IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NO. 31,421

STATE OF NEW MEXICO, *ex rel.*
FRANK C. FOY AND SUZANNE B. FOY,

Qui tam Plaintiffs-Appellants,

v.

FIRST JUDICIAL DISTRICT
No. D-101-CV-2009-1189

AUSTIN CAPITAL MANAGEMENT, LTD, *et al.*,

Defendants-Appellees.

INTERLOCUTORY APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT, SANTA FE COUNTY
HON. JOHN W. POPE, District Judge

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ORAL ARGUMENT IS REQUESTED

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As required by Rule 12-213(G), we certify that this Answer Brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Worldox GX^2 Version, the body of the brief, as defined by Rule 12-213(FD)(1), contains 2,945 words.

Statutes and Court Rules:

REQUEST FOR ORAL ARGUMENT

Pursuant to NMRA 12-214(B)(1) and NMRA 12-213(A)(6), the Psilos and Ares Defendants request oral argument, and state that oral argument would be helpful to a resolution of the issues because of the complexity of the proceedings in the District Court and in this Court, the underlying question of subject matter jurisdiction, and the effect of the foregoing on whether the constitutional issue should be reached.

INTRODUCTION

The Psilos and Ares Defendants[1] respectfully submit this brief in opposition to the interlocutory appeal by *qui tam* Plaintiffs Frank and Suzanne Foy from the July 8, 2011 Order by the District Court (Hon. John W. Pope) that the Fraud Against Taxpayers Act ("FATA") cannot constitutionally be applied to conduct occurring prior to July 1, 2007, when the statute took effect. The present appeal is premature and should be dismissed as improvidently granted. Indeed, the *qui tam* Plaintiffs now have conceded as much by asking this Court to lift the automatic stay of further proceedings in the District Court, under NMRA 12-203(E), pending this appeal.

[1] For convenience and clarity, all Defendants-Appellees will be referred to herein as "Defendants". Likewise, all Plaintiffs-Appellants will be referred to as "Plaintiffs".

Established principles of appellate procedure and the judicial process dictate that the constitutional question at issue in this interlocutory appeal be deferred, so that the District Court can handle the underlying case in a comprehensive and coherent manner that will bring some semblance of order to this unnecessarily chaotic litigation. Only after proceedings at the trial level have run their course – and the record reflects the extent to which the constitutional question presented here remains material to the case – will it be appropriate to seek consideration of that question by this Court.

Currently pending before the District Court are potentially dispositive motions made on behalf of *all* Defendants. Specifically, the District Court has yet to decide (1) whether subject matter jurisdiction exists; (2) whether the Complaint contains sufficient particularity to satisfy NMRA 1-009(B); and (3) whether the Complaint states a legally cognizable claim, as required under NMRA 1-0012(B)(6). Until these threshold issues have been determined below, it would not be appropriate for this Court to expend its resources on deciding a constitutional question that, in any event, will not dispose of all of the claims against all of the Defendants.

SUMMARY OF PROCEEDINGS

The *qui tam* Plaintiffs have filed two related actions under the FATA, naming approximately one hundred defendants in aggregate, and alleging a vast

conspiracy to defraud the State in connection with investments that failed in the wake of the recent economic crisis. The first case, *State of New Mexico, ex rel. Frank C. Foy and Suzanne B. Foy v. Vanderbilt Capital Advisors, LLC, et al.* ("*Foy I*") involving 36 defendants, was assigned to Judge Pfeffer in the Santa Fe County District Court. The present case ("*Foy II*"), involving over 70 named defendants and concerning other investments made by the Educational Retirement Board and the State Investment Council, was subsequently filed and assigned to Judge Pope.

On April 28, 2010, Judge Pfeffer issued a 31-page decision in *Foy I*, finding that the retroactive application of FATA, as purportedly authorized by Section 44-9-12(A), was unconstitutional. That decision did not, of course, affect any claims Appellants might have under FATA for events that took place after the Act's July 1, 2007 effective date. Appellants applied to this Court in *Foy I* for interlocutory review of the identical legal question currently before the Court. This Court (Judge Roderick T. Kennedy and Judge Celia Foy Castillo) denied the application. *See* Exhibit A attached to Notice of Errata filed in the Court of Appeals.

At the outset of *Foy II*, all of the Defendants challenged the District Court's jurisdiction over the subject matter of Appellants' suit under Section 44-9-9(A) of the FATA. That statute provides that:

> No court shall have jurisdiction over an action brought pursuant to Section 5 of the Fraud Against Taxpayers Act [44-9-5 NMSA

> 1978] by a present or former employee of the state unless the employee, during employment with the state and in good faith, exhausted existing internal procedures for reporting false claims and the state failed to act on the information provided within a reasonable period of time.

It is undisputed that *qui tam* Plaintiff Frank Foy ("Foy") was a state employee before he instituted the present lawsuit.

Certain Defendants also argued there was no subject matter jurisdiction under Section 44-9-9(B), which precludes a court from jurisdiction over "an action" under FATA against an appointed state official "if the action is based on evidence or information known to the state agency to which the false claim was made or to the attorney general when the action was filed." In addition, Defendants moved to dismiss for failure to state a claim under Rule 1-012(B)(6), and for failure to plead fraud with particularity as required by Rule 1-009(B).

The District Court has yet to hear or address the motions to dismiss for failure to state a claim or for failure to plead fraud with particularity. Judge Pope's Order of July 8, 2011 only "tentatively" denied the subject matter jurisdiction motions, while inviting further briefing on that issue. *See* Order, Exhibit 1 to Plaintiffs' Application, ¶¶ 1-3. In so ruling, the District Court noted that even if it did not change its order tentatively denying the subject matter jurisdiction motions, Defendants would be free to "raise these issues of subject matter jurisdiction at a later time by an appropriate motion and evidentiary hearing." *Id.* ¶ 4. In this same

Order, Judge Pope adopted the reasoning and analysis of Judge Pfeffer and held that the retroactive application of FATA permitted by Section 44-9-12(A) was unconstitutional. *Id.* ¶ 5.

In response to the District Court's invitation for further briefing, the Defendants filed supplemental briefs in further support of their subject matter jurisdiction motions, under both Sections 44-9-9(A) and 44-9-9(B). Specifically, in their August 4, 2011 supplemental brief under Section 44-9-9(A), the Psilos and Ares Defendants renewed their arguments that Plaintiffs had failed to establish subject matter jurisdiction, and further argued that if the present record were insufficient to determine that Foy, during his State employment and in good faith, had exhausted existing internal procedures for reporting false claims, then the Court should permit limited discovery on that issue, followed by an evidentiary hearing on whether Foy met his burden of proving compliance with Section 44-9-9(A).[2]

[2] Jurisdictional facts are decided by the Court in a motion to dismiss for lack of subject matter jurisdiction under Rule 1-012(B)(1), an analysis that is "quite different" from a summary judgment motion. *Valenzuela v. Singleton*, 100 N.M. 84, 89, 666 P.2d 225 (Ct. App. 1982); *Sizova v. Nat'l. Inst. of Stds. and Tech.*, 282 F.3d 1320, 1324-1328 (10th Cir. 2002) (reliance on evidence outside pleadings in addressing motion to dismiss for lack of subject matter jurisdiction does not convert motion to one for summary judgment unless resolution of jurisdictional question requires resolution of an aspect of substantive claim; that exception is inapplicable where question is whether plaintiff exhausted administrative remedies; trial court should have allowed discovery and conducted evidentiary hearing on jurisdictional facts).

Instead of responding to the Defendants' supplemental briefs with respect to subject matter jurisdiction, Plaintiffs proceeded to file an application for interlocutory appeal of Judge Pope's constitutional ruling, and this Court (Judge Michael D. Bustamante and Judge Cynthia A. Fry) granted that application on August 30, 2011. That same day, Plaintiffs moved to certify the issue to the New Mexico Supreme Court. Defendant Bruce Malott filed a Suggestion of Lack of Jurisdiction on September 21, 2011. On September 27, this Court denied both the certification motion and Bruce Malott's Suggestion of Lack of Jurisdiction, but noted in the order denying the Suggestion of Lack of Jurisdiction that "The parties may raise this issue in their briefing."

On September 19, 2011, the State of New Mexico, by and through the Attorney General, filed a motion for a partial remand of the case to the District Court so that Judge Pope could decide the State's motion (already pending when the interlocutory appeal was granted) to dismiss Plaintiffs' Complaint to the extent it involved claims of fraud relating to investments made by the State Investment Council. These claims were already the subject of a pending common law action filed by the Attorney General against some of the *Austin* Defendants (in which the constitutionality of the retroactive application of the FATA would be irrelevant). The State's motion for partial remand was granted on October 18, 2011. The District Court commenced a hearing on the State's motion for partial dismissal on

December 16, 2011, and that hearing is scheduled for continuation on February 6, 2012.

On December 20, 2011, Plaintiffs – apparently having had second thoughts about their decision to seek an interlocutory appeal in the first place – filed a motion to lift the remainder of the stay so that the proceedings in the District Court could continue as though the interlocutory appeal had never been taken. Plaintiffs essentially argued that the jurisdictional basis for the interlocutory appeal, *i.e.,* that the constitutional question was a "controlling" question of law and that resolution thereof would "materially advance the ultimate termination of the litigation," really did not exist because "large parts" of their claims "are not impacted" by the interlocutory appeal that Plaintiffs had persuaded this Court to grant. Plaintiffs' Motion to Lift Remainder of Automatic Stay, p. 1. Indeed, although Plaintiffs had argued, in their Application for Interlocutory Appeal, that interlocutory appeal should be granted because requiring them to proceed in District Court before the constitutional issue was decided by this Court would "cost the State several hundred million dollars," Application, p. 2, in their subsequent Motion to Lift the Stay, Plaintiffs inconsistently maintained that the stay pursuant to NMRA 12-203(E) is "irrevocably prejudicing the State's ability to recover money" and causing "an irreparable loss of post judgment interest." Plaintiffs' Motion, p. 3.

ARGUMENT

I. IT IS NOT NECESSARY TO DECIDE THE CONSTITUTIONAL ISSUE PRESENTED BY THIS INTERLOCUTORY APPEAL

Plaintiffs have rushed to this Court to present a piecemeal, non-dispositive constitutional issue, even though that issue need not now be decided and indeed may never require this Court's attention in this case, depending on the District Court's ultimate resolution of the potentially dispositive motions pending before it. Plaintiffs' interlocutory appeal thus violates the fundamental legal proscription against unnecessary determination of constitutional issues by the judiciary. *See Schlieter v. Carlos*, 108 N.M. 507, 510, 775 P.2d 709, 712 (1989) ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so."); *Advance Schools, Inc. v. Bureau of Revenue,* 89 N.M. 79, 82, 547 P.2d 562, 565 (1976) ("Constitutional questions are not decided unless they are necessary to the disposition of the case.")

The factual background set forth above readily establishes the lack of necessity for this Court to decide the constitutionality of the retroactive application of FATA at this time. The District Court has not yet dismissed any claim against any particular Defendant, much less all claims against any Defendant, on the basis of the constitutional ruling. If such dismissal occurs, the Plaintiffs' appellate remedy will remain intact, as they may then take an ordinary appeal, provided the

District Court decides not to retain jurisdiction over the entire case pursuant to NMRA 1-054(B)(2).

Moreover, and as set forth in more detail below, quite apart from the constitutional question, this case may be disposed of in its entirety by the District Court on the pending dispositive motions, especially including the motion to dismiss for lack of subject matter jurisdiction under Section 44-9-9(A). Accordingly, it may not prove necessary for this Court to reach the constitutional question at all.

II. THIS COURT SHOULD DECLINE APPELLATE JURISDICTION UNTIL THE DISTRICT COURT DECIDES WHETHER IT HAS SUBJECT MATTER JURISDICTION UNDER § 44-9-9(A), AND UNTIL THE DISTRICT COURT RULES ON THE OTHER DISPOSITIVE MOTIONS

Whether a court has jurisdiction over the subject matter of an action is a fundamental question that must be resolved at the outset of the litigation. *See Smith v. City of Santa Fe,* 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300 (lack of jurisdiction "must be resolved before going further" with the case); *Davidson v. Enfield,* 35 N.M. 580, 583-584, 3 P.2d 979, 980 (1931) ("Jurisdiction of the subject-matter ... is a fundamental consideration .... From whatever source challenged, the court must pause, consider and determine its jurisdiction before proceeding further ...."). Indeed, this Court may, on its own motion, determine whether subject matter jurisdiction exists even though it has granted an

interlocutory appeal on an entirely different issue. *Wilson v. Denver*, 1998-NMSC-016, ¶ 8, 125 N.M. 308, 961 P.2d 153.

The Psilos and Ares Defendants respectfully submit that it would be premature and inappropriate for this Court to decide, on this interlocutory appeal, that subject matter jurisdiction exists under Section 44-9-9(A). The question of subject matter jurisdiction under this section of the FATA has been the subject of extensive briefing and argument before the District Court. Defendants have submitted affidavits and exhibits in support of their position that Plaintiffs have failed to prove that Foy, during his employment with the State and in good faith, exhausted internal procedures for reporting false claims. Specifically, Defendants' evidence shows that:

- There were existing internal procedures for reporting false claims during Foy's state employment.
- Foy failed to exhaust such procedures in good faith, even though he admittedly "knew" of alleged "kickbacks" and "fraud" concerning state investments.
- Instead of complying with the requirements of § 44-9-9 (A), Foy was planning during his state employment to sue under FATA and reap a huge personal windfall.

See Memorandum of Law by Psilos and Ares Defendants in Further Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, attached as Exhibit A to the Response by the Psilos and Ares Defendants to Plaintiffs' Motion for Certification to Supreme Court, filed herein on September 14, 2011.

While the District Court "tentatively" denied the subject matter jurisdiction motion, Judge Pope invited supplemental briefing, which has been duly provided by the Defendants but not yet by the *qui tam* Plaintiffs. The District Court, therefore, has not yet had an opportunity to rule on whether to change its tentative conclusion. Moreover, Judge Pope has made it clear that even if he does not change his tentative decision, the Defendants will free to raise the question of subject matter jurisdiction at a later time by an appropriate motion and at an "evidentiary hearing."

In light of the procedural posture of the case, this Court should dismiss the interlocutory appeal as improvidently granted, and should await further exploration and decision of the subject matter jurisdiction question under Section 44-9-9(A) by the District Court. *See Pena Blanca Partnership v. San Jose de Hernandez Community Ditch,* 2009-NMCA-016, ¶¶ 7-8, 145 N.M. 555, 202 P.3d 814 (stating the scope of review on interlocutory appeal and the "preference" for trial courts to determine issues in the first instance). As a matter of basic civil procedure, the District Court should be given the first opportunity to decide whether subject matter jurisdiction exists and how to apply NMRA 1-054(B)(2) to those few Defendants against whom all claims are barred by the decision on the constitutional issue.

III. THIS APPEAL DOES NOT MEET THE CRITERIA FOR INTERLOCUTORY APPEAL

The constitutionality of Section 44-9-12(A) is by no means a "controlling question of law," NMSA 1978, § 39-3-4(A), because the determination of that issue will not determine all of Plaintiffs' claims against all Defendants, and thus will not "materially advance the ultimate termination of the litigation." *Id.* Should the District Court dismiss on constitutional grounds all claims against the Defendants whose conduct occurred entirely before July 1, 2007, that Court can decide whether to make such ruling immediately appealable as of right or whether to retain jurisdiction of all parties and all claims at least until it decides the overriding question of its own subject matter jurisdiction and the other dispositive motions. *See* NMRA 1-054(B)(2).

Proceeding now with an interlocutory appeal under all of the foregoing circumstances violates the rationale of the final judgment doctrine, and, we respectfully submit, the well-reasoned purposes of an interlocutory appeal. "The final judgment rule serves a multitude of purposes, including the prevention of piecemeal appeals and the promotion of judicial economy." *Capco Acquisub, Inc. v. Greka Energy Corp.*, 2007-NMCA-011, ¶ 17, 140 N.M. 920, 149 P.3d 1017 (internal quotation marks and citation omitted). This Court should adhere to normal principles of appellate review and should permit determination of issues in the first instance and in proper sequence by the District Court.

IV. SECTION 49-9-12(A) OF THE FATA IS UNCONSTITUTIONAL

In the event this Court declines to dismiss the interlocutory appeal and proceeds to address the merits of the constitutional question, the Psilos and Ares Defendants assert that § 44-9-12(A) of the FATA violates the *ex post facto* and due process clauses of the United States and New Mexico Constitutions, for the reasons stated in the Brief and arguments submitted by Defendants The Topiary Trust and DB Investment Managers, in which Brief and arguments the Psilos and Ares Defendants expressly join.

CONCLUSION

The Court should dismiss this interlocutory appeal as improvidently granted. *See Ellis v. Cigna Prop. & Cas. Cos.*, 2007-NMCA-123, ¶¶ 11, 16, 142 N.M. 497, 167 P.3d 945 (interlocutory appeal dismissed as improvidently granted after thorough review of record).

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was served on the parties via e-mail as indicated below this ____ day of January, 2012.

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