *Snell*, 920 F.2d at 702.

According to Plaintiffs, NMCD and Secretary Marcantel conspired to place Mr. Sabeerin in solitary confinement to break his resolve so he would plead guilty to his remaining charges. The Complaint, however, pleads very few and very inconsistent facts to support this charge. For example, it alleges that Mr. Sabeerin entered a guilty plea “*on the advice of counsel* and because of his mental condition of terror occasioned by his treatment at Defendant’s [sic] hands.” (emphasis added). See ECF. No. 1, ¶ 21. Plaintiffs’ contentions amount to little more than conclusory allegations, which the Court disregards. See *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994) (stating that “[c]onclusory allegations of conspiracy are insufficient to state a valid § 1983 claim.”). Accordingly, the Court dismisses Count II against Secretary Marcantel without prejudice.

D. Counts III, IV, V, and VII: Claims brought under the New Mexico Tort Claims Act

The New Mexico Tort Claims Act specifically includes state constitutional violations committed by public officers and governmental entities within the torts for which liability may be found. *Begay v. State*, 1985-NMCA-117, 723 P.2d 252, *rev’d on other grounds by Smialek v. Begay*, 1986-NMSC-049, 721 P.2d 1306. A person cannot sue the public officers and governmental entities for damages for violation of a state constitutional right, however, absent a

waiver of immunity under the NMTCA. *Valdez v. State*, 2002-NMSC-028, ¶ 12, 54 P.3d 71, 77. If no specific waiver is found in the NMTCA, the claim must be dismissed. *See Begay v. State*, 723 P.2d at 255–56.

Plaintiffs' Complaint fails to identify which waiver under the NMTCA applies to their state law claims. Thus, their Complaint has not shown Secretary Marcantel's immunity is waived. The Court therefore dismisses without prejudice Counts III, IV, V, and VII against Secretary Marcantel.

E. Count VI: Abuse of Process

"In a malicious abuse of process claim, a claimant must establish three elements: (1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages." *LensCrafters, Inc., v. Kehoe*, 2012-NMSC-020, ¶ 29, 282 P.3d 758, 766. Plaintiffs allege that "Defendants misused the legal process by bringing charges against the Plaintiff that lacked probable cause and the proceedings against Sabeerins' [sic] and with malice." The Court dismisses this claim. Secretary Marcantel – who is neither a law enforcement officer nor a prosecutor – never used judicial process against Mr. Sabeerin. Count VI is accordingly dismissed without prejudice.

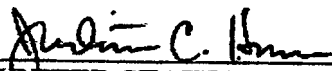
F. Counts VIII, IX, X: Loss of Consortium

Loss of consortium is a derivative cause of action, so that the plaintiff may not recover unless the defendant's misconduct harmed the person in relation to the plaintiff. *See McLelland v. United Wisc. Life Ins. Co.*, 1999-NMCA-055, ¶ 26, 980 P.2d 86, 310. Because Plaintiffs have not pleaded facts demonstrating Secretary Marcantel's liability, the Court need not address Plaintiffs' loss of consortium claim. Counts VIII, IX, and X are dismissed without prejudice.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (ECF No. 17) is **GRANTED**.

IT IS ALSO ORDERED that Plaintiffs' claims against Secretary Marcantel and NMCD are **DISMISSED** without prejudice.

The Court interprets Plaintiffs' Rule 56 request as a request for leave to file an amended complaint. Plaintiffs may file an amended complaint compliant with this Memorandum and Order and Rule 11 of the Federal Rules of Civil Procedure within **14 DAYS** of entry of this Order.


UNITED STATES DISTRICT JUDGE

369 P.3d 371 (Table)

(The decision of the Court is referenced
in a table in the Pacific Reporter)

Supreme Court of New Mexico

State

v.

Sabeerin

NO. 34,886

|
September 30, 2015

Opinion

Writ Quashed.

All Citations

369 P.3d 371 (Table), 2015 -NMCERT- 009

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STATE V. SABEERIN (2014)

Court of Appeals of New Mexico.

STATE of New Mexico, Plaintiff–Appellee, v. Boback SABEERIN, Defendant–Appellant.

Nos. 31,412, 31,895.

Decided: August 11, 2014

Gary K. King, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Appellee. Jorge A. Alvarado, Chief Public Defender, Mary Barket, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

{1} The issues in this appeal stem from two trials in which Defendant Boback Sabeerin was convicted of crimes related to his involvement in a vehicle identification number (VIN) switching operation. In the first trial, Court of Appeals No. 31,412, Defendant was tried together with his co-conspirator, Anjum Tahir (Tahir). In the second trial, Court of Appeals No. 31,895, Defendant was tried alone. The two trials generated two appeals that we consolidate into this Opinion.

{2} Defendant makes a number of arguments in support of reversal. We hold that Defendant's motions to suppress in both No. 31,895 and in No. 31,412 should have been granted. The affidavit in support of a search warrant for Defendant's place of business at 112 General Arnold in Albuquerque, New Mexico, failed to establish probable cause as required by the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. As a result, we reverse.

BACKGROUND

{3} The investigation that led to the charges and subsequent convictions at issue in these appeals began when Tahir was arrested for attempting to steal an automobile. When Tahir was arrested, he was driving an automobile registered in his name, but bearing the VIN of a different automobile—one that had been purchased by Tahir at an insurance auction as a "complete burn and totaled" vehicle. Detective Timothy Fassler of the Albuquerque Police Department's auto theft unit learned that the true VIN of the vehicle that Tahir was driving had been reported stolen two months before Tahir's arrest. Detective Fassler's further investigation revealed that Tahir had purchased a large number of totaled vehicles at auction.

{4} Having received a tip that Tahir "did business" at a combined structure located at 108 and 112 Rhode Island (the Rhode Island property) in Albuquerque, Detective Fassler started surveillance at that property. From his surveillance, Detective Fassler concluded that Tahir had two vehicles—one that Detective Fassler concluded must have been stolen and its VIN altered and another of the same make, purchased at auction, that provided the VIN for its stolen counterpart. A search warrant was issued for the Rhode Island property on August 19, 2009, at 2:13 p.m., and a search confirmed the factual basis of Detective Fassler's search warrant affidavit and revealed other stolen and VIN-altered vehicles. During his investigation into Tahir's activities, Detective Fassler "learned" that Tahir also "did business" at 112 General Arnold (the General Arnold property) in Albuquerque, so he sent a unit to watch that property. Tahir was seen there and taken into custody. Because Detective Fassler observed vehicles at the General Arnold property which he described as "suspicious," he sought a search warrant for that property as well.

{5} On August 19, 2009, at 4:40 p.m., a search warrant was issued for the General Arnold property, and detectives proceeded to search the property. Defendant, the lessee of the property, arrived and agreed to speak with Detective Fassler. Detective Fassler read Defendant his Miranda rights, interviewed Defendant about the stolen and VIN-switched vehicles on his property, and Defendant gave a statement implicating Tahir and himself in a car theft and VIN-switching operation. Further, a search of the General Arnold property revealed a number of stolen vehicles, as well as evidence of a car theft and VIN-switching operation.

{6} On October 1, 2009, Defendant was indicted in No. 31,412. Similar charges were filed against Tahir, and the cases were joined. A jury trial was held and Defendant was found guilty. Based on the same investigation that led to the charges in No. 31,412, Defendant was indicted in No. 31,895. A jury trial was also held in that case and Defendant was found guilty. Defendant appeals from his convictions in both cases. Because we hold that Defendant's motions to suppress should have been granted, and reverse on that basis, we do not reach his remaining arguments.

{7} Defendant argues that the district court erred in denying his motions to suppress the evidence obtained as a result of the search of the General Arnold property. Defendant contends that the affidavit for the search warrant did not provide sufficient probable cause or specificity to support issuance of the search warrant, thereby rendering the search warrant invalid. Defendant attacks the affidavit for the search warrant on three bases. He argues that improper hearsay from an unknown source led the affiant, Detective Fassler, to believe that Tahir "also did business at 112 General Arnold." He also argues that Detective Fassler's "assertion that there were 'several suspicious vehicles' at" the General Arnold property was insufficient to "establish probable cause to believe that evidence of criminal activity would be found there." He argues further that the search warrant affidavit was too broad in its description of the parameters of the search. We agree with all three arguments.

Probable Cause

{8} "The Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution both require probable cause to believe that a crime is occurring or seizable evidence exists at a particular location before a search warrant may issue." *State v. Williamson*, 2009-NMSC-039, ¶ 14, 146 N.M. 488, 212 P.3d 376 (alterations, internal quotation marks, and citation omitted). In *McDonald v. United States*, 335 U.S. 451, 455 (1948), Justice William O. Douglas explained the importance of the warrant requirement:

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a[n issuing judge] between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.

"Probable cause to search a specific location exists when there are reasonable grounds to believe that a crime has been committed in that place, or that evidence of a crime will be found there." *State v. Evans*, 2009-NMSC-027, ¶ 10, 146 N.M. 319, 210 P.3d 216.

{9} A search warrant may only issue "on a sworn written statement of the facts showing probable cause for issuing the warrant." Rule 5-211(A)(4) NMRA. An affidavit in support of a search warrant "must contain sufficient facts to enable the issuing [judge] independently to pass judgment on the existence of probable cause." *Williamson*, 2009-NMSC-039, ¶ 30 (internal quotation marks and citation omitted); see also *State v. Knight*, 2000-NMCA-016, ¶ 15, 128 N.M. 591, 995 P.2d 1033 ("Affidavits supporting search warrants must be sufficiently detailed so that the analyzing court can make a probable cause determination."), holding limited by *Williamson*, 2009-NMSC-039, ¶ 29; see also *State v. Gonzales*, 2003-NMCA-008, ¶ 12, 133 N.M. 158, 61 P.3d 867 (stating that probable cause to issue a warrant requires a factual showing "that there is a reasonable probability that evidence of a crime will be found in the place to be searched"), holding limited by *Williamson*, 2009-NMSC-039, ¶ 29.

{10} Detailed search warrant affidavits "must show: (1) that the items sought to be seized are evidence of a crime; and (2) that the criminal evidence sought is located at the place to be searched." *Evans*, 2009-NMSC-027, ¶ 11 (internal quotation marks and citation omitted). Additionally, search and seizure is only lawful where the search warrant affidavit sets forth a factual basis establishing "a sufficient nexus between (1) the criminal activity, and (2) the things to be seized, and (3) the place to be searched." *State v. Gurule*, 2013-NMSC-025, ¶ 15, 303 P.3d 838 (internal quotation marks and citation omitted).

{11} There is no bright-line test for determining probable cause. *Evans*, 2009-NMSC-027, ¶ 11. Probable cause does not have to be based on absolute factual certainty, but it must be based on "more than a suspicion or possibility." *Id.* (internal quotation marks and citation omitted). "[A] mere suspicion that the objects in question are connected with criminal activity will not suffice." *Gurule*, 2013-NMSC-025, ¶ 14 (citing 2 Wayne LaFare, et. al., *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(d), at 414 (5th ed.2012)); see also *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (finding that a search warrant was improperly issued where the sworn affidavit was insufficient where it contained a mere affirmation of suspicion or belief by the affiant without setting forth the supporting facts or circumstances).

{12} "[P]robable cause" shall be based upon substantial evidence." Rule 5-211(E); see also *State v. Haidle*, 2012-NMSC-033, ¶ 11, 285 P.3d 668 (same). "[T]he substantial basis standard of review is more deferential than the de novo review applied to questions of law, but less deferential than the substantial evidence standard applied to questions of fact." *Williamson*, 2009-NMSC-039, ¶ 30. "This standard, however, does not preclude the reviewing court from conducting a meaningful analysis of whether the search warrant was supported by probable cause, but rather precludes the reviewing court from substituting its judgment for that of the issuing judge[.]" *Gurule*, 2013-NMSC-025, ¶ 16 (internal quotation marks and citation omitted). Hence, "if the factual basis for the warrant is sufficiently detailed in the search warrant affidavit and the issuing court has found probable cause, the reviewing courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *Williamson*, 2009-NMSC-039, ¶ 30 (alteration, internal quotation marks, and citation omitted).

{13} Any information that was not provided to the issuing judge at the time the search warrant affidavit and warrant were presented to him cannot be considered by the reviewing court in assessing the validity of the warrant. "[I]n evaluating a probable cause determination, the reviewing court must focus on the issuing judge's determination regarding the information contained in the four corners of the [search warrant] affidavit." *Gurule*, 2013-NMSC-025, ¶ 17; see also *Williamson*, 2009-NMSC-039, ¶ 31 (noting that the reviewing court must consider only the information contained within "the four corners of the search warrant affidavit," as well as the affidavit as a whole). "All direct and circumstantial evidence alleged, as well as all reasonable inferences to be drawn from those allegations, should be considered." *State v. Snedeker*, 1982-NMSC-085, ¶ 24, 99 N.M. 286, 657 P.2d 613. As the reviewing court, we are required to give deference to the issuing court's determination of probable cause and should not substitute our judgment for that court. *Id.* ¶ 22. Our analysis is therefore focused at the time the affidavit was presented to the issuing judge and with only the information contained within the affidavit at that time.

The Search Warrant Affidavit's Content

On August 13, 2009, Detective Fassler obtained two search warrants. First, he obtained a warrant to search the Rhode Island property, which he had connected to Tahir through his investigation and his surveillance of the Rhode Island property. The affidavit in support of the Rhode Island property warrant explains that police began investigating Tahir when he was apprehended for auto theft. The search warrant affidavit goes on to explain that at the time Tahir was arrested, he was driving a stolen truck that had been VIN-switched with a similar truck which had been totaled and sold to Tahir at an auction in Arizona.

(15) The search warrant affidavit details Detective Fassler's subsequent investigation into Tahir's VIN-switching operation, including internet searches revealing several totaled vehicles bought at auction and a tip that Tahir was doing business at the Rhode Island property. In the search warrant affidavit, Detective Fassler describes how, after receiving a tip regarding the Rhode Island property, he began surveillance there which revealed two Hummer vehicles; one red totaled Hummer SUV that Tahir had purchased at auction, and a second blue Hummer truck, which was registered to Tahir using the totaled red Hummer SUV's VIN. Based on Tahir's arrest for auto theft, the tip that Tahir was doing business at the Rhode Island property, and the discovery of the apparently VIN-switched Hummers at the Rhode Island property, Detective Fassler obtained the Rhode Island property search warrant.

(16) After executing the Rhode Island property search warrant and confirming the presence of stolen and VIN-switched vehicles there, Detective Fassler sought a search warrant for the General Arnold property. The facts in the search warrant affidavit supporting the search warrant application for the General Arnold property appear to have been copied directly from the Rhode Island property search warrant affidavit. The information is identical except for the description of the General Arnold property, the sentence identifying and describing the vehicles visible through the fence, and three sentences added at the end of the affidavit. As a result, the General Arnold property search warrant affidavit contains all of the detailed factual information which was used to establish probable cause to search the Rhode Island property, but relatively few facts related to the General Arnold property. The only additional facts pertaining to the General Arnold property are:

There are numerous vehicles visible through the fence that have been, or are being dismantled. Also cars with no damage at all are visible.

During the investigation [into Tahir's suspected criminal activity at the Rhode Island property], [Detective Fassler] learned that Tahir also did business at 112 General Arnold. [Detective Fassler] sent a unit to watch that [property] and [Tahir] was taken into custody walking around that business. Several suspicious vehicles can also be seen on that lot.

We must determine whether this language, within the four corners of the affidavit for the General Arnold property, provides sufficient facts upon which to conclude that there was a reasonable probability connecting Tahir's criminal activity at the Rhode Island property to the General Arnold property. We conclude that it does not.

(17) The State argues that against the backdrop of the investigation and search of the Rhode Island property, the information leading police to the General Arnold property, Tahir's presence there, and the presence of "suspicious vehicles" on the premises, collectively support an inference that further evidence of Tahir's auto theft and VIN-switching operation would be found at the General Arnold property. We disagree.

(18) The question before us is whether there are sufficient underlying circumstances in the General Arnold property search warrant affidavit from which the issuing judge could conclude that the information learned by Detective Fassler, no matter the source, was credible or reliable. The General Arnold property search warrant affidavit does not contain detailed facts that support such an inference. Cf. *State v. Dietrich*, 2009-NMCA-031, ¶¶ 14, 23, 145 N.M. 733, 204 P.3d 748 (holding that the search warrant affidavit contained sufficient information regarding the investigating detective's sources of information, including information from informants and from investigation to support a probable cause determination). While we understand that during the course of his investigation of the Rhode Island property Detective Fassler learned that Tahir did business at the General Arnold property, the affidavit is completely silent regarding the source and substance of such information. Detective Fassler does not specify, within the affidavit, how he learned of this information, nor did he explain the content of the information learned. More questions have been raised than answers have been provided. Was this information such that Detective Fassler could provide as first-hand knowledge? Was this information something he was told by another person, did he get it from documentation or other type of evidence that led him to determine that Tahir was engaging in the same criminal activity at both locations? It is unclear whether the information was obtained through a tip, as Defendant suggests, or whether it was obtained as a result of Detective Fassler's investigation. The search warrant affidavit does not indicate whether police conducted any investigation into a possible VIN-switching operation at the General Arnold property. Cf. *State v. Trujillo*, 2011-NMSC-040, ¶ 28, 150 N.M. 721, 266 P.3d 1 (holding that details of the police investigation contained in the search warrant affidavit were sufficient to establish a factual basis for the probable cause determination).

(19) It is a concern that we cannot determine whether the source of this information learned by Detective Fassler is reliable or credible. See Rule 5-211(E) (stating there must be "a substantial basis for believing the source of the hearsay to be credible and . . . that there is a factual basis for the information furnished"); see also *State v. Cordova*, 1989-NMSC083, ¶ 17, 109 N.M. 211, 784 P.2d 30 (holding that a two-prong test for evaluating whether hearsay information contained in an affidavit for search warrant is sufficient to establish probable cause under the New Mexico Constitution). There is insufficient information before the issuing judge to determine whether the substance or source of Detective Fassler's information is credible or reliable. There is also insufficient information before the issuing judge to determine whether the circumstances by which Detective Fassler, or his source, obtained this information, demonstrated the probability that the criminal activity taking place at the Rhode Island property was also taking place at the General Arnold property.

(20) It is also necessary to address whether there are sufficient underlying circumstances in the search warrant affidavit from which the issuing judge could conclude that the "suspicious" vehicles were reasonable grounds to believe that a crime had been committed at the General Arnold property or that evidence of a crime would be found there. *Evans*, 2009-NMSC-027, ¶ 10. The search warrant affidavit states that "suspicious vehicles" were observed on the premises. In

describing the property, it does not explain why the vehicles were suspicious, other than to say that some of the vehicles looked like they were being dismantled and some did not. Cf. Williamson, 2009–NMSC–039, ¶ 32 (upholding a search warrant because the facts describing a suspicious package were sufficiently detailed to support the issuing court's determination of probable cause).

{21} Additionally, we note that where, as here, the facts provided in the search warrant affidavit only established conduct consistent with lawful activity, our inquiry should be “particularly exacting.” State v. Nyce, 2006–NMSC–026, ¶ 14, 139 N.M. 647, 137 P.3d 587, limited on other grounds by Williamson, 2009–NMSC–039, ¶ 29. See Nyce, 2006–NMSC026, ¶¶ 13–14 (holding that the purchase of tincture of iodine and hydrogen peroxide at multiple stores in a hurried manner is equally consistent with lawful activity and alone does not establish probable cause); State v. Anderson, 1988–NMCA–033, ¶ 16, 107 N.M. 165, 754 P.2d 542 (holding that facts consistent with a drug courier profile are insufficient in themselves to establish probable cause, because they “are generally descriptive of hundreds of innocent persons traveling through New Mexico on the interstate every day”).

{22} The Nyce case presents an analogous situation where the observation of suspicious activity was insufficient to establish that it was reasonably probable that there was criminal activity occurring at the location identified. 2006–NMSC–026. In Nyce, the defendant purchased multiple items at different stores. These items were ingredients used to make methamphetamine, but could also be used for legal purposes. Id. ¶ 2. She attempted to use a self-pay register. Id. She had a hurried pace. Id. ¶ 3. She purchased more items at another store and then dropped everything off at her boyfriend's home. Id. ¶ 4. Affiant noted that in his experience persons who purchased ingredients for methamphetamine buy the items in more than one store to avoid detection by law enforcement. Id. ¶ 3. Affiant suspected the boyfriend was involved in the manufacturing of methamphetamine. Id. ¶ 4. The Court concluded that these suspicious activities were insufficient to establish that it was any more or less probable that the defendant would use them for an illicit purpose. Id. ¶ 28. Thus, the affidavit failed to establish probable cause to support the issuance of a search warrant for the boyfriend's house. See id.

{23} In State v. Sansom, 1991–NMCA–103, 112 N.M. 679, 818 P.2d 880, overruled on other grounds by State v. Tollardo, 2012–NMSC–008, ¶ 37 n. 6, 275 P.3d 110, this Court concluded that there was no probable cause to search a trailer where the affidavit in support of a search warrant recounted that the truck used during the commission of a crime and was believed to have been carrying the weapon used in the crime, was found parked in front of the trailer within twenty-four hours after the commission of the crime. Id. ¶¶ 2–3. There were insufficient facts in the search warrant affidavit to show that the suspect resided in the trailer or that evidence of the crime could be found in the trailer. Id. ¶¶ 14–15.

{24} While the facts here may seem suspicious to police familiar with Tahir and the investigation into the Rhode Island property, they are also consistent with innocent, lawful activity. We conclude that the facts alone may be sufficient to arouse suspicion that the General Arnold property was connected to Tahir's criminal endeavors, but are insufficient to establish the reasonable probability that criminal activity was taking place at the General Arnold property, or that evidence of a crime would be found there.

{25} To hold that the extensive concentrated details of the Rhode Island property affidavit is a sufficient reasonable inference to support the issuance of a search warrant for the General Arnold property dodges the protections set forth by the United States and New Mexico Constitutions. Again, a mere affirmation of a suspicion or belief by affiant that the objects in question are connected with criminal activity is insufficient to establish probable cause. Gurule, 2013–NMSC–025, ¶ 14; see Nathanson, 290 U.S. at 47; Evans, 2009–NMSC027, ¶ 11.

Affidavit's Concluding Paragraph

{26} Defendant also argues that the warrant does not describe with particularity the things to be searched or seized. The concluding paragraph of the affidavit for search warrant states:

Based on the above information, and due to the circumstances, the Affiant respectfully requests this search warrant be granted in order to examine the scene for any and all evidence which may lead investigators to the offender(s) and or possible witnesses in this case under the auspices of the District Court, County of Bernalillo, State of New Mexico.

(Emphasis added.) The Fourth Amendment to the United States Constitution requires that a search warrant particularly describe the “things to be seized.” Article II, Section 10 of the New Mexico Constitution requires that the search warrant must describe the “things to be seized.” “The purpose of the particularity requirement is to prevent general searches.” State v. Light, 2013–NMCA–075, ¶ 22, 306 P.3d 534; see also Voss v. Bergsgaard, 774 F.2d 402, 404 (10th Cir.1985) (stating that “[t]he particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause”). There must be a sufficient nexus between the evidence law enforcement is looking for and the particular place being searched.

{27} In our recent opinion in Light, we concluded a search warrant was impermissibly broad when it allowed law enforcement to search “all persons” located within a theater known for illegal substances and the defendant's only connection to any crime was her presence at a public event where the illegal activity was taking place. 2013–NMCA–075, ¶¶ 1–2. The Light parties agreed that there was probable cause to search the defendant and that law enforcement was justified in entering and searching the premises for evidence of drugs and drug paraphernalia. Id. ¶ 23. However, the disagreement was with the validity of an “all persons” warrant. Id. ¶¶ 24–25.

{28} There is no question that the search warrant and supporting affidavit are clear about the place to be searched, the General Arnold property. The problem is with the all encompassing authorization given to law enforcement officers to search for and seize everything and anything that they the officers themselves determine “may lead investigators to the offender(s) and or possible witnesses” in the case. This warrant is therefore invalid as an impermissible general warrant.

{29} Accordingly, we conclude that the General Arnold property search warrant was invalid for lack of probable cause and as an impermissible general warrant. The comprehensive information pertaining to the Rhode Island property and the morsels of flawed information attributable to the General Arnold property fall short of showing the required nexus between Tahir and his alleged criminal activity at the Rhode Island property and Tahir and similar alleged criminal activity at the General Arnold property. See *Haidle*, 2012–NMSC–033, ¶ 36 (concluding that the facts included in the search warrant affidavit amounted to “bits and pieces of circumstantial . content . [which] fail[ed] to provide the substantial evidence required for the [judge] to find probable cause”). We reverse and remand for proceedings consistent with this Opinion.

{30} IT IS SO ORDERED.

{31} I respectfully dissent.

{32} In reviewing a challenge to a search warrant, we do not substitute our judgment for that of the issuing court. *Trujillo*, 2011–NMSC–040, ¶ 17. Rather, looking at the affidavit as a whole, while considering the reasonable inferences that may be drawn from it, as well as the direct and circumstantial evidence alleged, we must determine whether it provides a “substantial basis for determining that there is probable cause to believe that a search will uncover evidence of wrongdoing.” *Id.* ¶¶ 17, 19 (internal quotation marks and citation omitted). “Probable cause to search a specific location exists when there are reasonable grounds to believe that a crime has been committed in that place[] or that evidence of a crime will be found in that location.” *Id.* ¶ 16 (alteration, internal quotation marks, and citation omitted). Because the relevant inquiry is whether the warrant-issuing court’s determination of probable cause was supported by a substantial basis in the affidavit, we limit our review to “the information contained in the four corners of the affidavit.” *Gurule*, 2013–NMSC025, ¶¶ 16–17. If the affidavit provides a substantial basis to support a finding of probable cause, the issuing court’s determination must be upheld. *Id.* ¶ 16. “When ruling on probable cause, we deal only in the realm of reasonable possibilities, and look to the totality of circumstances to determine if probable cause is present.” *Williamson*, 2009–NMSC–039, ¶ 31 (internal quotation marks and citation omitted).

{33} The majority places no significance on or relevance as to that part of the affidavit for the General Arnold property that recites the information in the Rhode Island property affidavit. The affidavit for the General Arnold property contained the same information that was in the Rhode Island property affidavit. The court issuing the General Arnold property search warrant had that information before it. The court’s careful reading of the affidavit would provide reasonable inferences to support issuance of the search warrant. With the information contained in the affidavit for the General Arnold property relating to the Rhode Island property affidavit and the remainder of the information contained in the General Arnold property affidavit, I conclude that there existed probable cause to issue the General Arnold property search warrant.

{34} The “tip” received and the investigation conducted by Detective Fassler were rendered credible from the information Detective Fassler obtained from the Rhode Island property investigation combined with his independent observation of the General Arnold property. Detective Fassler had probable cause to seek a search warrant the moment he saw Tahir at the General Arnold property with the same sort of suspicious vehicles in sight that he discovered in his investigation of Tahir’s activities at the Rhode Island property.

{35} The majority’s view that the search warrant and affidavit too broadly authorized the executing officers to search and seize “everything and anything” conducive to the investigation is based on an isolated view of the affidavit’s concluding paragraph. Majority Op. ¶ 28. Viewed within the context of the entire affidavit, an officer would reasonably discern the items to be seized under the warrant. See *United States v. Kuc*, 737 F.3d 129, 133 (1st Cir.2013) (declining to read a single clause of a warrant in isolation, and recognizing that “a warrant’s language must be read in context, such that the general tail of the search warrant will be construed so as not to defeat the particularity of the main body of the warrant” (internal quotation marks and citation omitted)); *United States v. Conley*, 4 F.3d 1200, 1208 (3d Cir.1993) (“[T]he phrases in a search warrant must be read in context and not in isolation.”).

{36} In the opening paragraphs of his affidavit, Detective Fassler stated that he had reason to believe that the following items were concealed at the General Arnold property: “stolen/alter[ed] vehicles[, v]ehicles with vin plates removed, [t]ools to take and alter vehicles, documentation of altering/changing vehicles [, r]emoved vin plates, [and] NADER labels[] to change and alter stolen vehicles[] identities.” The affidavit included details regarding Detective Fassler’s investigation into Tahir’s VIN-switching operation at the Rhode Island property, and the fact that surveillance of the General Arnold property revealed an apparently similar operation. Against that backdrop, the affidavit concluded: “Based on the above information, and due to the circumstances, the Affiant respectfully requests this search warrant be granted in order to examine the scene for any and all evidence which may lead investigators to the offender(s) and/or possible witnesses in this case[.]” Read in its entirety, the affidavit, which was attached to and incorporated by the warrant would permit an officer reading it to reasonably know that the items to be seized were those items particularly related to the at-issue VIN-switching operation, in particular the tools-of-the-trade enumerated in the initial paragraphs of the affidavit. See *State v. Hinahara*, 2007–NMCA–116, ¶ 9, 142 N.M. 475, 166 P.3d 1129 (stating that the test for particularity is whether the warrant would allow an officer reading it to reasonably discern the place to be searched and the items to be seized); *State v. Steinzig*, 1999–NMCA–107, ¶¶ 37–39, 127 N.M. 752, 987 P.2d 409 (rejecting the defendant’s lack-of-particularity argument where the items “to be searched and seized were described with sufficient particularity to be specifically related to the [specific criminal] activity believed to be occurring at” the place to be searched). To assume otherwise exhibits a lack of faith in the sensibleness of police officers charged with reading and executing the search warrant.

ZAMORA, Judge.

I CONCUR: MICHAEL E. VIGIL, Judge. JONATHAN B. SUTIN, Judge (dissenting).

Was this helpful?

Yes 

No 

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

FILED
SECOND JUDICIAL DISTRICT

2012 APR -4 PM 3:28

STATE OF NEW MEXICO,
Plaintiff

Amey F. Buld

vs.

No: D-202-CR-2010-3692

BOBACK SABEERIN,
Defendant.

MEMORANDUM ORDER

THIS MATTER coming before this Court based upon Defendant Boback Sabeerin's Motion to Suppress ("Motion to Suppress") is well-taken a grants the Motion to Suppress. Specifically, the items to be suppressed are the following: 1) any and all items seized from 112 General Arnold NE pursuant to the warrant and signed on August 19, 2009, at 4 p.m; 2) any and all statements made by Mr. Sabeerin as the result of the illegal seizure of his person on August 19, 2009; and 3) any and all other fruits of the illegal seizure and search. In that regard, this Court **FINDS AND ORDERS** the items set forth above be suppressed because they were obtained in violation of Article 2, Section 10 of the New Mexico Constitution and the Fourth Amendment of the United States Constitution.

FACTS

These facts come directly from the State's Affidavit in support of the search warrant, upon which the issuing district judge relied (copy attached as Exhibit 1), in finding probable cause to issue the warrant. These factual assertions are set forth in detail to provide the context necessary for review of a probable cause determination.

On June 26, 2009, a detective with the Albuquerque Police Department with approximately 16 years of experience was called to investigate subjects arrested while attempting to steal a 2001 Lexus automobile. The detective had been assigned to the CIB/Auto Theft Unit. The detective received information that a subject, identified as Tahir Anjum,¹ was driving a 2008 Nissan Titan truck registered to him. The detective viewed the truck and immediately saw signs that "the truck had been altered." The detective seized the truck and served a warrant on Anjum's 2008 Nissan Titan truck. The investigation revealed that the truck had been Vin switched. The true Vin to the truck had been reported as stolen in Albuquerque on April 27, 2009.

The detective began investigating how Anjum had come into possession with the "Vin he owned." It was revealed that Anjum had bought a Nissan Titan truck from an Insurance Auction out of Arizona. The Nissan Titan truck had been a "complete burn and totaled." During the investigation, the detective found that Anjum had bought a very large amount of totaled vehicles from the Insurance Auction in Arizona. The detective's investigation led him to several high dollar vehicles that Anjum placed loans on in Albuquerque from a free and clear title. One of those vehicles was a 2003 Hummer H2 that "was registered 'title' only to Anjum." The Hummer H2 was manufactured off the assembly line as a red, SUV Hummer. That Hummer H2 was totaled in a roll over accident and sold at an Insurance Auction in Indiana. That Hummer H2 was not titled to Anjum in New Mexico, and the reported color was blue. The detective received a tip that Anjum did business at 108/112 Rhode Island NE. The detective started surveillance at the 108/112 Rhode Island NE location to look for the Hummer that Anjum possessed suspecting that it was stolen.

¹ Tahir Anjum is used in the Affidavit but the State refers to the person as Anjum Tahir in the State's Response to Defendant's Motion to Suppress, filed July 8, 2011.

On June 26, 2009, a blue Hummer was seen parked in the rear of the 108/112 Rhode Island NE address. The detective requested pictures of the Hummer H2 that Anjum had purchased from Indiana. The detective received the pictures on the Internet. The pictures of the Hummer H2 revealed a Hummer H2 that was red with heavy damage from a roll over. There was a red Hummer H2 parked in the lot of 108/112 Rhode Island NE with roll over damage. Based upon this investigation, the detective determined that the blue Hummer that Anjum had was Vin altered. Specifically, the detective's investigation revealed that the Hummer that Anjum had in his possession was not manufactured "till years later." The investigation revealed that another vehicle was being dismantled while surveillance was being done. The detective chose to secure 108/112 Rhode Island NE to prevent any other further possible criminal activity to obtain a search warrant for the property.

A warrant was served and it was determined that the Blue Hummer was stolen with the Vin altered. Another black stolen 2005 Hummer H2 with the Vin plate removed that was stolen two days before was next to the Blue Hummer. In addition, a Vin switched 2006 Charger was found to be altered and was stolen.²

During the investigation, the detective learned that Anjum also did business at 112 General Arnold NE. The detective sent a unit to watch the 112 General Arnold NE address and Anjum was taken into custody walking around the "business" at 112 General Arnold NE. The detective set forth that "[s]everal suspicious vehicles had also been seen on that lot", and the detective secured the 112 General Arnold NE address for a search warrant.

² It appears that the warrant that "was served" is based upon another warrant issued with a separate Affidavit (Attached as Exhibit 2).

Based upon the Affidavit, the issuing district judge found probable cause and issued a warrant to search with regard to 112 General Arnold NE. Mr. Sabeerin filed a motion to suppress physical evidence. The motion was based upon the argument that: the affidavit did not include any observations or information concerning what suspicious activity was occurring at 112 General Arnold NE: the affidavit was without support for the assertion that "suspicious vehicles" were at the 112 General Arnold NE in order to establish probable cause; the affidavit written on August 19, 2009, dealt with an event not including Mr. Sabeerin that occurred on June 26, 2009, provided stale information, which did not establish probable cause to believe that Mr. Sabeerin or his auto body shop was involved in the alleged theft on that date; the Affidavit failed to adequately describe the persons or things to be seized; and was therefore unconstitutional upon its issuance and execution.

Mr. Sabeerin submits that this Court should submit an Order suppressing evidence seized from 112 General Arnold NE, and any evidence that flowed therefrom because the evidence was obtained in violation of Article 2, Section 10, of the New Mexico Constitution and the Fourth Amendment of the United States Constitution.

ANALYSIS

Standing and Authority to Be on Premises

Before addressing the issue regarding Mr. Sabeerin's motion to suppress, this Court must address two preliminary issues. The Court convened a hearing on January 19, 2012, to address two issues that were the subject of a Brief in Support of Defendant's Motion to Suppress evidence filed on December 14, 2011. At the end of the January 19, 2012 hearing, this Court found that Mr. Sabeerin had standing and that the police officers

did not have the authority to be on the premises without a valid search warrant. This Order affirms those rulings.

Probable cause is required for a Search Warrant

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures....” U.S. Const. amend. IV. Except in the case of a “few specifically established and well-delineated exceptions, “before conducting search, the Fourth Amendment requires police to obtain a warrant issued by a judge or magistrate.” *Katz v. United States*, 389 U.S. 347, 357 (1967), superseded by statute as stated in *United States v. Koyamejian*, 946 F.2d 1450, 1455 (9th Cir. 1991).

In addition, Article II, Section 10 of the New Mexico Constitution provides that “no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, not without a written showing of probable cause.” Specifically, both the United States Constitution and the New Mexico Constitution require a showing of probable cause prior to the issuance of a search warrant. See *State of New Mexico v. Williamson*, 2009-NMSC-039, 146 N.M. 488, P.3d 376 where the New Mexico Supreme Court advised district judges reviewing a search warrant after the fact to defer to the judgment and reasonable inferences of the judge who issued the warrant “if the Affidavit provides a substantial basis to support a finding of probable cause.” In *State of New Mexico v. Trujillo*, 2011-NMSC-040, the Supreme Court reiterated and emphasized that “[a] reviewing court should not substitute its judgment for that of the issuing court.”

Standard of Review

In *Williamson*, the Supreme Court clarified that “an issuing court’s determination of probable cause should not be reviewed *de novo* but, rather, must be upheld if the Affidavit provides a substantial basis to support a finding of probable cause. *Williamson*, 2009-NMSC-039 Para 1. “A reviewing court should not substitute its own judgment for that of the issuing court.” *Id.* at ¶29. Rather, is the reviewing judge’s duty to “determine whether the Affidavit as a whole, and the reasonable inferences that may be drawn there from, provide a substantial basis for determining that there is probable cause to believe that a search will uncover evidence of wrongdoing.” *Id.*

As the Court also set forth in *Williamson*, “[t]he substantial basis standard of review is more deferential than the *de novo* review applied to questions of law, but less deferential than the substantial evidence standard applied to questions of fact.” *Williamson*, 2009-NMSC-039 ¶30. In addition, the Court set forth that this standard “does not preclude the reviewing court from conducting a meaningful analysis of whether the search warrant was supported by probable cause.” *Id.* Rather, “[i]f after reviewing the Affidavit as a whole, the direct and circumstantial evidence alleged, as well as all reasonable inferences drawn from those allegations, does not support the issuing court’s determination of probable cause, then the search is invalid and unreasonable.” *Id.* But, if the factual basis for issuing the warrant is sufficiently detailed in the Affidavit, “and the issuing court ‘has found probable cause, the [reviewing] courts should not invalidate the warrant by interpreting the Affidavit in a hypertechnical, rather than commonsense manner.” *Id.*

In order to search a specific location, probable cause must exist “where there are reasonable grounds to believe that a crime has been committed in that place, or that

evidence of a crime will be found [in that location]." *State of New Mexico v. Evans*, 2009-NMSC-027, ¶10, 146 N.M. 319. "There are no 'bright line, hard-fast rules' for determining probable cause, but the degree of proof necessary to establish probable cause is 'more that a suspicion or possibility but less that certainty of proof. *Id.*

The Necessary Nexus Between the Affidavit and the Place to Be Searched.

The Affidavit did not include any observations or information regarding the "suspicious activity" that was occurring at 112 General Arnold NE.

There must be sufficient detail in the affidavit to show a nexus between the evidence sought and the particular place being searched. *See Evans*, 2009-NMSC-027 Para 24. "The fundamental inquiry is whether there is probable cause to believe there will be evidence of a crime at a particular location." *Id.* at 25. The review is limited to the four corners of the document. *Williamson*, 2009-039, ¶31.

In this case, the only information contained in the Affidavit that relates to alleged criminal activity at 112 General Arnold NE is the following:

During the investigation, I learned that Amjum Tahir also did business at 112 General Arnold NE. I sent a unit to watch that address and Anjum was taken into custody walking around that business. Several suspicious vehicles can also be seen on that lot. I had that address secured for a warrant also.

This statement does not set forth facts that articulate the probable cause by direct proof or indirect proof. The allegation that Tahir "did business at 112 General Arnold" and there were "[s]everal suspicious vehicles" does not support that criminal activity was occurring at 112 General Arnold NE.

At the January 19, 2012 hearing, this Court asked counsel for the State to address the issue regarding the business Tahir conducted at 112 General Arnold NE. In response, counsel for the State submitted that was a "credibility question as to the Affidavit."

Transcript of January 19, 2012 hearing at TR-108. Upon further inquiry by this Court, counsel for the State acknowledged that "...there's not any additional facts. There are not any additional facts, as to what business he's doing" [at 112 General Arnold NE]. *Id.* Counsel for the state also acknowledged that "I agree that this warrant could have been better." *Id.*

Based upon the record developed at the January 19, 2012 hearing, a district court judge found that there was probable cause to believe that there was criminal activity related to 108/112 Rhode Island NE. In that regard, the majority of the facts set forth in the Affidavit for 112 General Arnold NE relate to 108/112 Rhode Island NE. There are no details regarding any vehicles at 112 General Arnold NE other than there were "[s]everal suspicious vehicles."

The State sets forth the argument that there was criminal activity at another location [108/112 Rhode Island NE] – however, the fact there may have been criminal activity that existed at 108/112 Rhode Island NE does not establish probable cause to believe that a crime was committed at 112 General Arnold NE. The fact that more information could have been included in the Affidavit supports this Court's conclusion that probable cause did not exist. The Affidavit does not articulate why the affiant believed there were "suspicious vehicle[s]."

Specifically, the Affidavit does not set forth any facts to support the allegation that criminal activity was occurring at 112 General Arnold NE. Even though Tahir was seen walking on the property and did "business" at the 112 General Arnold NE property, there are no facts set forth in the Affidavit that criminal activity was present at 112 General Arnold NE. In addition, there is nothing in the Affidavit to set forth what Tahir was involved with regard to criminal activity. Both the United States and New Mexico

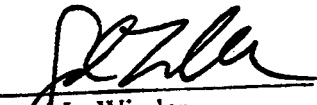
Constitutions require that the affiant articulate the reasons why the vehicles looked suspicious. There are no facts in the Affidavit to support this assertion.

Finally, the information in the Affidavit contains facts related to events that occurred on June 26, 2009 at the 108/112 Rhode Island NE address. Fifty four days later, the Affidavit sets forth language relating to the June 26, 2009 investigation involving the 108/112 Rhode Island NE address. The facts related to the June 26, 2009 investigation are stale and irrelevant information. There is nothing in the Affidavit other than Tahir doing "business at 112 General Arnold NE and "[s]everal suspicious vehicles" being seen on the lot of 112 General Arnold NE. Any suspicion of illegal activity of someone other than Mr. Sabeerin that occurred close to two months after June 26, 2009 does not justify the issuance of a search warrant for 112 General Arnold NE.

Stale information does not support a finding of probable cause. *Gonzales*, 2003-NMCA-008, ¶11. The Affidavit does not set forth any ongoing illegal activity to indicate that the information is not stale.

Summary

This Court **FINDS AND ORDERS** that the evidence and items obtained pursuant to the Affidavit of August 19, 2009, were obtained in violation of Article 2, Section 10 of the New Mexico Constitution and the Fourth Amendment of the United States Constitution. This Court's Findings and Orders are based upon a meaningful analysis of whether the search warrant was supported by probable cause.


Samuel L. Winder
District Court Judge - Division XIX
Dated April 4, 2012

CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

Fourth Amendment

Fourth Amendment Explained

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution - Fourteenth Amendment | Resources | Constitution... <https://constitution.congress.gov/constitution/amendment-14>

CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

Fourteenth Amendment

Fourteenth Amendment Explained

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the

whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

Article VI

Article VI Explained

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 81. Supreme Court (Refs & Annos)

28 U.S.C.A. § 1257

§ 1257. State courts; certiorari

Currentness

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Pub.L. 91-358, Title I, § 172(a)(1), July 29, 1970, 84 Stat. 590; Pub.L. 100-352, § 3, June 27, 1988, 102 Stat. 662.)

Notes of Decisions (276)

28 U.S.C.A. § 1257, 28 USCA § 1257

Current through P.L. 119-117. Some statute sections may be more current, see credits for details.

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§ 1331. Federal question

28 USCA § 1331 • United States Code Annotated • Title 28. Judiciary and Judicial Procedure • (Approx. 2 pages)

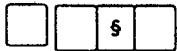
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Notes of Decisions (3,410)

History (16)

Citing References (1,041,034)

Context & Analysis (657)



United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; Pub.L. 85-554, § 1, July 25, 1958, 72 Stat. 415; Pub.L. 94-574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 96-486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

Notes of Decisions (3410)

28 U.S.C.A. § 1331, 28 USCA § 1331

Current through P.L. 119-117. Some statute sections may be more current, see credits for details.

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§ 1343. Civil rights and elective franchise

28 USCA § 1343 • United States Code Annotated • Title 28. Judiciary and Judicial Procedure • (Approx. 2 pages)

Document

Notes of Decisions (1,465)

History (14)

Citing References (209,302)

Context & Analysis (242)

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United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1343

§ 1343. Civil rights and elective franchise

Currentness

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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Unconstitutional or Preempted Limitation Recognized by In re Mid-Continent Electric, Inc., Bkrcty.M.D.Fla., Apr. 11, 2002

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1367

§ 1367. Supplemental jurisdiction

Currentness

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

CREDIT(S)

(Added Pub.L. 101-650, Title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

Notes of Decisions (1899)

28 U.S.C.A. § 1367, 28 USCA § 1367

Current through P.L. 119-117. Some statute sections may be more current, see credits for details.

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Unconstitutional or Preempted Limitation Recognized by *Flam v. Flam*, 9th Cir.(Cal.), June 08, 2015

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 89. District Courts; Removal of Cases from State Courts (Refs & Annos)

28 U.S.C.A. § 1447

§ 1447. Procedure after removal generally

Effective: November 9, 2011

Currentness

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 939; May 24, 1949, c. 139, § 84, 63 Stat. 102; Pub.L. 88-352, Title IX, § 901, July 2, 1964, 78 Stat. 266; Pub.L. 100-702, Title X, § 1016(c), Nov. 19, 1988, 102 Stat. 4670; Pub.L. 102-198, § 10(b), Dec. 9, 1991, 105 Stat. 1626; Pub.L. 104-219, § 1, Oct. 1, 1996, 110 Stat. 3022; Pub.L. 112-51, § 2(d), Nov. 9, 2011, 125 Stat. 546.)

Notes of Decisions (1776)

28 U.S.C.A. § 1447, 28 USCA § 1447

Current through P.L. 119-117. Some statute sections may be more current, see credits for details.

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§ 1983. Civil action for deprivation of rights [Statutory Text & N...

2 USCA § 1983 • United States Code Annotated • Title 42. The Public Health and Welfare • Effective: October 19, 1996 • (Approx. 9 pages)

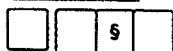
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Notes of Decisions (4,842)

History (63)

Citing References (1,196,295)

Context & Analysis (3,347)



United States Code Annotated

Title 42. The Public Health and Welfare

Chapter 21. Civil Rights (Refs & Annos)

Subchapter I. Generally

Unconstitutional or Preempted • Limited on Preemption Grounds by • *Molinelli-Freytes v. University of Puerto Rico* • D. Puerto Rico •

July 27, 2010

Proposed Legislation

Effective: October 19, 1996

42 U.S.C.A. § 1983

**§ 1983. Civil action for deprivation of rights [Statutory Text & Notes of
Decisions subdivisions I to IX]**

Currentness

<Notes of Decisions for 42 USCA § 1983 are displayed in multiple documents.>

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

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Notes of Decisions (4842)

42 U.S.C.A. § 1983, 42 USCA § 1983

Current through P.L. 119-117. Some statute sections may be more current, see credits for details.

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ARTICLE 1 Limitations of Actions

37-1-4. [Accounts and unwritten contracts; injuries to property; conversion; fraud; unspecified actions.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

II. APPLICABILITY.

A. IN GENERAL.

B. ACTIONS BY STATE OR PUBLIC BODY.

C. ACTIONS BARRED.

D. ACTIONS NOT BARRED.

III. ACCRUAL OF CAUSE OF ACTION.

37-1-4. [Accounts and unwritten contracts; injuries to property; conversion; fraud; unspecified actions.]

Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within four years.

History: Laws 1880, ch. 5, § 4; C.L. 1884, § 1863; C.L. 1897, § 2916; Code 1915, § 3349; C.S. 1929, § 83-104; 1941 Comp., § 27-104; 1953 Comp., § 23-1-4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For limitation on action for damages for injuries to person or reputation, see 37-1-8 NMSA 1978.

For limitations on wrongful death actions, see 41-2-2 NMSA 1978.

For limitations on actions to recover gambling losses, see 44-5-3 NMSA 1978.

For limitations on enforcement of mechanics' liens, see 48-2-10 NMSA 1978.

For limitations on actions to enforce liens on oil and gas wells and pipelines, see 70-4-7 NMSA 1978.

I. GENERAL CONSIDERATION.

Equitable tolling. — Equitable tolling doctrine does not apply where class actions against firm were alleged to have been initiated after limitations periods governing investor's claims had run. *Ballen v. Prudential Bache Sec., Inc.*, 23 F.3d 335 (10th Cir. 1994).

Determination of fraudulent intent. — Where, in suit to cancel deed and settlement agreement entered

into prior to divorce for lack of consideration, the only possible defense is the statute of limitations, or laches, to establish which the burden rested upon the defendant husband, trial court should determine, first, whether husband at time of execution of the deed and the agreement held a fraudulent intent not to perform on his part, and, second, when the wife first discovered this fraud. *Primus v. Clark*, 1944-NMSC-030, 48 N.M. 240, 149 P.2d 535.

Filing as conditional tolling of statute. — The filing of the complaint one week before the asserted cause of action would be barred by this section did not toll that statute where service of process was not procured for over 13 months, for although the act of filing a complaint usually conditionally suspends the statute of limitations, New Mexico has recognized the need for good faith in the filing of actions and of due diligence in the issuance of process in order to toll the statute of limitations; defendant's failure to issue process for over 13 months indicates a continued lack of reasonable diligence, an essential to the effective suspension of the statute of limitations. *Murphy v. Citizens Bank*, 244 F.2d 511 (10th Cir. 1957).

Abandonment of suit not shown. — While conduct of a plaintiff subsequent to a timely filing of complaint may constitute an abandonment of the action, failure to procure service of summons for slightly more than 60 days after the expiration of the period of limitation does not in itself constitute lack of due diligence or show abandonment of the cause of action. *Isaacks v. Jeffers*, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Service timely. — Where complaint was filed before period of limitations had expired, though process was not actually served until slightly more than 60 days after expiration of four years from the accrual of the action, the action was timely brought and running of the statute was interrupted. *Isaacks v. Jeffers*, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Computing timeliness. — When appellant filed suit herein exactly four years from the date of decedent's death, his claim was timely filed within the four years required by this section as under former 12-2-2 NMSA 1978 (see now 12-2A-7 NMSA 1978) in computing time, the first day is excluded and the last included unless the last falls on Sunday, in which case, the time prescribed is extended to include the whole of the following Monday. *Skarda v. Skarda*, 1975-NMSC-028, 87 N.M. 497, 536 P.2d 257.

Laches. — The four elements necessary to establish laches are: (1) conduct of the defendant giving rise to a situation for which the plaintiff seeks a remedy; (2) delay by the plaintiff in asserting his rights, though he has notice or knowledge of the defendant's conduct and has had the opportunity to institute suit; (3) lack of knowledge or notice on the defendant's part that the plaintiff would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant should the plaintiff be accorded relief or the suit is not held to be barred. *McCabe v. Hawk*, 1982-NMCA-039, 97 N.M. 622, 642 P.2d 608, cert. denied, 98 N.M. 50, 644 P.2d 1039.

Relation back of amendments to complaint. — Where original complaint, filed before running of the statute, and amendments thereof filed after the period had run, all centered around the same transaction, the handling of certain branded cattle, the only difference being that in the earlier pleadings plaintiff also sought an accounting from others than the defendant, the last amended complaint dated back to the filing of the original complaint so that the statute constituted no bar. *Isaacks v. Jeffers*, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Effect of verbal promise. — Verbal promise to pay an old debt in monthly installments in consideration for extension of time for paying balance due was not a new contract superseding original loan contract and did not toll running of the statute of limitations. *Petranovich v. Frkovich*, 1945-NMSC-037, 49 N.M. 365, 164 P.2d 386.

Verbal promise to use monthly rentals from garage and filling station until their sale to pay on loan contracts,

and payment of balance from sale proceeds, was without consideration and invalid since it amounted to an extension of time for repayment of loan as to which there was an existing obligation to pay. *Petranovich v. Frkovich*, 1945-NMSC-037, 49 N.M. 365, 164 P.2d 386.

Extinguishment of lien. — Lien created by the statute authorizing the recordation of a transcript of the docket thereof is a right as distinguished from a remedy, and if the remedy of foreclosure of the judgment lien prayed for in a counterclaim is barred, the lien has been extinguished. *Pugh v. Heating & Plumbing Fin. Corp.*, 1945-NMSC-031, 49 N.M. 234, 161 P.2d 714.

Foreign judgments later domesticated. — Actions to domesticate a foreign judgment are governed by 37-1-2 NMSA 1978, and as such these actions must be brought within the applicable period of limitation for foreign judgments. Accordingly, a 1989 judgment on the domestication issue converted the foreign judgment into a New Mexico judgment from which date the applicable state statutes of limitations commenced running. Plaintiff's 1992 action for a charging order based on the 1989 judgment satisfied the three alternative state statutes of limitations (37-1-4, 39-1-20, 37-1-2 NMSA 1978) and does not force a decision on the "correct" statute. *Galef v. Buena Vista Dairy*, 1994-NMCA-068, 117 N.M. 701, 875 P.2d 1132.

II. APPLICABILITY.

A. IN GENERAL.

The four-year statute of limitations does not apply to a division of undivided retirement benefits under Section 40-4-20 NMSA 1978. *Gilmore v. Gilmore*, 2010-NMCA-013, 147 N.M. 625, 227 P.3d 115.

Trade Practices and Frauds Act. — The four-year statute of limitations applies to the private right of action under the Trade Practices and Frauds Act, 59A-16-1 NMSA 1978. *Martinez v. Comejo*, 2009-NMCA-011, 146 N.M. 223, 208 P.3d 443, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

Statutes of limitations apply to both complaints and counterclaims, whether they be compulsory or permissive. *Hartford v. Gibbons & Reed Co.*, 617 F.2d 567 (10th Cir. 1980).

Appointment of receiver did not revive a stale state law claim. *FDIC v. Schuchmann*, 319 F.3d 1247 (10th Cir. 2003).

Nature of right dispositive. — The nature of the right sued upon, and not the form of action or relief demanded, determines the applicability of the statute of limitations. *Taylor v. Lovelace Clinic*, 1967-NMSC-234, 78 N.M. 460, 432 P.2d 816.

Subrogated insurer's action against third-party tortfeasor. — When a workers' compensation insurer settles with an injured worker, receives an assignment of his negligence cause of action to the extent of the payment, and seeks reimbursement from a third party, the relevant statute of limitations is not this section (four-year period), which governs unspecified actions, but § 37-1-8 (three-year period), which governs actions for personal injury, which begins to run on a subrogated insurer's action against a third-party tortfeasor at the same time that the statute of limitations would begin to run on an action by the insured, or his personal representative in the event of the death of the insured. *American Gen. Fire & Cas. Co. v. J.T. Constr. Co.*, 1987-NMCA-094, 106 N.M. 195, 740 P.2d 1179.

Tort of misappropriation of likeness, which occurs when someone appropriates to his own use or benefit the name or likeness of another, is a property claim governed by this section. *Benally v. Hundred Arrows Press, Inc.*, 614 F. Supp. 969 (D.N.M. 1985), *rev'd on other grounds sub nom. Benally v. Amon Carter Museum of W. Art*, 858 F.2d 618 (10th Cir. 1988).

"Account" defined. — A mutual, open, current account of which the law takes cognizance in determining the rights and liabilities of debtor and creditor litigants in apparent qualification of the statute of limitations may be defined as an account usually and properly kept in writing, wherein are set down by express or implied agreement of the parties concerned a connected series of debit and credit entries of reciprocal charges and allowances. *Gentry v. Gentry*, 1955-NMSC-055, 59 N.M. 395, 285 P.2d 503.

Open account shown. — Where there is a record of a connected series of debit and credit entries and a continuation of a related series, along with evidence that the amount claimed to be due by plaintiff and defendant's payments thereon were intended by the parties as the beginning of a connected or related series, there was a mutual open account, and the four-year limitation period commenced with the last entry thereon. *Hunt Process Co. v. Anderson*, 455 F.2d 700 (10th Cir. 1972).

Loans not transformed to account. — The fact that defendant makes payments to plaintiff on loans works no change in the nature of plaintiff's rights or defendant's liability; it does not create an open current account between the parties. *Gentry v. Gentry*, 1955-NMSC-055, 59 N.M. 395, 285 P.2d 503.

"Other actions". — It was intended that actions on constructive trusts should be included within the all-inclusive words, "and all other actions not herein otherwise provided for and specified within four years," of this section. *Reagan v. Brown*, 1955-NMSC-064, 59 N.M. 423, 285 P.2d 789.

Prior to the 1988 enactment of 52-2-14 NMSA 1978, there was no specific period of limitations for actions against the Subsequent Injury Fund contained in the Subsequent Injury Act (52-2-1 to 52-2-13 NMSA 1978), and an employer's claim for reimbursement from the fund was not sufficiently analogous to a claim for personal injuries so as to justify invocation of the statute of limitations (37-1-8 NMSA 1978) on this theory. Therefore, the four-year limitations period in 37-1-4 NMSA 1978 for "all other actions not . . . otherwise provided for and specified" was the applicable statute. *Hernandez v. Levi Strauss, Inc.*, 1988-NMCA-075, 107 N.M. 644, 763 P.2d 78 (Subsequent Injury Act repealed).

Section has application to ordinary action based upon fraud, such as suits to rescind contracts brought about by false representations of the defendant; it has no application to suits in which the fraud charged is a collateral matter. *Trujillo v. Padilla*, 1968-NMSC-090, 79 N.M. 245, 442 P.2d 203.

No application to collateral fraud. — This section does not apply to suits wherein the fraud charged is collateral in nature, but applies only to the ordinary action based on fraud, such as suits to rescind contracts which are the result of false representations by the defendant. *Lotspeich v. Dean*, 1949-NMSC-054, 53 N.M. 488, 211 P.2d 979.

Applicability to duress. — In an action to cancel a contract because of alleged duress, the same statute of limitations applies as controls in actions based on alleged fraud. *Taylor v. Lovelace Clinic*, 1967-NMSC-234, 78 N.M. 460, 432 P.2d 816.

Declaratory actions are governed by same limitations applicable to other forms of relief. *Taylor v. Lovelace Clinic*, 1967-NMSC-234, 78 N.M. 460, 432 P.2d 816.

Action for establishing paternity. — Trial court's sua sponte application of this section in an action to establish paternity was not error, despite the fact that the father never pled, presented evidence or argument, or requested a finding of fact dealing with this section, although the father did specifically present a statute of limitations defense by way of argument for the application of the prior Bastardy Statute, which was previously declared to be unconstitutional. *Padilla v. Montano*, 1993-NMCA-127, 116 N.M. 398, 862 P.2d 1257.

Applicability in federal court. — The law of New Mexico governs as to the time within which an action

must be commenced when brought in federal court of that state, but the manner in which actions are commenced, when actions are deemed to have begun, the manner and method of serving process, all relate to procedure and are governed by the law of the forum. *Isaacks v. Jeffers*, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Statute of limitations applicable to 42 U.S.C. § 1983 actions. — An action under 42 U.S.C. § 1983 for excessive use of force during an arrest is not governed by the limitations on actions contained in the Tort Claims Act but by the general statutory limitations on actions for personal injury, 37-1-8 NMSA 1978, or for miscellaneous claims, this section. *Gunther v. Miller*, 498 F. Supp. 882 (D.N.M. 1980).

Section 41-4-15 NMSA 1978 applicable to claims under 42 U.S.C. § 1983. — The two-year period under 41-4-15 NMSA 1978 is the applicable limitation period to claims under the Federal Civil Rights Act, 42 U.S.C. § 1983. *DeVargas v. State ex rel. New Mexico Dep't of Cors.*, 1981-NMCA-109, 97 N.M. 447, 640 P.2d 1327 (overruled by *Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987)).

Application to claim against subsequent injury fund. — An employer's claim against the subsequent injury fund which accrued prior to the effective date of former 52-2-14 NMSA 1978, was governed by the four-year limitations period provided for in this section and not the two-year limitations period provided for in former 52-2-14 NMSA 1978. *Kennecott Copper Corp. v. Chavez*, 1992-NMCA-005, 113 N.M. 504, 828 P.2d 416 (Subsequent Injury Act repealed).

Suits to divide personalty. — The four-year statute of limitations of this section applies to suits to divide personal property brought under 40-4-20 NMSA 1978. *Plaatje v. Plaatje*, 1981-NMSC-040, 95 N.M. 789, 626 P.2d 1286.

Receipt of payments for military retirement. — The statute of limitations applicable to the receipt of payments for military retirement is a four-year statute, this section, and it runs from the date of each installment of military retirement. *Berry v. Meadows*, 1986-NMCA-002, 103 N.M. 761, 713 P.2d 1017.

Deceit by attorney. — This section applied to a claim against an attorney for deceit. *Duncan v. Campbell*, 1997-NMCA-028, 123 N.M. 181, 936 P.2d 863, cert. denied, 123 N.M. 168, 936 P.2d 337.

Claim for breach of contract to procure insurance. — Where there was no written contract to procure insurance between surplus lines broker and businessman, claim for breach of contract to procure insurance was governed by the four-year statute of limitations for unwritten contracts, and the statute of limitations for claims based upon written contracts does not apply to this claim. *Nance v. L.J. Dolloff Assocs., Inc.*, 2006-NMCA-012, 138 N.M. 851, 126 P.3d 1215.

Claims for violations of statutes. — Claims founded on violations of statutes fall within "other unspecified actions" under the four-year statute of limitations set forth in this section. *Nance v. L.J. Dolloff Assocs., Inc.*, 2006-NMCA-012, 138 N.M. 851, 126 P.3d 1215.

Negligent misrepresentation. — Where claim of negligent misrepresentation arises from the common-law obligations among the parties, not from a contract, this claim cannot be viewed as being founded on a written contract, and it is governed either by the four-year statute of limitations in this section or by the three-year statute of limitations applicable to negligence actions in 37-1-8 NMSA 1978. *Nance v. L.J. Dolloff Assocs., Inc.*, 2006-NMCA-012, 138 N.M. 851, 126 P.3d 1215.

Actual injury to limited partner. — Where plaintiff invested in a limited partnership based on accountant's advice, her cause of action for accountant malpractice based on the investment accrued when she received notice of Final Partnership Administrative Adjustment (FPAA) from the Internal Revenue Service; the FPAA is the functional equivalent of an individual IRS tax deficiency notice and constitutes actual injury to a

partner in a limited partnership. *Wiste v. Neff & Co.*, 1998-NMCA-165, 126 N.M. 232, 967 P.2d 1172, cert. denied, 126 N.M. 534, 972 P.2d 353.

B. ACTIONS BY STATE OR PUBLIC BODY.

Improper venue as negligence in prosecution. — An original suit does not fail for negligence in its prosecution when it is filed in an improper venue. A second suit filed in the proper venue is a continuation of the first action. *AMICA Mut. Ins. Co. v. McRostie*, 2006-NMCA-046, 139 N.M. 486, 134 P.3d 773, cert. denied, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120.

Statute of limitations does not run against the state. *Board of Educ. v. Standhardt*, 1969-NMSC-118, 80 N.M. 543, 458 P.2d 795.

The state was not barred by the statute of limitations from intervening in a suit to compel compliance with 47-6-1 NMSA 1978 et seq. Even if the county, the original plaintiff, was barred by the limitations period, the state's status as a "real party in interest" precluded dismissal of the suit. *State ex rel. Stratton v. Alto Land & Cattle Co.*, 1991-NMCA-146, 113 N.M. 276, 824 P.2d 1078.

Statute may run against localities. — Statutes of limitations do not run against the state unless the statute expressly includes the state or does so by clear implications, but will run against county and other political subdivisions, including school districts, unless such may be deemed to be an arm of the state because of the particular governmental functions or purposes involved. *Board of Educ. v. Standhardt*, 1969-NMSC-118, 80 N.M. 543, 458 P.2d 795.

Actions by municipal corporations. — The plea of the statute of limitations is no defense to actions by counties or municipal corporations involving public rights, such as taxation, unless the statute expressly so provides, and our statute contains no such provision. *Hagerman v. Territory*, 1901-NMSC-020, 11 N.M. 156, 66 P. 526.

Statute of limitations applies to actions by municipalities to enforce municipal liens. *Hurley v. Village of Ruidoso*, 2006-NMCA-041, 139 N.M. 306, 131P.3d 693.

Special assessments. — The four-year statute of limitations applies and runs against special assessments for street paving obligations, since such assessments are not levied for governmental purposes and are not "taxes," and actions to foreclose such improvement assessment liens are barred where for nearly six years there has been default in payment of annual installments. *Altman v. Kilburn*, 1941-NMSC-023, 45 N.M. 453, 116 P.2d 812.

School board as real party in interest. — If a school district or board of education has the power or duty to contract, lease, issue bonds, sue and be sued and hold both real and personal property then it is a body corporate and politic, and where the obligation sued upon is one owed solely to the school district as administered by the board of education, it is the real party in interest and the statute of limitations may run against it. *Board of Educ. v. Standhardt*, 1969-NMSC-118, 80 N.M. 543, 458 P.2d 795.

Statute does not run against directors of state insane asylum (now state hospital). *Directors of Insane Asylum v. Boyd*, 1932-NMSC-053, 37 N.M. 36, 17 P.2d 358.

C. ACTIONS BARRED.

Trusts founded on verbal agreements. — This limitation applies to equitable actions on trusts founded on verbal agreements or unwritten contracts when the defendant has not fraudulently concealed his cause of

action, or the existence thereof. *Patterson v. Hewitt*, 1901-NMSC-012, 11 N.M. 1, 66 P. 552, *aff'd*, 195 U.S. 309, 25 S. Ct. 35, 49 L. Ed. 214 (1904).

Breach of warranty or products liability claim was barred by the four-year statute of limitation. *Standhardt v. Flintkote Co.*, 1973-NMSC-040, 84 N.M. 796, 508 P.2d 1283.

Setting aside probated will. — Under the laws of the territory of New Mexico, a judgment of a probate court in that territory admitting a will to probate could not be annulled by the same court in a proceeding instituted by an heir more than 20 years after the original judgment was rendered and more than four years after the heir became of age. *Bent v. Thompson*, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891).

Association membership. — Where plaintiff acquired whatever right he had to membership in cooperative association no later than 1956 by his own testimony, at which time he was rejected, the four-year limitation period provided in this section for the bringing of his suit to compel his acceptance to membership had expired long before the filing of his complaint in intervention. *Moya v. Chilili Coop. Ass'n, Inc.*, 1974-NMSC-100, 87 N.M. 99, 529 P.2d 1220, cert. denied, 421 U.S. 965, 95 S. Ct. 1954, 44 L. Ed. 2d 452 (1975).

Legal malpractice suit barred where discoverable more than four years prior to filing of complaint. — Where the harm or damage from an alleged legal malpractice in drafting and supervising the execution of a will arose at the time the testatrix died, although the cause of action did not accrue until the harm or damage was ascertainable or discoverable, the executrix was in a position to ascertain or discover the harm or damage to her as a result of the alleged defect in the execution of the decedent's will each time she changed attorneys and also at the time the court set aside the order admitting the will to probate. So, if the executrix had a cause of action against her attorney, it was ascertainable or discoverable more than four years before she filed her complaint, the four-year statute of limitations had elapsed and the executrix's complaint was properly dismissed. *Jaramillo v. Hood*, 1979-NMSC-068, 93 N.M. 433, 601 P.2d 66.

Where plaintiff knew all the facts underlying his claim for legal malpractice more than four years before filing suit, the claim was time barred under both this section and 37-1-8 NMSA 1978. *Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, 126 N.M. 717, 974 P.2d 1174, cert. denied, 126 N.M. 532, 972 P.2d 351.

Malpractice action against accountant for failure to file corporate tax returns was barred under this section where the taxpayer hired a new accountant who told him more than four years before the action was commenced that the returns in question had not been filed, regardless of the fact that the taxpayer did not receive an IRS notice of tax deficiency until later. *Haas Enters., Inc. v. Davis*, 2003-NMCA-143, 134 N.M. 675, 82 P.3d 42.

D. ACTIONS NOT BARRED.

Action to divide retirement benefits not barred. — Where plaintiff filed a divorce action against defendant in California in 1991; the California court granted plaintiff a default divorce in 1994; defendant retired and began receiving monthly retirement benefits in 2005; the California court issued a qualified domestic relations order awarding plaintiff a portion of defendant's retirement benefits in 2006; the California court set aside the qualified domestic relations order in 2006 for lack of personal jurisdiction; and plaintiff filed an action in New Mexico in 2007 for a division of the retirement benefits, plaintiff's right to sue accrued when the payment of each installment of retirement benefits became due and plaintiff's action was not barred by statute of limitation. *Gilmore v. Gilmore*, 2010-NMCA-013, 147 N.M. 625, 227 P.3d 115.

Section does not apply to actions founded on written instruments. *Coler v. Board of Cnty. Comm'rs*, 1891-NMSC-024, 6 N.M. 88, 27 P. 619.

Section inapplicable to personal injuries. — Where the action in its effect is one for the recovery of damages for personal injury, the statute of limitations for injuries to the person applies, even though the cause of action stated is *ex contractu* in its nature. *Chavez v. Kitsch*, 1962-NMSC-122, 70 N.M. 439, 374 P.2d 497.

Quiet title actions. — Plaintiffs' action, as heirs, to have title in property left by decedent quieted in them as against defendant creditors to whom, pursuant to compromise settlement, the administrator had executed deeds to the property, but who did not have possession thereof, was not barred by four-year statute of limitations, as bar of laches does not run in favor of one claiming real property, by or through a void deed, who is not in possession. *Emblem v. Emblem*, 1953-NMSC-062, 57 N.M. 495, 260 P.2d 693.

Cause of action to establish interest in real estate and to quiet title in plaintiff was not barred by this section. *Apodaca v. Hernandez*, 1956-NMSC-095, 61 N.M. 449, 302 P.2d 177.

Defendant's claims to the realty were not barred by the four-year statute of limitations where the trial court could properly determine that he possessed a superior claim to that asserted by plaintiff. *Tres Ladrones, Inc. v. Fitch*, 1999-NMCA-076, 127 N.M. 437, 982 P.2d 488, cert. denied, 127 N.M. 391, 981 P.2d 1209.

Statute of limitations does not apply to action for accounting and partition of real property. *Martinez v. Martinez*, 2004-NMCA-007, 135 N.M. 11, 83 P.3d 298.

Request for change in property tax schedule. — Because Section 7-38-78 NMSA 1978 does not contain a time limit for filing the request for a change in the property tax schedule, the general statute of limitations of four years pursuant to this section applies. *Fed. Express Corp. v. Abeyta*, 2004-NMCA-011, 135 N.M. 37, 84 P.3d 85, cert. granted, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

Action by remaindermen. — Where remaindermen brought quiet title action against one to whom the life tenant had conveyed a "fee" and delivered quitclaim deed bearing the alleged forged signatures of the remaindermen, the four-year statute of limitations applicable to actions seeking relief against fraud is not applicable. *Lotspeich v. Dean*, 1949-NMSC-054, 53 N.M. 488, 211 P.2d 979.

Suit for balance of purchase price. — Where evidence lent support to the clear implication that initial agreement as to the times and amounts of payments on the purchase price had been changed, filing of suit after discovery of defendants' recording of quitclaim deed prior to full payment, in violation of this agreement, was timely. *Romero v. Sanchez*, 1974-NMSC-013, 86 N.M. 55, 519 P.2d 291.

Section does not bar suit to enforce restrictive covenant or negative easement brought within 10-year period applicable under 37-1-22 NMSA 1978. *Jenkins v. City of Jal*, 1963-NMSC-198, 73 N.M. 173, 386 P.2d 599.

Condemnation compensation. — This section was not applicable to action to recover compensation for condemned land. *State Hwy. Comm'n v. Ruidoso Tel. Co.*, 1963-NMSC-150, 73 N.M. 487, 389 P.2d 606.

Promise to devise. — Where plaintiff in a cross-action claims title to land because of repeated promises of its owner to adopt plaintiff and leave her property to plaintiff at her death, such action is not barred by limitation of four years after ancestor's death, since the claim is not founded upon contract, and did not accrue at ancestor's death. *Wooley v. Shell Petroleum Corp.*, 1935-NMSC-008, 39 N.M. 256, 45 P.2d 927.

Creditor's suit timely. — Where trial court found that transferee had accepted conveyance of title with fraudulent intent in order to assist debtor to defraud creditors, a creditor's suit which was brought within the statutory period of limitations was not barred by laches, where no change in property value or relationship of the parties had taken place. *Consolidated Placers, Inc. v. Grant*, 1944-NMSC-040, 48 N.M. 340, 151 P.2d

In absence of a change in relationship of the parties or value of the property a creditor's suit against the debtor's transferee seeking to set aside a conveyance as fraudulent commenced two years and eight months after the conveyance and two months after debtor's death was not barred by laches. *Consolidated Placers, Inc. v. Grant*, 1944-NMSC-040, 48 N.M. 340, 151 P.2d 48.

Obstruction and appropriation of creek. — This section did not apply to a suit for damages for obstruction of flow and appropriation of waters of a creek. *N.M. Prods. Co. v. N.M. Power Co.*, 1937-NMSC-048, 42 N.M. 311, 77 P.2d 634.

Collateral fraud. — Section did not apply to suit by former wife to set aside conveyance fraudulently procured by former husband on grounds that she did not have competent and independent legal counsel. *Trujillo v. Padilla*, 1968-NMSC-090, 79 N.M. 245, 442 P.2d 203.

III. ACCRUAL OF CAUSE OF ACTION.

Fraudulent issuance of stock certificates. — Where registered shareholders sold and transferred their certificates of shares in the defendant corporation; the original certificates were subsequently transferred to plaintiff in 1989; the intervening original certificate holders did not register the original certificates in their names; the registered shareholders obtained replacement certificates for the shares in 1987; when plaintiff attempted to register the original certificates in plaintiff's name in 1990, the corporation refused to register the original certificates; plaintiff did not inquire into the reason plaintiff was unable to register the certificates and took no action to compel the corporation to register the certificates; when plaintiff attempted to register the original certificates again in 2007, the corporation refused to register the certificates; and when plaintiff discovered in 2007 that the corporation had issued replacement certificates to the registered shareholders, plaintiff filed suit for fraud, plaintiff's claim accrued in 1990 because plaintiff's inability to register the certificates in 1990 constituted knowledge of facts that would have led a reasonable person to undertake further investigation into the reasons underlying the impediment to registration and to discover that the registered shareholders had obtained replacement certificates in 1987. *Wilde v. Westland Dev. Co., Inc.*, 2010-NMCA-085, 148 N.M. 627, 241 P.3d 628.

Where a registered shareholder sold and transferred the shareholder's original certificate of shares in the defendant corporation; the original certificate was subsequently transferred to plaintiff in 1989; the intervening original certificate holders did not register the original certificate in their names; when plaintiff attempted to register the original certificate in plaintiff's name in 1990, the corporation refused to register the certificate; in 1998, a descendant of the registered shareholder inquired about buying the original certificate from plaintiff; in 2004, the descendant filed an affidavit with the corporation stating that the descendant was the successor of the estate of the registered shareholder and the corporation issued a replacement certificate to the descendant; plaintiff attempted to register the original certificate; and in 2007, when plaintiff discovered that the corporation had issued a replacement certificate to the descendant, plaintiff filed suit for fraud, plaintiff's claim accrued in 2004 because the earliest that plaintiff could have become aware of the descendant's misconduct in requesting the replacement certificate was 2004. *Wilde v. Westland Dev. Co., Inc.*, 2010-NMCA-085, 148 N.M. 627, 241 P.3d 628.

Professional malpractice. — In cases of malpractice where the professional's alleged negligence has caused the plaintiff to be liable to a third party, the plaintiff's claim accrues when the liability is imposed. *N.M. Pub. Schs. Ins. Auth. v. Gallagher & Co.*, 2008-NMSC-067, 145 N.M. 316, 198 P.3d 342, *rev'g* 2007-NMCA-142, 142 N.M. 760, 170 P.3d 998.

Where an insurance broker negligently drafted insurance policies which resulted in the imposition of liability

on a state agency that provided risk-related insurance coverage to public schools, the state agency's malpractice claim against the insurance broker did not accrue until liability was imposed on the state agency. *N.M. Pub. Schs. Ins. Auth. v. Gallagher & Co.*, 2008-NMSC-067, 145 N.M. 316, 198 P.3d 342, *rev'g* 2007-NMCA-142, 142 N.M. 760, 170 P.3d 998.

Legal malpractice claim was barred by four-year statute of limitations. — Where, in December of 2014, plaintiff filed a lawsuit on her own behalf, on behalf of her adult son, and on behalf of her two minor children, alleging legal malpractice, negligent misrepresentation, fraud, breach of fiduciary duty, breach of contract, and conspiracy to commit fraud, against defendant attorneys and their law firms, seeking damages related to settlement agreements that administered the proceeds of two life insurance policies, plaintiff's claims were barred by the four-year statute of limitations where the record shows that plaintiff knew even before she entered into the settlement agreements in 2008 that there may have been serious errors in her attorneys' work, that in 2007 plaintiff sent an email to her attorney that she believed the life insurance proceeds were exempt from creditors, that she expressed to others that she had doubts about whether she was being properly represented, and that in 2008, plaintiff consulted an attorney about her suspicion of malpractice. This evidence was sufficient to show that plaintiff was on notice of the facts concerning her claim at least five years prior her filing a lawsuit, but failed to file her lawsuit within the four-year statute of limitations. *Day-Peck v. Little*, 2021-NMCA-034.

Action for accounts and unwritten contracts may be brought within four years after the cause of action accrues and where there is no specified time for the payment of loans, the action accrues upon the date of such loan. *Akre v. Washburn*, 1979-NMSC-017, 92 N.M. 487, 590 P.2d 635.

Unwritten contracts. — Where a contract is silent as to the time of performance, the law implies that it is to be performed within a reasonable time and the four-year statute of limitations does not begin to run until the lapse of a reasonable time for performance of the contract. *Smith v. Galio*, 1980-NMCA-134, 95 N.M. 4, 617 P.2d 1325.

Former spouse's share of military retirement benefits. — Military retirement benefits are a form of employee compensation and are community property if the period of employment upon which those benefits are based occurred during coverture. Although the right to receive benefits matured prior to divorce, the right to receive each monthly installment accrues when the installment becomes due. Thus the statutory time limitation upon a former spouse's right to sue for a portion of each installment commences to run from the time each installment comes due. *Plaatje v. Plaatje*, 1981-NMSC-040, 95 N.M. 789, 626 P.2d 1286.

Statute of limitations began to run with discovery of fraud in 1961 and did not bar suit in 1963 for fraud from 1957 to 1961 against finance company for payments made by house trailer dealers to finance company for insurance which was not obtained. *Sw. Inv. Co. v. Cactus Motor Co.*, 355 F.2d 674 (10th Cir. 1966).

As to the common-law fraud, the limitations period commences to run upon discovery of the fraud or upon discovery of such facts as would, on reasonable diligent investigation, lead to a knowledge of fraud. *Jones v. Ford Motor Co.*, 599 F.2d 394 (10th Cir. 1979).

Appointment of receiver for chartered state institution. — A cause of action accrued within four years of the date a receiver was appointed for chartered state institution on the grounds the institution had engaged in numerous unsound practices and was insolvent. *FDIC v. Schuchmann*, 319 F.3d 1247 (10th Cir. 2003).

Fraudulent concealment in fiduciary context tolls statute. — In the context of a fiduciary relationship, a party with superior knowledge has a duty to disclose material information, and failure to disclose such information constitutes fraudulent concealment that tolls the statute of limitations. *Martinez v. Martinez*, 2004-NMCA-007, 135 N.M. 11, 83 P.3d 298.

Accrual of accountant malpractice claim. — New Mexico has adopted a two-prong test to determine when a cause of action for accountant malpractice accrues: (1) when the client sustains an "actual injury" and (2) when the client discovers, or through reasonable diligence should discover, the facts essential to the cause of action. *Haas Enters., Inc. v. Davis*, 2003-NMCA-143, 134 N.M. 675, 82 P.3d 42.

A cause of action for accountant malpractice based on improperly prepared tax returns accrues when the taxpayer receives a notice of tax deficiency from the IRS; the IRS notice serves simultaneously as the injury itself and the notice to the client thereof. *Haas Enters., Inc. v. Davis*, 2003-NMCA-143, 134 N.M. 675, 82 P.3d 42.

In a malpractice action against an accountant for failure to file corporate tax returns, the cause of action accrued when the taxpayer hired a new accountant who told him the that returns in question had not been filed, not when he later received a notice of tax deficiency from the IRS. *Haas Enters., Inc. v. Davis*, 2003-NMCA-143, 134 N.M. 675, 82 P.3d 42.

Learning of fraud. — A demurrer based on 37-1-7 NMSA 1978 was not well taken where the complaint alleged that "it was not until about the month of July, 1902" that plaintiff learned of defendant's fraudulent claim to be the absolute owner of the real estate in question, in violation of an agreement made in 1898, which complaint was filed November 24, 1903. *Alexander v. Cleland*, 1906-NMSC-027, 13 N.M. 524, 86 P. 425.

When negligence cause arises. — The period of limitation begins to run when the cause of action accrues; and there is no cause of action for negligence until there has been a resulting injury to the plaintiff. *Chisholm v. Scott*, 1974-NMCA-106, 86 N.M. 707, 526 P.2d 1300; *Spurlin v. Paul Brown Agency, Inc.*, 1969-NMSC-061, 80 N.M. 306, 454 P.2d 963.

Successive injuries from structure or nuisance. — Where a structure or nuisance is such that its construction and continuance are not necessarily injurious, damages may be awarded for successive injuries, and a new statute of limitations begins to run from the date of each injury. *Valdez v. Mountain Bell Tel. Co.*, 1988-NMCA-039, 107 N.M. 236, 755 P.2d 80.

Successive injuries to property. — Where, in 1998, the municipality constructed a flood retention pond next to plaintiff's building; in the years following the construction of the retention pond, the building began to show signs of damage to the foundation, walls, roof and floor; in 2008, plaintiff filed suit against the non-municipal defendants for damages; defendants claimed that plaintiff's suit was time barred because plaintiff knew or should have known about the injuries to the property more than four years before plaintiff filed suit; plaintiff contended that the property incurred separate injuries and each new injury had its own discovery date and period of limitations; defendants failed to show that the retention pond and seepage from the retention pond were permanent and that the damages were ascertainable at the time the retention pond was constructed; and there was evidence that when the retention pond was full, particularly during the monsoon season, the water migrated beneath the surface of plaintiff's property and that different cracks and damage developed in the foundation, walls and ceiling of the building over time, summary judgment for defendants was not proper because material disputed facts existed regarding whether separate causes of action accrued with each new injury to the property. *Yurcic v. City of Gallup*, 2013-NMCA-039, 298 P.3d 500.

Notice of injuries to property. — Where, in 1998, the municipality constructed a flood retention pond next

to plaintiff's building; in the years following the construction of the retention pond, the building began to show signs of damage to the foundation, walls, roof and floor; in 2008, plaintiff filed suit against the non-municipal defendants for damages; defendants claimed that plaintiff's suit was time barred because plaintiff knew or should have known about the injuries to the property more than four years before plaintiff filed suit; defendants argued that plaintiff was on notice of structural cracks in 1998 when plaintiff remodeled the building and plaintiff argued that plaintiff's tenant examined the premises in 1998 and found no noticeable problems with the structure of the building; defendant argued that in 2001, plaintiff's tenant reported a substantial crack in the tile floor, but offered no proof linking the crack with the retention pond; defendant argued that in 2002 or 2003, plaintiff's tenant informed plaintiff that the northeast side of the foundation of the building was substantially cracking, that the ground around it was saturated with water, and that the tenant believed that the retention pond caused the damage; and plaintiff contended that the tenant talked to plaintiff in 2004, summary judgment for defendants was not proper because material disputed facts existed about when plaintiff knew or should have known about the injuries to the property and the existence of plaintiff's claims against defendants. *Yurcic v. City of Gallup*, 2013-NMCA-039, 298 P.3d 500.

Failure to furnish insurance. — The cause of action arising out of negligent failure to furnish liability coverage could only accrue when legal liability materialized, that is, when negligence suit was filed, and since a policy of insurance such as defendant allegedly failed to furnish would have provided for the insurance company to furnish a defense; otherwise the loss would have accrued only after judgment had been entered, or possibly when settlement had been made or a judgment paid. *Spurlin v. Paul Brown Agency, Inc.*, 1969-NMSC-061, 80 N.M. 306, 454 P.2d 963.

Action against insurer for failure to settle claim accrues upon judgment against insured. — An action against an insurer for wrongful failure to settle a claim does not accrue until judgment against the insured is final. It is only then that any liability in excess of the policy limits is established. *Torrez v. State Farm Mut. Auto. Ins. Co.*, 705 F.2d 1192 (10th Cir. 1982).

Tax deficiency. — Liability imposed by deficiency notice from the IRS was the injury which formed plaintiffs' cause of action against defendant accountants, as the deficiency was not owed until the IRS rendered its assessment in written notice to the taxpayer plaintiff; hence, the statute may not be deemed to have run until four years after this notice had been given. *Chisholm v. Scott*, 1974-NMCA-106, 86 N.M. 707, 526 P.2d 1300.

Discovery of breach of fiduciary duty. — In lessor's action against realtor for breach of fiduciary duty in connection with negotiation of lease on lessor's behalf, trial court properly submitted issues of whether lessor relied on realtor acting in fiduciary capacity and when lessor discovered or should have suspected fraud or negligence of realtor. *Ramsey v. Culpepper*, 738 F.2d 1092 (10th Cir. 1984).

Repudiation of constructive trust. — A statute of limitations does not run between a trustee and his beneficiary until there has been a repudiation of the constructive trust. *Miller v. Miller*, 1971-NMSC-104, 83 N.M. 230, 490 P.2d 672; *Garcia v. Marquez*, 1984-NMSC-074, 101 N.M. 427, 684 P.2d 513.

Equitable trust. — When suit is brought for imposition of an equitable trust, the statute of limitations does not run between a trustee and a beneficiary until there has been a repudiation of the trust, whether it be a constructive trust, or a resulting trust. To prove repudiation of the trust, the complaining party must show that there has been an open denial of the trust by the trustee who held the property for the benefit of the plaintiff. *Granado v. Granado*, 1988-NMSC-069, 107 N.M. 456, 760 P.2d 148.

Pretermitted heir suing executrix. — Plaintiff pretermitted heir could properly anticipate that executrix would administer the estate according to law; until executrix asserted unlawful dominion over plaintiff's property interest, which she must have done, if at all, after the entry of the decree approving the final

account and ordering distribution to her as sole devisee and legatee, there was no dispute between them and nothing over which they had reason to contest; hence, suit filed well within the four-year period after entry of the decree was timely. *Hagerman v. Gustafson*, 1973-NMSC-058, 85 N.M. 420, 512 P.2d 1256.

Continuous representation does not toll statute of limitation. — New Mexico does not recognize the "continuous representation" doctrine as a principle that tolls the statute of limitations for legal malpractice. *Sharts v. Natelson*, 1994-NMSC-114, 118 N.M. 721, 885 P.2d 642.

Action against subsequent injury fund. — Where an employer seeks to file a suit against the subsequent injury fund for reimbursement, and where the 1988 statute of limitations (52-2-14 NMSA 1978) is not applicable, the period of limitations on such claim begins to run from the time the employer knew or should have known it had a claim against the fund. *Hernandez v. Levi Strauss, Inc.*, 1988-NMCA-075, 107 N.M. 644, 763 P.2d 78 (Subsequent Injury Act repealed).

The four-year statute of limitations with respect to claims by an employer against the Subsequent Injury Fund, as announced in *Hernandez v. Levi Strauss, Inc.*, 1988-NMCA-075, 107 N.M. 644, 763 P.2d 78, should be applied retrospectively. *Kennecott Copper Corp. v. Chavez*, 1990-NMCA-002, 109 N.M. 439, 786 P.2d 53 (Subsequent Injury Act repealed).

Accrual at time of injury. — Where plaintiffs had sufficient water to irrigate their land until 1945 when the flow of water in the streams from which plaintiffs diverted water materially decreased so that the water was insufficient to irrigate their land, the four-year statute of limitations did not begin to run from the date water was used by defendants, but from the date defendants' use of the water deprived plaintiffs of their appropriated water in 1945. *Bounds v. Carner*, 1949-NMSC-008, 53 N.M. 234, 205 P.2d 216.

Accrual of legal malpractice claim. — The statute of limitations in a cause of action for legal malpractice commences when both elements of a two-part test have been satisfied, namely: (1) when the harm or damage is ascertainable or discoverable by the injured party; and (2) when actual loss or damage has occurred to the client. In this case, the plaintiffs' cause of action for legal malpractice accrued when the judgment was entered against them in the employment contract dispute. At that point the plaintiffs were aware that the law firm's legal advice had been determined to be erroneous and they had been damaged. While there was still a possibility both those decisions would be reversed on appeal, an unreversed judgment is final between the parties as to all matters to which the judgment relates. *Brunacini v. Kavanagh*, 1993-NMCA-157, 117 N.M. 122, 869 P.2d 821, cert. denied, 117 N.M. 215, 870 P.2d 753.

An invasion of a legally protected interest (an injury), without actual loss (harm), is insufficient to accrue a cause of action in legal malpractice. *Sharts v. Natelson*, 1993-NMCA-082, 1993-NMCA-082, 118 N.M. 330, 881 P.2d 690, *rev'd on other grounds*, 1994-NMSC-114, 118 N.M. 721, 885 P.2d 642.

A cause of action for legal malpractice is established when the client can allege the following facts: (1) the employment of the attorney; (2) the attorney's neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the client. *Sharts v. Natelson*, 1994-NMSC-114, 118 N.M. 721, 885 P.2d 642.

The limitations period for legal malpractice commences when the client sustains actual injury and the client discovers, or through reasonable diligence should discover, the facts essential to the cause of action. *Sharts v. Natelson*, 1994-NMSC-114, 118 N.M. 721, 885 P.2d 642.

Where plaintiffs lost the right to avoid liens on their property through a bankruptcy proceeding when they were discharged in bankruptcy, plaintiffs sustained actual injury in 1986 at the time of their discharge, but because the occurrence of actual injury is only one prong of the legal malpractice test, a legal malpractice claim did not accrue until the plaintiffs discovered, or through reasonable diligence should have discovered,

the facts essential to their claim. *Brown v. Behles & Davis*, 2004-NMCA-028, 135 N.M. 180, 86 P.3d 605.

Accrual of legal malpractice claim began when plaintiff became aware of actual injury. — Where plaintiff filed a legal malpractice claim in 2018 against defendants, alleging that defendants failed to timely identify a doctor in a medical malpractice claim prior to the expiration of the medical malpractice limitation period, and where plaintiff's legal malpractice claim accrued by June 2013 at the latest, because by that time plaintiff was aware, or should have been aware, that defendants had erred in failing to identify the doctor earlier and that defendants' actions had caused her actual injury, plaintiff's claims were time barred, because a legal malpractice claim must be filed within four years from the date of accrual. *Cahn v. Word*, 365 F. Supp. 3d 1188 (D. N.M. 2019).

Discovery of injury by client. — The statute of limitations does not begin to run until the client discovers, or should discover, that he or she has suffered a loss and that the loss may have been caused by the attorney's wrongful act or omission. *Sharts v. Natelson*, 1994-NMSC-114, 118 N.M. 721, 885 P.2d 642.

The question of when a client is deemed to have discovered an attorney's malpractice and the resulting injury is generally a question of fact, but if the undisputed facts show that the client knew, or should have been aware of the negligent conduct on or before a specific date, the issue may be decided as a matter of law. *Sharts v. Natelson*, 1994-NMSC-114, 118 N.M. 721, 885 P.2d 642.

Continuing wrong doctrine. — In an action for fraud, misrepresentation and unfair trade practices, the fact that the plaintiff knew of his injuries, which he attributed to the risk of loss inherent in every contract, did not prevent application of the continuing wrong doctrine since the defendant held the plaintiff to the agreement while at the same time taking measures to dissolve it. *Tiberi v. CIGNA Corp.*, 89 F.3d 1423 (10th Cir. 1996).

Tolling of legal malpractice claim. — A cause of action for legal malpractice is not tolled during the pendency of an appeal of the underlying action. *Brunacini v. Kavanagh*, 1993-NMCA-157, 117 N.M. 122, 869 P.2d 821, cert. denied, 117 N.M. 215, 870 P.2d 753 (1994).

Attorney's fees. — Where plaintiff in suit for attorney's fees was employed to perform services involved in the foreclosure of a mortgage, his right to compensation began when the sale of the mortgaged premises was confirmed by the court, not when the decree of foreclosure was signed, and suit begun within four years from the date of the order confirming the sale was not barred. *Prichard v. Fulmer*, 1919-NMSC-051, 25 N.M. 452, 184 P. 529.

Cancellation of liens by municipality. — Where municipality not merely failed to enforce collection of assessments but affirmatively accepted bonds higher in number than those held by plaintiff in satisfaction of the lien against the property of the persons surrendering the bonds and canceled the lien against the property, plaintiff was required to take notice of the records of the municipality pertinent to the time and manner of payments, defaults, etc., and in the absence of evidence that cancellation of the liens was surrounded by secrecy, cause of action accrued at time this wrong occurred and a suit initiated more than four years thereafter was barred by limitations. *Freeman v. Town of Gallup*, 152 F.2d 273 (10th Cir. 1945).

Action against void private land grant corporation. — A void private land grant corporation has no right to the proceeds from a land sale and no authority to pay such proceeds to its "shareholders." Conversion is present where the "shareholders" claim and erroneously receive proceeds of the sale. The party aggrieved cannot be deemed to have discovered she has a cause of action for conversion until the date of the judicial opinion which declares the company in question to be a void corporation. *Apodaca v. Unknown Heirs of Tome Land Grant*, 1982-NMSC-100, 98 N.M. 620, 651 P.2d 1264.

Pleading accrual of cause. — A general allegation in a complaint in an action for injury to property fixing the accrual of the cause of action within four years is controlled and limited by a specific averment showing

the discovery of the injury at an earlier date. *Mayer v. Lane*, 1927-NMSC-078, 33 N.M. 18, 262 P. 178.

Injuries from continuing trespass. — The accrual date for a cause of action for a claim for a continuing trespass is each day of the trespass. *McNeil v. Rice Engineering & Operating, Inc.*, 2006-NMCA-015, 139 N.M. 48, 128 P.3d 476, cert. denied, 2006-NMCERT-002, 139 N.M. 339, 132 P.3d 596.

Written accounts. — If a written contract is an account, the four-year limitation of 37-1-4 NMSA 1978 applies; hence, despite written agreements by hospital patients to be responsible for payment of their accounts, these accounts would still be subject to a four-year limitation. 1970 Op. Att'y Gen. No. 70-25.

Abstractor's bond. — Action on an abstractor's bond, by reason of a defect in the abstract, would probably be founded on an unwritten contract, and must be brought in four years. 1921 Op. Att'y Gen. No. 21-3003.

Law reviews. — For comment on *Trujillo v. Padilla*, 79 N.M. 245, 442 P.2d 203 (1968), see 9 Nat. Resources J. 101 (1969).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For article, "Survey of New Mexico Law, 1979-80: Torts," see 11 N.M.L. Rev. 217 (1981).

For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico," see 11 N.M.L. Rev. 359 (1981).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For annual survey of New Mexico law relating to torts, see 13 N.M.L. Rev. 473 (1983).

For note, "Federal Civil Rights Act - The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983: *DeVargas v. State ex rel. New Mexico Department of Corrections*," see 13 N.M.L. Rev. 555 (1983).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Accounts and Accounting § 21 et seq.; 18 Am. Jur. 2d Conversion § 94; 37 Am. Jur. 2d Fraud and Deceit §§ 400 to 415; 51 Am. Jur. 2d Limitation of Actions §§ 84 to 85, 91, 100 to 101, 124 to 125.

Contract in writing within statute of limitations, what constitutes, 3 A.L.R.2d 809.

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Commencement of running of statute of limitations respecting actions by owners of right of re-entry or actions against third persons by reversioners, 19 A.L.R.2d 729.

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Entry or indorsement by creditor on note, bond or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

Statute of limitations governing damage action against warehouseman for loss of or damage to stored goods, 23 A.L.R.2d 1466.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

Statute of limitations governing action to recover unearned premium retained by insurer upon cancellation of policy, 29 A.L.R.2d 938.

Account stated, limitation of actions as applied to, 51 A.L.R.2d 331.

When limitation commences to run against action to recover, or damages for detention of, property deposited without definite date for its return, 57 A.L.R.2d 1044.

When statute of limitations or laches begins to run against action to set aside fraudulent conveyance or transfer in fraud of creditors, 100 A.L.R.2d 1094.

Action to recover money or property lost and paid to gambling as affected by statute of limitations, 36 A.L.R.3d 900.

Running of statute of limitations against claim for contribution or indemnity based on tort, 57 A.L.R.3d 867.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tortfeasor, 91 A.L.R.3d 844.

Delay in prosecution of disciplinary proceeding as defense or mitigating circumstance, 93 A.L.R.3d 1057.

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Limitation of action against insurer for breach of contract to defend, 96 A.L.R.3d 1193.

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284.

Statutes of limitation: actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability, 12 A.L.R.4th 866.

When statute of limitations begins to run against action based on unwritten promise to pay money where there is no condition or definite time for repayment, 14 A.L.R.4th 1385.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts, 18 A.L.R.4th 1340.

Oil and gas royalty as real or personal property, 56 A.L.R.4th 539.

Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants, 11 A.L.R.5th 438.

Physician's use of patient's tissues, cells or bodily substances for medical research or economic purposes, 16 A.L.R.5th 143.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts, 33 A.L.R.5th 1.

Attorney malpractice - tolling or other exceptions to running of statute of limitations, 87 A.L.R.5th 473.

When does state statute of limitations begin to run in civil action for securities fraud under § 10(b) of

Securities Exchange Act of 1934 (15 USCS § 78j(b)), 71 A.L.R. Fed. 257.

Limitations of actions applicable to action by trustees of employee benefit plan to enforce delinquent employer contributions under ERISA (29 USCS § 1132(a)), 90 A.L.R. Fed. 374.

54 C.J.S. Limitations of Actions §§ 36, 64, 67, 68, 71.