IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff,
ex rel. FRANK C. FOY and SUZANNE B. FOY, *qui tam* Plaintiffs

Appellants,

v. Ct. App. No. 31421

AUSTIN CAPITAL MANAGEMENT, LTD; *et al.*

Defendants/Appellees.

REPLY BRIEF BY PLAINTIFFS ABOUT PSILOS DEFENDANTS' ASSERTION THAT THE LEGISLATURE HAS DEPRIVED THE JUDICIARY OF SUBJECT MATTER JURISDICTION OVER THIS CASE

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Oral Argument Is Requested

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I. DEFENDANTS ENGAGE IN DELIBERATE FALSEHOOD WHEN THEY REPRESENT THAT FRANK FOY KNEW ABOUT THE KICKBACKS WHILE HE WORKED AT THE ERB.

The defendants assert that no court has jurisdiction over them, because they interpret NMSA 1978, § 44-9-9(A) as meaning that the Legislature deprived the judiciary of subject matter jurisdiction to adjudicate the claims against them. Their argument about "jurisdiction" is false, both legally and factually. The legal and constitutional fallacies in their argument are addressed in Points III and IV below. The factual falsehoods in their argument are addressed here, at the outset.

To establish a factual predicate for their argument that the courts lack jurisdiction, the defendants resort to deliberate falsehood. On page 10 of the Psilos Answer Brief, all of the defendants join in a wilfully false assertion of fact. They assert that Frank Foy knew about the kickbacks when he was employed at the Educational Retirement Board. This is outrageous. The fraudfeasors and their lawyers are trying to assassinate the character of an honest man. *See* Rule 1-011, NMRA.

To escape liability, the fraudfeasors are now trying to drag Frank Foy down in the dirt with them, so that they can construct an argument that the courts have no jurisdiction over them. According to the defendants, Frank

Foy knew about the kickbacks while he worked at the ERB, and therefore no court has jurisdiction over them. Both prongs of this argument are false. Frank Foy did not know about the kickbacks, and the New Mexico judiciary does have jurisdiction over all the defendant-fraudfeasors.

Facts in the record which defendants did not mention in their briefs.

A. Frank Foy did not know about the kickbacks while he was employed at the ERB. *See* Affidavit of Frank Foy, RP 001266-73. While he was at the ERB, Foy suspected that there might be corruption, but he was not able to find proof before he was forced to retire in March 2008. Corrected First Amended Complaint, ¶ 157, RP 000178-79.

B. The kickbacks did not come to light until 2009, more than a year later. *Id.*, Exhibits 1 and 2, RP 000191-206

C. The kickbacks started at the SIC, and most of the kickbacks occurred at that agency. *Id.* Frank Foy worked at the ERB (in Albuquerque), not at the State Investment Council (in Santa Fe), so there is no way he would have known about the kickbacks at the SIC. Affidavit ¶ 4, RP 001266-67.

D. While he worked at the ERB, Frank Foy had a strict policy against all third-party fees because those fees could be used to disguise kickbacks, and

because these fees reduce the amount that can be invested to earn income for teachers' retirement. *Id.* ¶ 6, RP 001267.

E. Because Frank Foy was an obstacle to corruption, some of the defendants and co-conspirators plotted in secret to have him removed. *See* Plaintiffs' Supplement to the Record on Appeal: Aldus Transcripts and Malott Resignation, Exhibit 1. In this transcript the defendant Saul Meyer of Aldus Equity says that he is pushing to get Frank Foy fired from his job at the ERB.

F. The conspirators succeeded in December 2006, when the defendant Bruce Malott fired ERB director Evalynne Hunnemuller and shunted Frank Foy aside, so that Foy was not in a position to learn about or stop the kickbacks. Affidavit ¶ 23, RP 001270.

G. The conspirators then framed Frank Foy with a false sexual harassment claim to force him to retire. Corrected Amended Complaint ¶ 157 RP 000178-79.

H. While Foy was employed at the ERB, there were no established procedures for reporting false claims. Affidavit ¶¶ 25, 27, RP 001270, 001271.

I. While Foy was employed at the ERB, he was not able to find proof to substantiate his suspicions about possible corruption. *Id.* ¶ 3, RP 001266; Corrected Amended Complaint ¶¶ 126-42, RP 000165-170.

J. The complaints in this case were filed more than a year after Mr. Foy left the ERB. They include critical information which Mr. Foy and his lawyers were able to collect after he left the ERB. As an example, the initial Austin complaint in April alleges that there might have been kickbacks which Foy did not know about. Complaint ¶¶ 83-90, RP 000022-24. However, the kickbacks were not uncovered until after the initial complaint had been filed, so Foy amended his complaint in June 2009 to include them. RP 000134-206.

To establish a predicate for their assertion that the courts lack jurisdiction, all of the defendants are advancing the absurd argument that Frank Foy should have reported what he did not know. In other words, Frank Foy was required to report kickbacks that he didn't know about. Since this argument makes no sense, defendants are forced to fabricate the false and scurrilous accusation that somehow Foy knew about the kickbacks. How? Telepathy? As Frank Foy asked in his affidavit, "IF I KNEW ABOUT THE KICKBACKS, WHO TOLD ME?" Affidavit ¶ 2, RP 001266]

II. BOTH DISTRICT JUDGES HAVE ALREADY REJECTED DEFENDANTS' SPURIOUS ARGUMENTS ABOUT "JURISDICTION."

Judge Pope's order of July 8, 2011. Judge Pope entered an order tentatively denying all the defendants' motions to dismiss based on an alleged

lack of subject matter jurisdiction. Judge Pope found, "based solely on the papers filed and the existing record at this time, that Mr. Foy has demonstrated the existence of subject matter jurisdiction." Order, Ex.1 to Plaintiffs' Application.

Judge Pfeffer's order on January 27, 2012. Judge Pfeffer entered an order in the *Vanderbilt* case denying the defendants' motions to dismiss on "jurisdictional" grounds. *See* Notice of Supplemental Authority, filed herewith. He rejected the very same arguments which the defendants are trying to make during this interlocutory appeal.

Section 44-9-9(A) – exhausting existing internal remedies. Defendants argued that the court was deprived of subject matter jurisdiction by § 44-9-9(A), which requires state employees to use good faith efforts to exhaust "existing internal remedies for reporting false claims" during employment with the state. Judge Pfeffer ruled that:

> [E]xhaustion of administrative remedies is an affirmative defense, and, therefore, what Plaintiff Foy knew and when he knew it as to alleged wrongdoing under FATA cannot be determined in a 12(B)(1) Motion to Dismiss.

Judge Pfeffer further entered a finding that:

> [T]he allegations cited by Defendants contained in the Amended and Supplemental Complaint

("Complaint") do not show that while Foy was employed by the State of New Mexico he knew of the alleged wrongdoings under FATA by Defendants.

Section 44-9-9(B) – actions against state officials. Judge Pfeffer also denied defendants' motion to dismiss based upon an alleged lack of subject matter jurisdiction under § 44-9-9(B). These issues are discussed in Plaintiffs' brief in reply to Bruce Malott.

III. ALTHOUGH PHRASED IN "JURISDICTIONAL" TERMINOLOGY, THE STATUTE RELATES TO WHETHER CERTAIN ACTIONS ARE BARRED, RATHER THAN WHETHER THE COURTS HAVE SUBJECT MATTER JURISDICTION.

The defendants at various times have miscited *Valenzuela v. Singleton*, 100 N.M. 84, 666 P.2d 225 (Ct. App. 1982), as support for their contention that this Court lacks subject matter jurisdiction, so that this case must be dismissed under Rule 1-012(B)(1). This is a complete misreading of *Valenzuela*, which establishes exactly the opposite: dismissal under Rule 12 is reversible error where there are facts in dispute, even when those facts might be termed "jurisdictional." If factual issues are involved, a case can be dismissed only under Rule 1-056. This means that a case cannot be dismissed when there are disputed issues of fact. It also means that discovery must be

allowed. *Valenzuela* completely supports Mr. Foy's position, and it is distressing that so many of the defendants have miscited it.

In *Valenzuela*, the district court, acting under Rule 12(B)(1), determined that the plaintiff knew that his employer had workers compensation coverage. The district judge therefore ruled that the district court lacked subject matter jurisdiction, and that the plaintiff's only remedy was under the Workers Compensation Act. The district judge treated this question as a "jurisdictional fact," meaning that he was required to decide the facts at the outset of the case.

The Court of Appeals found that this was reversible error.

> Did the trial court properly analyze the issue in terms of subject matter jurisdiction, or should it have treated it in terms of summary judgment? We hold that the latter is correct.
>
> * * * *
>
> It is implicit in the trial court's analysis that it was characterizing plaintiff's knowledge as a "jurisdictional fact." The trial court believed that as a jurisdictional fact it was a question of law, and thus for it to determine.
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> * * * *
>
> **While it is generally true that jurisdictional facts are determined by the judge,** *State Ex Rel. Anaya v. Columbia Research Corp., 92 N.M. 104, 583 P.2d 468 (1978); Chatham Condominium Ass'ns v. Century Village, Inc., 597 F.2d 1002 (5th Cir.1979),* **the trial judge erred in treating plaintiff's knowledge or lack of knowledge as a jurisdictional fact.** Plaintiff's knowledge goes only to whether or not she had a cause of action under common law negligence, not to

> whether or not the court had subject matter jurisdiction. Because it determines whether or not a cause of action exists summary judgment, not subject matter jurisdiction, is relevant.
>
> * * * *
>
> The District Court has the power to decide a common law negligence action. **Plaintiff's knowledge only determines whether or not she has a cause of action under common law negligence, not whether the District Court had subject matter jurisdiction.** It follows that a summary judgment analysis is proper.
>
> The difference is significant. Under a summary judgment analysis the plaintiff is entitled to have all of her allegations taken as true, with all their favorable inferences. The trial court cannot grant summary judgment unless there is no genuine issue of material fact. The burden is on the moving party to show that there is no genuine issue of material fact. Under a 12(b)(1) motion to dismiss for lack of jurisdiction the analysis is quite different.

100 N.M. at 87-88, 89, 666 P.2d at 228-29, 230 (emphases added).

In *Valenzuela*, the Supreme Court granted *certiorari* and ultimately decided the case on other grounds. It decided that the trial court's finding that the claimant had actual knowledge overcame Allsup's failure to comply with worker's compensation filing requirements. *Valenzuela* remains good law and has been cited several times for its holding that whether the plaintiff has a cause of action is a different question than whether the courts have subject matter jurisdiction.

Intertwined facts. Under Rule 1-012(B)(1), when jurisdictional facts are intertwined with the facts on the merits, all questions of fact are decided under Rule 56 or by the fact finder – in this case the jury. *Valenzuela v. Singleton*; *Olsen v. United States ex rel. Dep't of the Army*, 144 Fed. Appx. 727 (10th Cir. 2005) (court is required to convert Rule 12(B)(1) motion to Rule 12(B)(6) motion or Rule 56 summary judgment motion when resolution of jurisdictional question is intertwined with merits of the case); *In re Third Party Summonses*, 99 A.F.T.R.2d (RIA) 403, 2007 U.S. Dist. LEXIS 566 (D. Colo. 2007); *Garcia v. United States*, 2009 U.S. Dist. LEXIS 58206, at *17 (D.N.M. 2009) ("Where, however, the court determines that jurisdictional issues raised in rule 12(b)(1) motion are intertwined with the case's merits, the court should resolve the motion under either rule 12(b)(6) or rule 56."); *see also United States ex rel. Yannacopolous v. General Dynamics*, 315 F. Supp. 2d 939, 946-47 (N.D. Ill. 2004) (supposed jurisdictional bar under FCA is actually a matter of substantive law, so court has subject matter jurisdiction over the dispute).

Federal courts have also held that the False Claims Act does not oust the courts from subject matter jurisdiction, even though the FCA uses the same phraseology as FATA. The FCA provides that "no court shall have jurisdiction over" a case brought by a member of the armed forces against a

member of the armed forces; or a case against a member of Congress or the judiciary or a senior executive branch official; or a case based on public disclosures. 31 U.S.C. § 3730(e)(1), (2), and (4), entitled "Certain actions barred."

In *United States ex rel. Yannacopolous v. General Dynamics*, the qui tam plaintiff sued General Dynamics and Lockheed Martin on behalf of the United States, alleging fraud in the F-16 fighter program. General Dynamics and Lockheed filed Rule 12(b)(1) motions asserting that the court lacked subject matter jurisdiction because the complaint was allegedly based on publically disclosed information. The court rejected the argument that it lacked subject matter jurisdiction:

> Defendants' reliance on Rule 12(b)(1) is misplaced. Sections 3730(e)(4)(A) & (B) are matters of substantive law, not a "jurisdictional bar" as suggested by some courts. *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 494-95 (7th Cir. 2003) (citing *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950-51, 138 L. Ed. 2d 135, 117 S. Ct. 1871 (1997). *See also United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 940-941 (7th Cir. 1996) (stating, "[§ 3730(e)(4)(A) & (B) do] not curtail the categories of disputes that may be resolved (a real 'jurisdictional' limit) but instead determines who may speak for the United States on a subject, and who if anyone gets a financial reward. 'Jurisdiction' is a notoriously plastic term."). In § 3730 actions, subject matter jurisdiction is actually conferred by §§ 1331, 1345, and 3732(a)

> rather than § 3730(e)(4)(A) & (B). *Id.* at 941. Accordingly, the court has subject matter jurisdiction over the dispute.

315 F. Supp. 2d at 946-47.

In *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 940-41 (7th Cir. 1996), Judge Easterbrook cogently addressed and disposed of the so-called "jurisdiction" issue on behalf of the Seventh Circuit. Six qui tam plaintiffs sued defense contractor Accudyne, which argued that the court lacked jurisdiction because their claims were based on public information.

> According to *Accudyne*, the district court lacked subject-matter jurisdiction over Count II.
>
> * * *
>
> *Accudyne* is oblivious to the fundamental distinction between jurisdiction and the merits.
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> * * *
>
> Now we grant that § 3730(e)(4)(A) offers *Accudyne* some comfort. It says:
>
> > No court shall have jurisdiction over an action under this section based upon [public information]. . . .
>
> This subparagraph uses the magic word "jurisdiction."
>
> * * *

> For what it is worth, we doubt that § 3730(e)(4)(A) uses the word "jurisdiction" in the sense of adjudicatory power, which is conferred by §§ 1331, 1345, and 3732(a) rather than "this section" (sec. 3730). In context, the word appears to mean that once information becomes public, only the Attorney General and a relator who is an "original source" of the information may represent the United States. This does not curtail the categories of disputes that may be resolved (a real "jurisdictional" limit) but instead determines who may speak for the United States on a subject, and who if anyone gets a financial reward. "Jurisdiction" is a notoriously plastic term. See *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077-78 (7th Cir.1987). It is therefore not surprising that the Supreme Court had held that a similar reference to jurisdiction in the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104, limits remedies rather than subject-matter jurisdiction, see *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees,* 481 U.S. 429, 444-46, 107 S.Ct. 1841, 1850-51, 95 L.Ed.2d 381 (1987) – and, more to the point, that a lack of jurisdiction does not necessarily prevent a court from awarding attorneys' fees. See *Willy v. Coastal Corp.*, 503 U.S. 131, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992); cf. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393-98, 110 S.Ct. 2447, 2454-57, 110 L.Ed.2d 359 (1990).

As the courts have often noted, "jurisdiction" is a notoriously plastic term. Judges and lawyers often use the term to refer to issues which might bar the court from deciding a case on the merits, such as statutes of limitations, or sovereign immunity, or *res judicata*, or exhaustion of administrative remedies. Lawyers and judges routinely call these issues "jurisdictional," without

meaning that they deprive the court of subject matter jurisdiction. Such cases are within the subject matter jurisdiction of the court, but the underlying claim might be barred from being decided on the merits, for various reasons. For example, if the statute of limitations has run, then the court has subject matter jurisdiction and will decide that the plaintiff's claimed is barred.

In § 44-9-9 the term "jurisdiction" is used in that typical sense of the word: an issue which might bar the court from deciding the merits of the case. It is not used to refer to subject matter jurisdiction. The Legislature made this meaning clear by the title which it gave to § 44-9-9: "Certain Actions Barred." *See Yannacopolous, supra* (supposed jurisdictional bar under FCA is actually a matter of substantive law, so court has subject matter jurisdiction over the dispute).

In the federal courts, subject matter jurisdiction is sometimes a genuine issue, because federal courts are courts of limited subject matter jurisdiction. However, in the state courts of New Mexico, subject matter jurisdiction is rarely if ever a real issue, because the state courts have plenary general jurisdiction. *See San Juan Agricultural Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 39, 150 N.M. 64, 257 P.3d 884, BIC 18-19.

In this instance, as Judge Pfeffer has already ruled, § 44-9-9(A) merely requires exhaustion of administrative remedies under certain conditions. The Legislature can require exhaustion of administrative remedies, as it did in *U.S. Xpress, Inc. v. New Mexico Taxation and Revenue Dep't*, 2006-NMSC-017, 139 N.M. 589, 136 P.3d 999. However, such a procedural requirement does not deprive the courts of subject matter jurisdiction.

Furthermore, exhaustion is subject to several exceptions and qualifications recognized by the courts, such as futility. Exhaustion of administrative remedies, as in FATA, is an affirmative defense. *University of New Mexico Police Officers Ass'n v. University of New Mexico*, 2004-NMCA-050, ¶ 14, 135 N.M. 655, 92 P.3d 667; *see also Smith v. City of Santa Fe*, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300. Therefore defendants bear the burden of proof on this affirmative defense. Rule 1-008(C); *Bendorf v. Volkswagenwerk Aktiengeselischaft*, 88 N.M. 355, 358, 540 P.2d 835, 838 (Ct. App. 1975); *Lindberg v. Ferguson Trucking Co.*, 74 N.M. 246, 250, 392 P.2d 586, 588-89 (1964). The defendants must prove this affirmative defense with real evidence, just like other affirmative defenses. *See* UJI 13-302C and 13-302D. A defendant may allege affirmative defenses in an answer to the complaint, but merely alleging an affirmative defense does not entitle the defendant to

judgment under Rule 12. Under Rule 12, the plaintiffs' allegations in the complaint are taken as true, not the affirmative defenses alleged by the defendants.

IV. DEFENDANTS MISINTERPRET FATA TO INFRINGE THE JUDICIAL POWER AND VIOLATE ARTICLE VI OF THE NEW MEXICO CONSTITUTION, BECAUSE THE LEGISLATIVE BRANCH CANNOT DEPRIVE THE JUDICIAL BRANCH OF SUBJECT MATTER JURISDICTION.

To escape liability for the frauds which they perpetrated against the taxpayers of New Mexico, the defendant-fraudfeasors mount a frontal attack on the constitutional authority of the judiciary. They resort to the fallacious argument that the Legislature has the constitutional authority to limit the subject matter jurisdiction of the judiciary. According to the defendants, when the Legislature enacted FATA, the Legislature simultaneously deprived the judiciary of the power to enforce and interpret that statute. This is pernicious constitutional nonsense: the Legislature intended no such thing, and the Legislature has no such power under our State Constitution.

If the defendants were correct, then the Legislature could deprive the judicial branch of the power to interpret all statutes, not just FATA. No doubt the defendants would like this result, so that they could start lobbying the

Legislature to exempt them from the heavy hand of the judiciary. Fortunately for the citizens of this State, our Constitution does not permit such a result.

The New Mexico Legislature cannot limit the subject matter jurisdiction of the New Mexico judiciary. *Sundance Mechanical & Util. Corp. v. Atlas*, 109 N.M. 683, 686-87, 789 P.2d 1250, 1253-54 (1990) (statute does not limit subject matter jurisdiction, which is based on N.M. Const. art. VI, §§ 1 and 13).

As the Supreme Court pointed out in *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 12, the jurisdiction of the New Mexico judiciary springs directly from the Constitution itself. *See* N.M. Const. art. VI, § 1 ("The judicial power of the state shall be vested in the . . . district courts . . . .") and § 13 ("The district court shall have original jurisdiction in all matters and causes not excepted in this constitution . . . ."). Therefore the Legislature cannot limit or oust the Supreme Court or the district courts from the exercise of their jurisdiction. When defendants contend that § 44-9-9 withdraws jurisdiction, they are mistakenly extrapolating from federal law, where Congress apparently does have the constitutional power to limit or defeat the jurisdiction of the federal courts. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). *See* U.S. Const. art. III, § 2 ("In all the other cases before mentioned, the supreme court

shall have appellate jurisdiction . . . with such exceptions . . . as the congress shall make." [emphasis added]).

This is a grave structural defect in the federal Constitution, whereby Congress can limit the jurisdiction and power of the federal courts. Whenever limitations are imposed on the judicial power, civil liberties are diminished. This has been a source of worry ever since *Ex parte McCardle*, wherein Congress repealed the statute providing for *habeas corpus.*

Unfortunately, at the federal level, this problem is still with us. In the Military Commission Act of 2006, amending the so-called Patriot Act, Congress limited the jurisdiction of the federal courts to issue writs of *habeas corpus.* 28 U.S.C. § 2241(e). These limitations on federal court jurisdiction were recently overturned by the United States Supreme Court, but only by a 5-4 vote. *Boumediene v. Bush*, 553 U.S. 723 (2008). Since then, Congress has extended statutes which authorize wiretaps and intercepts without a warrant, and which deprive the federal courts of subject matter jurisdiction over such practices. Patriot Sunsets Extension Act of 2011, 125 Stat. 216 (2011). This is a truly frightening threat to the civil liberties of all citizens.

Fortunately, such a usurpation of the judicial power is not possible under New Mexico's Constitution. Our 1912 Constitution cures the *McCardle*

structural defect, by vesting general jurisdiction directly in the Supreme Court and the district courts. Therefore the Legislature cannot defeat, limit, or deprive the judiciary of its jurisdiction, although the Legislature may prescribe some procedures and provide additional methods by which that jurisdiction may be exercised. So the Legislature cannot create a statute and then deprive the courts of jurisdiction to adjudicate controversies under that statute, because the Constitution gives the state judiciary power to adjudicate "all matters and causes not excepted in this constitution." N.M. Const. art. VI, § 13.

Any change in the plenary subject matter jurisdiction of the judiciary requires an amendment to the State Constitution. A mere statute is not sufficient. In this regard, the history of workers compensation is instructive. The Legislature initially transferred workers compensation from the courts by statute, but this caused considerable unease among responsible legislators, judges, and lawyers. So the Legislature cured the constitutional defect by proposing a constitutional amendment, which was ratified by the people in the 1986 election. N.M. Const. art. III, § 1 (amended Nov. 4, 1986).

To construct their argument the defendants cite several cases without explaining what those cases are about.

For example, *U.S. Xpress, Inc.*, is an exhaustion of remedies case. The relevant statute stated that "No court shall have jurisdiction" over tax challenges unless the taxpayer has first pursued the protest remedy or the alternative refund remedy set forth in the Tax Administration Act. The Supreme Court interpreted this as a procedural requirement which must be met before filing suit. No one can quarrel with this ruling, but it does follow that the Legislature could pass a statute depriving the courts of subject matter jurisdiction over all tax controversies. [Of course, the tax collectors would love to enact such a statute, if such a statute were possible, since it would be quite a "revenue enhancer" and a great convenience to them, to eliminate the courts entirely.]

Wilson v. Denver, 1998-NMSC-016, 125 N.M. 308, 961 P.2d 153 is a statute of limitations case. The court simply enforced the statutory requirement that election contests must be filed within 15 days after the election. The Legislature can impose statutes of limitations on various kinds of suits, including a very short limitations period for election contests. However, it does not follow that the Legislature can deprive the courts of subject matter jurisdiction over elections. [Cynical observers might suggest

that sitting legislators would jump at the chance to pass such a statute, if they could.]

Sanchez v. Attorney General, 93 N.M. 210, 211, 598 P.2d 1170, 1171 (Ct. App. 1979) holds that a district judge cannot command a person to give a handwriting exemplar prior to being charged or arrested. *Sanchez* certainly does not stand for the conclusion that the Legislature could pass a statute that would prevent the courts from exercising jurisdiction over such cases. [Of course, policemen might welcome such a statute.]

The legislative branch cannot annihilate the judicial power by depriving the judiciary of subject matter jurisdiction, because the Constitution vests the judicial branch with "jurisdiction in all matters and causes not excepted in the constitution." N.M. Const. art. VI, § 13.

CONCLUSION

In their increasingly desperate efforts to escape liability for their frauds, the defendants will stop at nothing. First they falsely accuse Frank Foy of knowing about their secret kickbacks. Then they attack the constitutional jurisdiction of the judicial branch.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was emailed to all counsel of record and the Honorable John Pope this 13th day of February, 2012.

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