IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.* FRANK FOY, SUZANNE FOY AND JOHN CASEY,

Appellants,

v.

Santa Fe County
Sarah M. Singleton, District Judge
D-101-CV-201101534
Ct. App. No. 33,787

NEW MEXICO STATE INVESTMENT COUNCIL; DANIEL WEINSTEIN; VICKY L. SCHIFF; WILLIAM HOWELL; and MARVIN ROSEN,

Appellees.

REPLY BRIEF

Counsel for Appellants
Victor R. Marshall
Victor R. Marshall & Associates, P.C.
12509 Oakland NE
Albuquerque, New Mexico 87122
(505)332-9400 FAX: (505)332-3793
Email: victor@vrmarshall.com

Oral Argument Is Requested

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TABLE OF AUTHORITIES

New Mexico Cases:

New Mexico Court Rules and Statutes:

Other Authorities:

Point 1. The appellees repeat the *San Juan Agricultural Water Users* mistake, over and over again.

Instead of reading and obeying the statute the way it was written by the New Mexico Legislature, the appellees insist on arguing federal cases decided under a different statute. In *San Juan Agricultural Water Users Ass'n v. KNME*, 2011-NMSC-011, ¶¶ 38-40, 150 N.M. 64, Justice Daniels succinctly explained, for a unanimous court, why it was error for the lower courts to construe a state statute by relying on federal court cases construing a similar but not identical federal statute:

> {38} There are several reasons why we must decline to follow federal FOIA [Freedom of Information Act] caselaw when interpreting IPRA [Inspection of Public Records Act]. The text of IPRA is significantly different from the text of FOIA. For example, FOIA lacks (1) the unequivocal statement of public policy found in IPRA, Section 14–2–5, (2) the rule that a public entity cannot ask a person requesting records the reason for the request, Section 14–2–8(C), and (3) the provision for damages when a records custodian fails to respond to a request in a timely fashion, Section 14–2–11(C). These IPRA provisions underscore a legislative intent to ensure that New Mexicans have the greatest possible access to their public records. The differences in substantive text and legislative purposes make the application of federal FOIA law inappropriate when construing IPRA. *See Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n,* 2006–NMCA–115, ¶ 37, 140 N.M. 464, 143 P.3d 502 ("[T]here may be reasons, such as differences in statutory language, that may make

federal law or law from other jurisdictions inapplicable or inappropriate in New Mexico ...."); *see, e.g., State v. Badoni,* 2003–NMCA–009, ¶ 16, 133 N.M. 257, 62 P.3d 348 ("[F]undamental differences between federal and New Mexico's rules of pleading make federal case law on the issue of notification distinguishable ...."); *cf. State v. Cardenas–Alvarez,* 2001–NMSC–017, ¶¶ 14–16, 130 N.M. 386, 25 P.3d 225 (noting that New Mexico may wish to diverge from federal precedent because of "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics" (internal quotation marks and citation omitted)).

{39} Federal courts interpret FOIA within a legal framework different from that found in our state court jurisprudence. When evaluating standing, federal courts are constrained by the limited federal jurisdiction delegated to them under Article III of the United States Constitution. *See* U.S. Const. art. III, § 2, cl. 1; *see, e.g., Mahtesian v. U.S. Office of Pers. Mgmt.,* 388 F. Supp. 2d 1047, 1050 (N.D. Cal. 2005) ("[S]tanding to sue is an essential and unchanging part of the case or controversy requirement of Article III." (internal quotation marks and citation omitted)); *Nat'l Trust for Historic Preservation v. City of Albuquerque,* 117 N.M. 590, 593, 874 P.2d 798, 801 (Ct.App.1994) ("Federal courts have very limited authority beyond that conferred by statute or the Constitution."). Unlike the federal courts, "New Mexico state courts are not subject to the jurisdictional limitations imposed on federal courts by Article III, Section 2 of the United States Constitution." *ACLU of N.M.,* 2008–NMSC–045, ¶ 9, 144 N.M. 471, 188 P.3d 1222 (internal quotation marks and citation omitted).

> {40} A significant difference between federal and state courts is that, unlike state courts, federal courts do not presume that Congress intended for the common law to apply when interpreting a statute. *See Sims,* 1996–NMSC–078, ¶¶ 22–24, 122 N.M. 618, 930 P.2d 153 (discussing the state presumption). Federal courts use federal common law in only a few restricted contexts, such as "those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States, or our relations with foreign nations, and admiralty cases." *Nat'l Trust for Historic Preservation,* 117 N.M. at 593, 874 P.2d at 801 (quoting *Texas Indus., Inc. v. Radcliff Materials,* 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981)). "[A] state court, because it possesses common-law authority, has significantly greater power than a federal court to recognize a cause of action not explicitly expressed in a statute" and may do so in order to further public policy. *Id.* at 593–94, 874 P.2d at 801–02.

The same legal analysis applies to the present case. Yet the SIC and the other appellees absolutely refuse to read the New Mexico statute. Most adamantly, they will not acknowledge that the New Mexico Legislature wrote its own statute. Appellees act as though there are no differences between the federal False Claims Act and the state Fraud Against Taxpayers Act, even though those differences govern this case.

The New Mexico Legislature added extra protections in FATA for qui tam plaintiffs who object to a settlement negotiated by the AG. *Inter alia,* FATA requires that:

(A) the court must provide an evidentiary hearing on their objections, not merely a hearing, § 44-9-6(B); and

(B) the AG must prove"good cause" for dismissing a case over the qui tam's objections, § 44-9-6(B); and

(C) once filed, a qui tam action can be dismissed only with the written consent of the court, "taking into account the best interest of the parties involved and the public purposes behind the Fraud Against Taxpayers Act." § 44-9-5(A).

These three requirements do not appear in the federal statute. The Legislature added these new requirements to FATA to prevent the government from entering into collusive or inadequate settlements with defendants; to prevent the government from cheating the qui tam plaintiff out of his reward; to prohibit district judges from rubber-stamping settlements; and to expose frauds – and the settlement of fraud cases – to scrutiny by the public.

When the New Mexico Legislature writes a statute, it is the judiciary's duty to enforce the statute as written, not some other statute, construed by other courts, in some other jurisdiction.

The answer briefs dodge the most basic rule of statutory construction. Before Felix Frankfurter became a justice of the United States Supreme Court,

he taught statutory construction at Harvard Law school. Professor Frankfurter never tired of teaching his students what Judge Friendly described as Frankfurter's "threefold imperative" of statutory interpretation:

"(1) Read the statute; (2) read the statute; (3) read the statute!"

Henry J. Friendly, *Benchmarks* 202 (1967).

In New Mexico we should add a fourth imperative:

"(4) read the statute that the legislature wrote, not something else."

The appellees cannot cope with *San Juan Agricultural Water Users* or the major divergences between the state and federal statutes. So the appellees double down on their legal mistake, by citing more and more federal cases. See **[SIC AB 29-30]**, collecting federal citations like *McCoy*, *Nudelman*, *Schweitzer*, *Ridenour*, or *Sequoia Orange*, etc., etc. Appellees apparently believe that they can change the text of New Mexico's statute, if only they can collect enough federal cases. This is a fallacy, a reversible legal error, but it is made so much easier by the false convenience of modern legal research: hit the button on Westlaw or Lexis and it will spew out dozens of federal cases, none of them dealing with our statute. Those rubber-stamping federal cases and their ilk were unacceptable to the New Mexico Legislature, so the Legislature devised its own qui tam statute, to overrule federal cases just like the ones cited

by appellees. Why is this so hard for appellees to understand? One of the strengths of our system of federalism is that state legislatures are not obliged to replicate the mistakes made by Congress.

The New Mexico Legislature did not want state judges to defer to government agencies when qui tam plaintiffs object to a settlement, as some (but not all) federal judges did. The Legislature insisted that qui tams would be allowed to gather and present evidence at a hearing, but Judge Singleton denied these rights.

In their Answer Brief, the SIC makes a bizarre argument **[SIC AB 30]**. It contends that the "good cause" requirement only applies to dismissals under § 44-9-6(B), and not the settlements under § 44-9-6(C). This is a distinction without a difference, because the settlements in this case include dismissals of the claims in this case and also the claims in *Austin Capital*. The SIC is simply trying to evade the "good cause" requirement which the New Mexico Legislature added to the qui tam statute. The good cause requirement does not appear in the federal False Claims Act. See the discussion above.

Point 2. The qui tam intervenors were barred from conducting discovery, in violation of FATA and the Rules of Civil Procedure.

In all the answer briefs, the appellees claim that qui tam plaintiffs were allowed to do discovery. The record shows otherwise. The qui tams repeatedly asked to be allowed to do the discovery that they needed to evaluate or contest the settlements, and the court repeatedly denied those requests. For example, see qui tam's Motion for Joint Discovery **[RP 2533-35]** (no hearing or ruling); Qui Tams' Consolidated Motion To Compel Discovery from Defendants **[RP 3547-3714]**; Order on Motions Relating to Qui Tams' Preliminary Discovery **[RP 4006-08]**; **[12-21-12 Tr. 10:11-15, 21:3-8, 45:16 through 48:15]**. The District Court refused to allow the qui tams to take any depositions. Or to propound any interrogatories. Or to serve any requests for production.

Judge Singleton decided to dispense with discovery. This is contrary to the provisions which the Legislature added to FATA. And it is contrary to the Rules of Civil Procedure. A district court can deny discovery only when the case qualifies for summary judgment under Rule 1-056, that is, when there are no disputed material facts. In this case, virtually all of the material facts were disputed, but Judge Singleton refused to allow discovery into those facts.

In effect, this is what Judge Singleton said to the qui tam plaintiffs – I know that FATA is different than the False Claims Act, but I prefer the federal approach. It's much cheaper, and it's a lot easier if we don't have discovery. So I'm going to let the defendants give the SIC whatever information the defendants elect to provide, and I'm going to accept their version of the facts as true. Qui tam plaintiffs, you don't get to take depositions, or get the documents you want, or ask interrogatories. You'll just have to be satisfied with what the defendants decide to provide, and what they say in their affidavits. Qui tam counsel, you can cross-examine the defendants via video link at the hearing. Maybe you can break the witnesses down on the stand, like Clarence Darrow or Perry Mason, and get them to recant their testimony...if you can do that, and the legal arguments too, in 4 hours. The stopwatch is running . . . Good Luck.

In substance, that is what the judge did. See the record citations above. See also the rulings in connection with the purported evidentiary hearing in November 2013. For example, at the hearing, the SIC introduced affidavits which neither the court nor qui tam counsel had seen before. When qui tam counsel asked for time to read the affidavits, the court ruled that this time would count against the qui tams' time limit **[11-25-13 Tr. 15:8-9]**.

In an attempt to maintain good humor under adversity, qui tam counsel did concede that he was not Clarence Darrow. Or Perry Mason, for that matter. Or Carnac the Magnificent, the swami who knows the answers to questions that are in a sealed envelope, before the questions are asked. See https://www.youtube.com/watch?v=lRTtLvKAKgk., cited in qui tams' objections to settlement with Broidy **[Broidy RP 6036]**. See also **[6-19-14 Tr. 39-40]**:

> Qui tam counsel: . . . it would not be in the best interests of the State for me to cross-examine these people blind, deaf and dumb and have them give statements about how innocent they were, because that will prejudice the case which I need to make when I get discovery. . . . I don't want the record to show that somehow I had an opportunity to have an evidentiary hearing because I didn't. If you don't have the right to gather evidence you don't have the right to an evidentiary hearing.
>
> Remember Johnny Carson and the Great Carnac ?
>
> Court: Yes.
>
> Qui tam counsel: I am not Carnac the Magnificent. I'm just a lawyer. All I can do is ask questions, and all I can do is subpoena people and try to pull together other documents and witnesses . . . .

By denying discovery, the district judge picked the winners in this case at the very beginning.

At **[SIC AB 12]**, the SIC's lawyers make the following statement: "Intervenors also requested and obtained specific discovery on what they said was needed in order to evaluate the settlements with the Settling Defendants: the gains and/or losses on each of the 13 NMSIC investments with which the Settling Defendants were involved." This statement is simply false. Qui tams repeatedly sought this information but Judge Singleton denied it. She ruled that qui tam plaintiffs could seek this information through discovery only after the court had approved the settlements **[6-19-14 Tr. 47]**. What good is that ?

[Note: the qui tam plaintiff-intervenors still have not received this information during the subsequent proceedings, because the SIC and all of the defendants are still refusing to supply it.]

Point 3. *Rivera-Platte* does not authorize a district court to deny discovery under FATA.

Appellees cite *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, 143 N.M. 158, as support for their conclusion that the district court can deny discovery concerning FATA settlements. That decision does not support their argument. The Court of Appeals decision was reviewed on *certiorari* by the Supreme Court, *Platte v. First Colony Life Ins. Co.*, 2008-NMSC-058, 145 N.M. 77. There the District Court's order was affirmed and the "Court of Appeals' opinion declared without any force or effect." The Supreme Court opinion

was not cited or referred to by appellees NMSIC or Rosen, only the Court of Appeals' opinion, contrary to the direct prohibition in the Supreme Court opinion.

The Supreme Court did not rule on the merits in *Platte*. It simply decided to affirm the district court because all of the parties had agreed to settle the case on appeal after the appellees agreed to give objectors part of their attorney fees. The Supreme Court received no briefs by anyone. *Id.* ¶ 1. The Supreme Court emphasized that its decision was based on "the unique posture of this case". *Id.* ¶ 7. And the Supreme Court did not address the issue of discovery. The word "discovery" does not even appear in the text of the decision; it only appears in the Westlaw headnote. Appellate decisions cannot be cited for propositions which the court did not address. The Court of Appeals did consider the question of discovery, and it concluded that the settlement was inadequately supported by evidence. 2007-NMCA-158, ¶¶ 27, 40.

The garbled mess in *Rivera-Platte* is not relevant under FATA. FATA explicitly provides for an evidentiary hearing and other protections for the qui tam plaintiffs, so that is the beginning and the end of the analysis. It would be reversible error to rely on *Rivera-Platte* and a weak analogy to class actions, to

nullify the plain terms of FATA. Once again, the courts are required to follow the explicit commands of the controlling statute rather than resorting to "analogies" to other statutes.

Point 4. Because discovery was not allowed, the summary judgment standard of review applies.

The appellees wrongly claim that this case must be reviewed under the "substantial evidence" standard. That assertion is legally incorrect, because the substantial evidence standard only applies when there has been discovery and a trial, and the judge or jury has weighed the evidence and the credibility of the witnesses. None of that happened in this case; there was no discovery, and there was no trial. The appellees' case citations are off the mark. So the appropriate standard is the one applicable to summary judgment. In some cases, the court can dispense with discovery, but not when there are disputed issues of material fact, or mixed questions of law and fact. See Rule 1-056 and the myriad cases decided thereunder.

Point 5. Appellees concede that the SIC secret subcommittee did not meet the statutory quorum requirement.

NMSA 1978, § 6-8-2 provides that the State Investment Council shall consists of 11 members, chosen as specified in the statute. Section 6-8-2 also imposes a quorum requirement of at least a majority, that is, 6 members. In

their answer briefs, appellees never address these statutes. They concede that the secret subcommittee did not meet the quorum necessary for the SIC to take action on the settlements.

Point 6. The SIC's secret subcommittee did not meet the SIC's own policy.

The litigation settlement policy provides that the secret subcommittee shall consist of at least 3 members of the SIC. However the subcommittee consisted of only 2 SIC members (Peter Frank and Linda Eitzen), plus the Governor's Counsel (Jessica Hernandez, who is not a member of the SIC). Even if the SIC could override the statutory quorum requirement, which it cannot, the SIC did not even comply with its own rules.

At **[SIC AB 40]**, the SIC argues that appellants had "impliedly conceded that the Council could properly delegate settlement authority to a committee of its members..." quoting COL3. The record shows that this conclusion was written for Judge Singleton by Day Pitney **[RP 5473-5519]**. The record also shows that the statement written by Day Pitney is false. Qui Tam plaintiffs never conceded that the State Investment Council could legally delegate full settlement authority to a small subcommittee. Qui tams believe that the SIC could have set up an advisory subcommittee to monitor the litigation and make recommendations to the full SIC for action, with a vote by the full SIC.

Making recommendations to the SIC is quite different than exercising full settlement authority, because recommendations are only recommendations. They can be rejected or modified by the full SIC.

On this point, Day Pitney seriously misstated the record to the District Court. And Day Pitney does so again on appeal.

Point 7. The Answer Briefs incorrectly claim that Judge Singleton left the effect of the settlement up to the *Austin Capital* judge. This is not accurate, because Judge Singleton approved a signed settlement contract that releases some of Foy's claims in *Austin*.

The settlement contract itself should have been changed from an absolute release, but it was not. When the parties arrive back in the *Austin Capital* court, the SIC and the appellees will change their tune – they will claim that the release and the judgment have conclusive effect. See § 44-9-6(H): "A finding of fact or conclusion of law made in the other proceeding that has become final shall be conclusive on all parties to an action under the Fraud Against Taxpayers Act [44-9-1 NMSA 1978]."

Point 8. Appellees do not dispute that "Gary King and His Staff Had Personal Conflicts of Interest. The District Court Erred by Ruling That Qui Tams Had No Standing to Raise These Conflicts."

None of the answer briefs address Part E of the BIC. The appellees do not dispute the fact that Gary King and his staff had serious personal conflicts

of interest, as set forth in part E. Furthermore, the appellees do not dispute the point of law that the qui tam plaintiff-intervenors have legal standing to raise these conflicts.

Point 9. The answer briefs do not dispute that Gary King and Day Pitney violated § 6-8-24.

Section 6-8-24 is part of the 2011 statute under which Day Pitney and Gary King were allowed to sign a contingent fee arrangement. Before allowing the bill to pass, the Legislature added special protections for qui tam plaintiffs like Frank Foy:

> 6-8-24. Qui tam plaintiffs.
>
> Nothing in this 2011 act shall prejudice or impair the rights of a qui tam plaintiff pursuant to the Fraud Against Taxpayers Act.

Day Pitney and Gary King have forgotten the specific statute under which they are operating. They never mention it in their briefs.

Point 10. The "Order of Dismissal" is not a final judgment because it does not adjudicate qui tams' statutory share of the settlement recoveries.

To qualify as a final judgment under Rule 1-054, the District Court's decision must adjudicate all of the rights of all of the parties. The district court did not adjudicate the share which belongs to the qui tam relators. Under FATA, the qui tam plaintiff-intervenors have a statutory right to 25 to 30% of

the recoveries in this litigation. See § 44-9-6(H): "If an alternate remedy is pursued, the qui tam plaintiff shall have the same rights in such a proceeding as the qui tam plaintiff would have had if the action had continued pursuant to this section." The award to the qui tam is mandatory, not discretionary: the judge has latitude only to set the reward somewhere between 25 and 30%. § 44-9-7(B). This statutory reward must be paid to the qui tam plaintiffs before the State takes the remainder. § 44-9-7(E). This is one of the innovations added by the New Mexico Legislature to protect the qui tam plaintiff. It is an integral part of the statute, not some ancillary or incidental matter.

Point 11. The answer briefs never address the valid reasons why the court rejected the SIC's Vanderbilt settlement.

Starting at **[SIC AB 14]**, the SIC's lawyers misrepresent the record about the Vanderbilt settlement. Judge Pfeffer did more than grant qui tams' motion to stay. He also denied the SIC's proposed settlement with Vanderbilt. *Inter alia*, Judge Pfeffer ruled that the SIC's lawyers had not done enough discovery to allow the SIC or the court to evaluate the fairness and reasonableness of the settlement. He also stated that the SIC's actions were inconsistent with the representations which the SIC's lawyers had made to him when they persuaded him to dismiss some of Mr. Foy's claims. And Judge Pfeffer said that it was distressing that the SIC was seeking to deny Mr. Foy any recovery

under FATA, as there was no indication that there would have been any recoveries at all if Mr. Foy had not brought his lawsuit. See Judge Pfeffer's decision **[BIC 15-19]**.

The answer briefs never respond to the merits of Judge Pfeffer's ruling. Judge Pfeffer's ruling correctly construes and applies FATA, whereas Judge Singleton's does not. Judge Pfeffer's decision deals carefully with the text and purpose of FATA, while Judge Singleton glides by the text of FATA to roam amid the federal cases.

[Note: The SIC blames qui tams for the fact that the $25.6 million is not earning a return. If in fact this money is not earning a return, it is the fault of the SIC and Vanderbilt. After Judge Pfeffer rejected their settlement, they should have made some interim arrangement for investing the money.]

Point 12. The SIC and the appellees make a variety of spurious arguments about the Open Meetings Act.

On these issues, see the SIC's Motion To Supplement the Record, filed June 4, 2015, and Appellants' Response in Opposition to the Motion To Supplement Record, filed June 19, 2015. The motion and response have not yet been decided. The appellees argue, erroneously, that the secrecy issues are now moot. They also contend, erroneously, that they can retroactively cure the legal defects in the secret subcommittee, many months after the fact.

Judge Wechsler has referred these matters to the panel, so the parties will await a ruling on the motion to supplement and instructions from the panel. Qui tams cannot frame a proper reply brief until they know whether they have to respond to all the new factual and legal issues which the SIC is trying to inject into this case outside the record on appeal. If the motion to supplement is granted, then appellants will respond by filing post-appeal evidence of their own.

CONCLUSION

The SIC and the appellees concede many of the points made by the BIC, and they avoid most of the rest. The District Court committed multiple errors of law which this Court must correct, in order to protect FATA and the Open Meetings Act from judicial nullification.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

Victor R. Marshall
Attorneys for State ex rel. Frank Foy,
Suzanne Foy, and John Casey, Appellants
12509 Oakland NE
Albuquerque, New Mexico 87122
505/332-9400 505/332-3793 FAX

I hereby certify that a true and correct copy of the foregoing was emailed to all counsel of record on June 24, 2015.

/s/ Victor R. Marshall
Victor R. Marshall