IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Supreme Court No. 34,013

Court of Appeals No. 31,421

Santa Fe County No. D-101-CV-2009-01189

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

Qui tam Plaintiffs/Petitioners and Conditional Cross-Respondents

v.

AUSTIN CAPITAL MANAGEMENT, LTD; AUSTIN CAPITAL MANAGEMENT GP CORPORATION; CHARLES W. RILEY; BRENT A. MARTIN; DAVID E. FRIEDMAN; WILL JASON ROTTINGER; VICTORY CAPITAL MANAGEMENT, INC.; KEYCORP; BEREAN CAPITAL; DUDLEY BROWN; TREMONT PARTNERS, INC.; TREMONT CAPITAL MANAGEMENT, INC.; TREMONT GROUP HOLDINGS, INC.; OPPENHEIMER FUNDS, INC.; GARY BLAND; DAVID CONTARINO; BRUCE MALOTT; MEYNERS + COMPANY; MARC CORRERA; ANTHONY CORRERA; SANDIA ASSET MANAGEMENT; ALFRED JACKSON; DAVIS HAMILTON AND JACKSON; GUY RIORDAN; JUNIPER CAPITAL; EILEEN KOTECKI; DAN HEVESI; HENRY "HANK" MORRIS; JULIO RAMIREZ; PAUL CROSS; CROSSCORE MANAGEMENT; SDN INVESTORS; PSILOS GROUP; ALBERT WAXMAN; JEFFREY KRAUSS; STEPHEN KRUPA; DAVID EICHLER; DARLENE COLLINS; WETHERLY CAPITAL GROUP; DAN WEINSTEIN; VICKY SCHIFF; QUADRANGLE GROUP; ALDUS EQUITY; SAUL MEYER; MARCELLUS TAYLOR; MATTHEW O'REILLY; RICHARD ELLMAN; DEUTSCHE BANK; DIAMOND EDGE CAPITAL; MARVIN ROSEN; CARLYLE MEZZANINE PARTNERS; CARLYLE GROUP; DB INVESTMENT MANAGERS; TOPIARY TRUST; PARK HILL GROUP; DAN PRENDERGAST; CATTERTON PARTNERS; BLACKSTONE GROUP; GOLD BRIDGE CAPITAL; DARIUS ANDERSON; KIRK ANDERSON; ARES MANAGEMENT; INROADS

GROUP; CAMDEN PARTNERS; HFV; BARRETT WISSMAN; TAG; AJAX INVESTMENTS; CLAYTON DUBILIER AND RICE; INTERMEDIA; LEO HINDERY; WILLIAM R. HOWELL; CABRERA CAPITAL; MARTIN CABRERA; CRESTLINE INVESTORS; JOHN DOE #1; AND JOHN DOE #3 THROUGH #50.,

Defendants/Respondents and Conditional Cross-Petitioner (Bruce Malott).

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF DEFENDANT/RESPONDENT/ CONDITIONAL CROSS-PETITIONER BRUCE MALOTT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

New Mexico Constitution, Statutes, and Rules

Federal Cases

Other Authority

GROUNDS ON WHICH THIS COURT'S APPELLATE JURISDICTION IS INVOKED

A. Dates of Decision and of Conditional Cross-Respondents' Petition

The Court of Appeals' Decision was entered on December 26, 2012. The Petition for Writ of Certiorari of Plaintiffs/Petitioners/Conditional Cross-Respondents Frank C. and Suzanne Foy (hereinafter "Conditional Cross-Respondents" and "the Foys") was filed on January 25, 2013. This Conditional Cross-Petition followed within fifteen (15) days of service of the Petition.

B. Questions Presented for Review by this Conditional Cross-Petition

Whether the district court lacked subject matter jurisdiction over this second-filed *qui tam* action, which alleges precisely the same scheme as the Foys' first-filed *qui tam* case in *State ex rel. Foy v. Vanderbilt Capital Advisors, LLC,* D-101-CV-2008-1895 (Santa Fe County District Court) (hereinafter "the Foys' *Vanderbilt* Case"). *See* NMSA 1978, Section 44-9-5(C) (2007) ("On the same day as the complaint is filed, the qui tam plaintiff shall serve the attorney general with a copy of the complaint and written disclosure of substantially all material evidence and information the qui tam plaintiff possesses"), *and* Section 44-9-9(B) (2007) ("No court shall have jurisdiction over [a *qui tam* claim] against an elected or appointed state official . . . if the action is based on evidence or information known . . . to the attorney general when the action was filed").

C. Facts Material to Questions Presented

On July 14, 2008, the Foys filed their first *qui tam* action against Bruce Malott and others – the Foys' *Vanderbilt* Case – under the Fraud Against Taxpayers Act, NMSA 1978, Sections 44-9-1 to -14 (2007) (hereinafter "FATA"). [RP 000779; Defendant Bruce Malott's Objection to Claim-Splitting and Notice of Nonacquiescence, p. 2, ¶ 2.] *Vanderbilt* was unsealed on January 14, 2009, and it remains pending in the First Judicial District Court, Santa Fe County. *Id.* The Foys' *Vanderbilt* Case is assigned to the Honorable Stephen D. Pfeffer.

The Foys then initiated this *Austin Capital* Case – their second-filed *qui tam* action against Malott and others – on April 17, 2009; *i.e.*, approximately nine (9) months after the Foys commenced their first-filed *Vanderbilt* action and approximately three (3) months after *Vanderbilt* was unsealed. [RP 000001.] The Foys filed *Austin Capital* in Santa Fe as well, and their second-filed *qui tam* case at one point likewise was assigned to Judge Pfeffer. [RP 001566.] But this time the Foys (by Mrs. Foy) chose to excuse Judge Pfeffer, and thus to split their claim before two trial judges sitting in the same District. [RP 00156.]

Both of the Foys' pending *qui tam* lawsuits allege the identical scheme. [RP004774; Plaintiffs' June 30, 2009 Notice of Related Proceeding in *Vanderbilt* (admitting: "In the original complaint in the present Vanderbilt case, Foy alleged that there were other instances of kickbacks and other illegal inducements. . . . The

Austin Capital complaint explains the other instances of 'pay-to-play' at the ERB and the SIC. As the *Austin Capital* complaint demonstrates, the facts in that case are closely intertwined and interrelated with the facts in this case, because the Vanderbilt investment and the Austin Capital investment were both part of a larger pay-to-play scheme . . . .")]; [RP000135; Plaintiffs' *Austin Capital* Corrected First Amended Complaint Under the Fraud Against Taxpayers Act (filed June 26, 2009), ¶ 2 (averring: "This complaint expands upon, and sets forth in greater detail, the allegations set forth in the original complaint filed by Frank Foy. On July 14, 2008, Mr. Foy filed . . . *State ex rel. Foy v. Vanderbilt*, No. D-101-CV-2008-1895 (N.M. 1st Jud. Dist. Ct.). The Vanderbilt complaint alleged the Vanderbilt investment was influenced by kickbacks and other illegal inducements. The complaint also alleged that there were other instances in which ERB and SIC investments were based upon kickbacks and other illegal inducements. . . . This complaint explains the other instances of 'pay to play' . . .").]

Therefore, as the New Mexico Attorney General has confirmed, "[t]here is significant overlap between the disclosures made in [the first-filed *Vanderbilt*] case and those made in [this second-filed] Austin Capital Management case." [RP004778; New Mexico Attorney General's Motion for Protective Order, p. 2 n.1.] That is, since this second-filed *Austin Capital* Case alleges the same scheme as the first-filed *Vanderbilt* Case, this case necessarily "is based on evidence or

information known . . . to the attorney general" from the Foys' disclosures nine (9) months earlier in *Vanderbilt*. Indeed, the Foys emphasized this fact in the trial court by relying on their allegations in this *Austin Capital* case to support (among other things) their opposition to defendants' motions to dismiss in *Vanderbilt*. [RP004775- RP004776; Plaintiffs' Notice of Related Proceedings in *Vanderbilt*, contending: "The facts as alleged in the Austin Capital case must be taken into account, and accepted as true, when considering the pending motions to dismiss in the present [*Vanderbilt*] case," and "the Austin Capital complaint is also germane to the pending Motion to Compel Against All Defendants" in *Vanderbilt*).]

Since the alleged scheme in both of the Foys' *qui tam* actions is identical, the legal issues likewise necessarily are identical. Accordingly, the legal issue decided by the Court of Appeals below is identical to the issue on which the Foys and their counsel first unsuccessfully sought interlocutory review in *Vanderbilt*. Court of Appeals No. 30,700, Order denying application for interlocutory review (October 21, 2010) (Castillo and Kennedy, JJ.). *See* the Foys' Petition for Writ of Certiorari at p. 3. ("In *Vanderbilt*, Judge Steven [sic] Pfeffer, acting *sua sponte*, raised the issue of double jeopardy and ex post facto. Without holding a hearing, Judge Pfeffer ruled that FATA was subject to the ex post facto clause, because it was 'punitive'. . . . In *Austin*, Judge John Pope adopted Judge Pfeffer's Opinion by reference . . . .")

D. Basis for Granting this Conditional Cross-Petition

The Court of Appeals' determination to address the Constitutionality of FATA's retroactivity provision before noticing the District Court's lack of subject matter jurisdiction conflicts with *Wilson v. Denver*, 1998-NMSC-016, ¶¶ 8-11, 125 N.M. 308, 312-13, 961 P.2d 153, 157-158 (notwithstanding the limited scope of an interlocutory review, "[p]rior to addressing the substantive issue certified for interlocutory appeal" appellate courts must determine "whether the district court had subject matter jurisdiction"). *See* Exhibit 1 to the Foys' Petition for Writ of Certiorari; opinion below at pp. 3-4, ¶¶ 4-5 ("we decline to address the issue of subject matter jurisdiction at this time").

That determination likewise conflicts with *City of Las Cruces v. El Paso Electric Company*, 1998-NMSC-6, ¶ 21, 124 N.M. 640, 646, 954 P.2d 72, 78 ("it is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so") (internal quotation marks and citation omitted).

Finally, granting this Conditional Cross-Petition and vacating the prior proceedings for want of subject matter jurisdiction likewise will remedy the Foys' expressed concerns about the purported ramifications of the opinion below. *See, e.g.,* Petition, p. 14 (claiming that "[i]f the Court of Appeals decision remains in place," (a) our State supposedly "never" could qualify for increased "federal

funding to combat medicaid fraud," and (b) "many other statutes besides FATA" purportedly would be "invalidate[d]").

E. Argument

I. *FATA Explicitly Withdraws Subject Matter Jurisdiction Under The Circumstances Alleged Here*

FATA explicitly withdraws subject matter jurisdiction over this case; *i.e.*, the Foys' second-filed *qui tam* action alleging precisely the same scheme as their first-filed *qui tam* lawsuit in *Vanderbilt*.

As a general matter, while the Foys may choose to increase their chances of hitting the lottery by buying multiple tickets, New Mexico law prohibits them from pursuing that same strategy in our Courts. *See, e.g., GCM, Inc. v. Kentucky Central Life Insurance Company,* 1997-NMSC-052, ¶ 32, 124 N.M. 186, 196, 947 P.2d 143, 153 (discussing the "'public policy designed to avoid a multiplicity of suits'"). *Accord*, the Foys' Response in the Court below to AG's Motion for Partial Remand, at 3 (filed October 5, 2011) (imploring the Court of Appeals to enforce "the basic policy embedded in the Rules of Civil Procedure . . . prevent[ing] piecemeal litigation" by prohibiting "an attempt to fractionate one lawsuit into several lawsuits, all arising from the same nucleus of operative fact").

More specifically, with regard to these private *qui tam* lawsuits, FATA abrogates the judiciary's power to adjudicate any subsequently-filed cases against State officials. The Act does so by (a) requiring full disclosure to the Attorney

General at the time of the first filing, and (b) withdrawing subject matter jurisdiction over any subsequent filings. *See supra,* p. 1 (heading B).

While the want of subject matter jurisdiction is not waivable and thus can be raised for the first time at any stage of the proceedings, Appellee Bruce Malott's Answer Brief (pp. 1-19) did fully present this issue to the Court of Appeals below.

The Foys' judicial admissions establish that both of their lawsuits allege the identical scheme. *See supra,* pp. 2-4 (heading C).

The relevant statutory subsection in pertinent part provides that "[n]o court shall have jurisdiction over" a *qui tam* action "against an elected or appointed state official . . . if the action is based on evidence or information known . . . to the attorney general when the action was filed." NMSA 1978, § 44-9-9(B). The phrase "[n]o court shall have jurisdiction over an action" is unambiguous; the plain text "undoubtedly" constitutes "a clear and explicit *withdrawal* of jurisdiction" in the specified category of disputes. *Rockwell International Corp. v. United States,* 549 U.S. 457, 467-68 (2007) (construing the identical jurisdictional phrase in the federal False Claims Act) (emphasis in original). As the *Rockwell* Court held, "[t]hat is surely the most natural way to achieve the desired result of eliminating jurisdiction over a category of False Claims Act actions . . . ." *Id.* at 469.

And while the Foys contended below that a second *qui tam* action alleging the identical scheme supposedly is barred *only if each and every alleged fact*

previously was known to the Attorney General, that language appears nowhere in the Act and would render the Legislature's jurisdictional limitation meaningless. *But see* NMSA 1978, Section 12-2A-18(A)(1) and (2) (1997) ("A statute . . . is construed, if possible, to... give effect to its objective and purpose" as well as "its entire text"). A profit-motivated private *qui tam* plaintiff always will be able to assert some additional alleged fact plaintiff claims was not known at the time of the initial disclosure, if that plaintiff perceives a strategic advantage to pursuing duplicative lawsuits against State officials. Indeed, new alleged facts will be developed in any case that proceeds to discovery, but that plainly cannot provide a basis for pursuing multiple *qui tam* actions against State officials in utter disregard of the Legislature's explicit withdrawal of subject matter jurisdiction.

Accordingly, as the United States Court of Appeals for the Tenth Circuit held in construing the analogous federal Act, the statutory language requires a "restrictive interpretation of the threshold 'based upon' test." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051-52 (10th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005) (regarding the jurisdictional limitations in actions "based upon the public disclosure of allegations or transactions" (p. 1051) (internal quotation marks and citation omitted)). As the Tenth Circuit explained:

> "Based upon" means "supported by" and the threshold analysis is "intended to be a quick trigger . . . ." Even *qui tam* actions only partially based upon publicly disclosed allegations or transactions may be barred. . . . The test is whether "substantial

> identity" exists between the publicly disclosed allegations or transactions and the *qui tam* complaint.

Id. Therefore, FATA withdraws jurisdiction where the second-filed *qui tam* case is based even partially on allegations substantially identical to "evidence or information known to . . . the attorney general when the action was filed."

Moreover, the Foys implicitly adopted the Tenth Circuit's interpretation in the *qui tam* plaintiffs' successful opposition in the trial court to the National Education Association's motion to intervene. *See* Appellee Bruce Malott's Answer Brief in the Court of Appeals below, pp. 14-16. Indeed, the Foys adopted the principal Defendant's argument on this point, differing only from Austin Capital's reliance on the Legislature's explicit use of the word "jurisdiction," and joined in the following arguments by that Defendant:

> Under the Fraud Against Taxpayers Act, similar to the False Claims Act, you are to look at the original complaint and the second filed complaint and see if they are related based on the facts underlying the pending action. This is something that Judge Pfeffer was able to do. He had the Foy complaint as an attachment to our filings in front of him when he was looking at the NEA case and the Foy case. The claims only have to be related; they do not have to be identical. This requires nothing more.

May 13, 2011 Transcript of Proceedings, p. 40, l. 22 through p. 41, l. 6.

The Foys were correct then, and they cannot manufacture subject matter jurisdiction now by taking a contrary position completely unsupported by FATA's explicit terms.

II. *Absent Subject Matter Jurisdiction, Our Courts Lack The Authority To Take Any Action Other Than To Dismiss*

More than eight decades ago, this Court announced that subject matter jurisdiction "is a fundamental consideration at all stages of any proceeding, and will be noticed by the court upon its own discovery or at the suggestion of any party." *Davidson v. Enfield*, 35 N.M. 580, 583, 3 P.2d 979, 980 (1931). Accordingly, district courts are required to address the lack of subject matter jurisdiction first, because absent jurisdiction over the subject matter trial courts lack the power to take any action other than to dismiss. Rule 1-012(H)(3) NMRA ("[w]henever it appears by suggestions of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). *See* 2-12 *Moore's Federal Practice* § 12.30[1] (civil) ("The district court must determine questions of subject matter jurisdiction first, before determining the merits of the case") (section cited with approval in *Protection and Advocacy System v. Albuquerque*, 2008-NMCA-149, ¶ 17, 145 N.M. 156, 164, 195 P.3d 1, 9).

Subject matter jurisdiction likewise is the first consideration on appeal, and our appellate courts will raise the issue *sua sponte* when the parties fail to do so. *Wilson v. Denver*, 1998-NMSC-016, ¶¶ 8-11, 125 N.M. 308, 312-13 (noticing want of jurisdiction *sua sponte*). This principle is no less true here, notwithstanding the limited scope of interlocutory review. "Prior to addressing the substantive issue certified for interlocutory appeal" appellate courts must determine "whether the

district court had subject matter jurisdiction." *Wilson v. Denver*, 1998-NMSC-016, ¶¶ 8-11, 125 N.M. 308, 312-13, 961 P.2d 153, 157-158.

Accordingly, the Court of Appeals should have remanded with instructions that the district court dismiss for lack of subject matter jurisdiction. *Wilson v. Denver*, 1998-NMSC-016, ¶¶ 8-11, 125 N.M. 308, 312-13 (remanding one of two election challenges on interlocutory appeal *sua sponte*, with instructions to dismiss for want of subject matter jurisdiction). *Accord, Stibitz v. General Public Utilities Corp.*, 746 F.2d 993 (3d Cir. 1984) (Seitz, J.) (dismissing Three Mile Island nuclear accident claims for want of subject matter jurisdiction following years of extensive litigation in the trial court, despite both the unanimous plea of all parties that the Third Circuit resolve the appeal on its merits, and the Court's expression of "regret" over "the waste of time and resources which result from dismissals of this sort" (*passim* and p. 997 n.5)). In the alternative, the Court should have dismissed the interlocutory appeal as improvidently granted, with instructions that the district court vacate all of its rulings and determine whether it had subject matter jurisdiction before proceeding to decide any substantive issue in the case.

III. *Contrary to Cross-Respondents' Argument Below, The Legislature Has Authority To Withdraw Jurisdiction Over A Category Of Claims The Legislature Itself Created*

In an attempt to evade FATA's explicit statutory jurisdictional limitations, the Foys contended below that the New Mexico Legislature is constitutionally

prohibited from crafting jurisdictional limits on causes of action that the Legislature itself creates. *E.g.,* September 17, 2010 Transcript of Proceedings, p. 95, l. 5 through p. 99, l.7. That is, Appellants challenged the constitutionality of the very *qui tam* statute they necessarily rely upon for their claims and in their Petition for Writ of Certiorari.

The Foys advanced this counterintuitive proposition based on the following excerpt from Article VI, § 13, of the New Mexico Constitution: "The district court shall have original jurisdiction in all matters and causes not excepted in this constitution . . . ." If it were true that the New Mexico Legislature were powerless to limit subject matter jurisdiction over actions the Legislature itself creates, however, a whole host of well-accepted New Mexico statutes repeatedly enforced by this Court likewise would be unconstitutional (including administrative exhaustion requirements, jurisdictional amount limits, notice prerequisites, etc.) *See, e.g., U.S. Xpress, Inc. v. State*, 2006-NMSC-017, 139 N.M. 589, 136 P.3d 999 (enforcing subject matter jurisdiction limitation based on administrative exhaustion requirement).

As this Court has held, however, Article VI, § 13, has no application to legislatively created causes of action. *Sanchez v. Attorney General*, 93 N.M. 210, 213, 598 P.2d 1170, 1173 (Ct. App. 1979). Rather, this constitutional provision applies solely to "matters known 'to the common law and equity practice of

England prior to 1776 . . . .'" *Id.* at 214 (citation omitted). Nevertheless, undaunted by this Court's binding authority, the Foys thus far have persisted in their constitutional challenge to FATA's subject matter jurisdiction limitations.

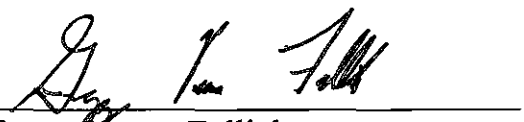
If the Foys were correct (and they unequivocally are not), the Legislature would be forced to choose between either (a) creating a new cause of action without any jurisdictional limits whatsoever, or (b) declining to create the new cause of action at all. Plainly, even absent this Court's *Sanchez* decision foreclosing the Foys' position, there would be no constitutional justification for imposing this Hobson's choice upon the legislative branch of State government. *See, e.g., Gamble v. Velarde*, 36 N.M. 262, 13 P.2d 559, 562 (1932) (announcing the now clearly settled principle that Courts should not "hamper legislation without promoting the constitutional purpose"). At bottom, the Foys' attempt to pick-and-choose which provisions of FATA shall apply is a thinly-veiled effort to enrich themselves in a manner explicitly precluded by the very statute on which they necessarily rely for their purported claims.

F. Prayer for Relief

Conditional Cross-Petitioner Bruce Malott respectfully requests that this Court vacate the decision below and remand with direction that the District Court vacate all of its rulings and dismiss for want of subject matter jurisdiction.

In the alternative, Conditional Cross-Petitioner respectfully requests that this Court vacate the decision below, and remand with direction that the District Court vacate all of its rulings and determine whether it has subject matter jurisdiction before proceeding further.

Respectfully submitted by:



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Statement of Compliance

In accordance with Rule 12-502(D) NMRA, the body of the foregoing conditional cross-petition contains 3,141 words, according to the word count provided by Microsoft Word Mac 2011, Version 14.3.0. The font is Times New Roman (14 point).

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served upon the following counsel by electronic mail on the 8th day of February, 2013:

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