

BUY™

SELL™

SHOP™



Downloaded From  
[www.TextBookDiscrimination.com](http://www.TextBookDiscrimination.com)



**SELL YOUR OWN SAMPLES**

(help others get the justice that they deserve)



**BUY™**

**SELL™**

**SHOP™**

[www.TextBookDiscrimination.com](http://www.TextBookDiscrimination.com)

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.

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

FILED  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

03 APR 28 PM 3:08

PATRICIA LITTELL,

Plaintiff,

vs.

No.

CIV - 03 - 0493

WDS RHS

ALLSTATE INSURANCE COMPANY,  
and TODD AAKHUS,

Defendants.

**NOTICE OF REMOVAL**

Defendant Allstate Insurance Company ("Allstate"), hereby gives notice of the removal to this Court pursuant to 28 U.S.C. § 1441, of the above-captioned action, formerly pending in the District Court for the First Judicial District, County of Santa Fe, State of New Mexico, as No. D-0101-CV-2003-00539. In support thereof, Allstate states as follows:

1. On April 7, 2003, Plaintiff Patricia Littell filed a civil complaint against Allstate and Todd Aakhus in the First Judicial District Court for the State of New Mexico entitled *Patricia Littell v. Allstate Insurance Company and Todd Aakhus*, no. D-0101-CV-2003-00539, having previously filed a Notice of Appeal from New Mexico Department of Labor, Human Rights Division Determination of Probable Cause. True and correct copies of the documents served by Plaintiff in this matter are attached hereto as Group Exhibit A.

2. The complaint alleges that Allstate and Todd Aakhus discriminated against Plaintiff because of her sex, in violation of the New Mexico Human Rights Act, that after she complained,

Allstate and Todd Aakhus "engaged in threats, reprisals, and discrimination against Plaintiff because she had opposed and continued to oppose discriminatory practices." Complaint, ¶ 13. Plaintiff also alleges causes of action for intentional infliction of emotional distress (Count II), prima facie tort (Count III), retaliatory discharge (Count IV), and punitive damages (Count V) against both Allstate and Todd Aakhus. The Complaint seeks damages, punitive damages, pre-judgment interest, post-judgment interest, costs, and attorneys' fees, "and any other relief the Court deems just and proper."

3. Plaintiff served Allstate with the Complaint by first class mail on April 7, 2003. As of that date, Plaintiff had not served Todd Aakhus with the Appeal from the Human Rights Division Determination.

4. Todd Aakhus died on April 21, 2003.

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441. There is complete diversity of citizenship as to all properly-joined parties, and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

6. Defendant has, pursuant to 28 U.S.C. ¶ 1446(a), attached hereto, as Group Exhibit A, all the state court process, pleadings and orders served upon it. This Notice of Removal is filed within thirty days after receipt by Allstate of a copy of the Complaint, in compliance with 28 U.S.C. § 1446(b).

**Complete Diversity of Citizenship Exists  
Between All Proper and Non-Fraudulently Joined Parties**

7. Plaintiff, Patricia Littell, is a citizen of the State of New Mexico and a resident of Bernalillo County, New Mexico. Complaint, ¶ 1.

8. Defendant, Allstate Insurance Company, is alleged to be a foreign corporation and is, in fact, an Illinois corporation, with its principal place of business in Illinois, and is a citizen of the State of Illinois for diversity purposes pursuant to 28 U.S.C. § 1332(c)(1). Complaint, ¶ 2.

9. Prior to his death, Defendant Todd Aakhus was a citizen of the State of New Mexico and a resident of Bernalillo County, New Mexico. Complaint, ¶ 4. However, Mr. Aakhus' citizenship is irrelevant because he is deceased, has been fraudulently misjoined as a defendant in this case and service was never effectuated while he was alive and now cannot be effectuated.

10. Specifically, Plaintiff's Complaint alleges only intentional torts against defendant Todd Aakhus, as well as a claim for intentional discrimination and retaliation under the New Mexico Human Rights Act. A claim against a defendant who dies during the pendency of an action against him is governed by the New Mexico survival statute, §§ 37-2-1 NMSA 1978 *et seq.*, in the same manner as claims brought by a later-deceased plaintiff. In *Medina v. Pacheco*, No. 95-1004, Mem. Op. (N.M. June 6, 1996), *judg. aff'd*, 161 F.3d 18 (10<sup>th</sup> Cir. 1998), this Court analyzed the survivability of claims under the federal civil rights statute, and found that they did not survive the death of the plaintiff. The Court explained its reasoning:

At common law, a cause of action based in tort generally did not survive the death of a plaintiff, unless property or contract rights were involved. ...

In 1976, the New Mexico Court of Appeals adopted a new common law allowing tort actions based upon negligence to survive the death of the plaintiff. *See Rodgers v. Ferguson*, 89 N.M. 688, 694 (Ct. App. 1976). However, the Court explicitly refused to rule on the survival of other actions under the common law. *Id.* ...

The New Mexico Court of Appeals has held that "absent specific justification, the [non-survival] rule should not apply to torts which did not exist when the rule developed." *Rodgers*, 89 N.M. at 691. A

cause of action for an intentional tort is one of the oldest existing actions at common law. It was well known and often used during the period in which the non-survival rule evolved. Consequently, since intentional torts existed at the time the non-survival rule developed, this Court finds that non-survival rule applies to intentional torts. Therefore, all § 1983 claims on behalf of Joe Cisneros shall be dismissed.

*Medina v. Pacheco*, attached hereto as Exhibit B. *See also Allred v. Solaray, Inc.*, 971 F.Supp. 1394, 1398 (D. Utah 1997) (ADA claim not one for "personal injury" so does not survive the plaintiff's death). In the present case, Plaintiff alleges against Todd Aakhus only intentional state law torts and a claim of intentional discrimination and retaliation under the New Mexico Human Rights Act based on the same conduct. Because those claims do not survive his death, she cannot bring such claims against his estate and his joinder in this case cannot destroy this Court's diversity jurisdiction. *See Miami Pipe Line Co. v. Panhandle Eastern Pipe Line Co.*, 384 F.2d 21, 27 (10<sup>th</sup> Cir. 1967) (because it was clear that plaintiff could not recover a judgment against a non-diverse defendant, joinder of that defendant was fraudulent and did not defeat removal jurisdiction); *Montanez v. Solstar Corp.*, 46 F. Supp.2d 101, 103 (D.P.R. 1999) (denying remand where plaintiffs established no cause of action against resident defendant who was, therefore, fraudulently joined); *Coughlin v. Nationwide Mutual Ins. Co.*, 776 F. Supp. 626, 628 (D. Mass. 1991) ("Fraudulent joinder exists when the complaint in effect at the time of removal states no claim against the non-diverse defendant").

10. Furthermore, because Todd Aakhus was not served with the Complaint before he died, service cannot now be effectuated upon him.

11. Thus, there is complete diversity of citizenship between all properly-joined parties hereto.

**The Amount in Controversy Requirement is Satisfied**

12. To confer subject matter jurisdiction on this Court based on diversity of citizenship, the amount in controversy must exceed the sum or value of \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a), as amended. Where a complaint does not contain dispositive allegations of the amount in controversy, the jurisdictional amount is determined by the allegations in the underlying complaint. *See, e.g., Laughlin v. K-Mart Corp.*, 50 F.3d 871, 873 (10<sup>th</sup> Cir. 1995). Calculations of the amount in controversy include both compensatory and punitive damages. *See, e.g., Bell v. Preferred Life Assur. Soc. of Montgomery, Alabama*, 320 U.S. 238, 240 (1943); *Watson v. Blankenship*, 20 F.3d 383, 386 (10<sup>th</sup> Cir. 1994).

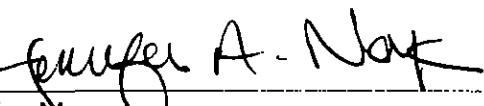
13. As noted above, Plaintiff seeks damages, punitive damages, pre-judgment interest, post-judgment interest, costs, and attorneys' fees, "and any other relief the Court deems just and proper." Furthermore, prior to filing the present Complaint, Plaintiff offered to settle her claims for \$150,000. *See* Exhibit C hereto. Offers of settlement are "relevant evidence of the amount in controversy[.]" *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9<sup>th</sup> Cir. 2002). *See also Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 428-30 (7<sup>th</sup> Cir. 1997) (plaintiff's settlement offer properly consulted in determining plaintiff's assessment of the value of her case). Therefore, it is clear that more than \$75,000 is at issue in this case.

14. Because the amount in controversy requirement is plainly met here, and, as shown above, there is complete diversity of citizenship between the parties, removal of this case to this Court is appropriate.

WHEREFORE, because there is complete diversity of citizenship between the parties here, and the amount in controversy, exclusive of interest and costs, is in excess of \$75,000,

defendant, Allstate Insurance Company, respectfully requests this Honorable Court to assume full jurisdiction over this action as provided by law.

MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.

By: 

Lisa Mann

Jennifer A. Noya

Attorneys for Defendant Allstate Ins. Co.

Post Office Box 2168

Bank of America Centre, Suite 900

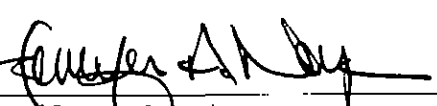
500 Fourth Street, N.W.

Albuquerque, New Mexico 87103-2168

Telephone: (505) 848-1800

I HEREBY CERTIFY that on this 28<sup>th</sup> day of April 2003, I caused a copy of the foregoing Notice of Removal to be delivered via first class mail to the District Court Clerk, First Judicial District, State of New Mexico and to counsel for Plaintiff, Daniel J. O'Friel, Post Office Box 2084, Santa Fe, New Mexico 87504-2084.

MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.

By: 

Jennifer A. Noya

K:\dov\client\11355\279\W0294824.DOC

FIRST JUDICIAL DISTRICT COURT  
COUNTY OF SANTA FE  
STATE OF NEW MEXICO  
Case No. D-0101-CV-2003- 00539

ENDORSED  
First Judicial District Court

MAR 19 2003

Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2000  
Santa Fe, NM 87504-2000

PATRICIA LITTELL,

Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY  
and TODD AAKHUS,

Defendants.

**NOTICE OF APPEAL**

Patricia Littell hereby files her Notice of Appeal from the Human Rights Division Order of March 11, 2003, requesting a trial de novo in the District Court in accordance with N.M.S.A. 1978, § 28-1-13 (2000). Patricia Littell files her Notice of Appeal.

A grievance was filed with the Human Rights Division under N.M.S.A. 1978, § 28-1-10 (2000). A Notice of Waiver of Hearing was filed on March 11, 2003. Patricia Littell now files a Notice of Appeal to obtain a trial de novo from the District Court.

Submitted By:

LAW OFFICES OF DANIEL J. O'FRIEL, LTD.  
Attorneys for Plaintiff

By P. Levy

Pierre Levy, Esquire  
P.O. Box 2084  
Santa Fe, New Mexico 87504-2084  
(505) 982-5929

EXHIBIT

A

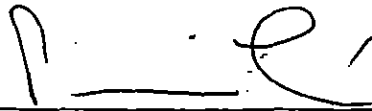
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed via certified mail, return receipt requested, postage prepaid, to the following person(s) on this 19th day of March, 2003:

Lisa Mann, Esq.  
Modrall, Sperling, Roehl,  
Harris & Sisk, P.A.  
P.O. Box 2168  
Albuquerque, NM 87103-2168

Todd Aakhus, Esq.  
4820 Yucatan Dr. NE  
Albuquerque, N.M. 87111

Ms. Francie Cordova, Director  
Human Rights Division  
Department of Labor, State of New Mexico  
1596 Pacheco Street  
Santa Fe, New Mexico 87505-3979

  
\_\_\_\_\_  
Pierre Levy, Esquire

DEPARTMENT OF LABOR  
HUMAN RIGHTS DIVISION  
FOR THE STATE OF NEW MEXICO

PATRICIA LITTELL

Complainant,

v.

HRD No. 02-08-14-0360

ALLSTATE INSURANCE CO.,/TODD AAKHUS

Respondent.

NOTICE OF WAIVER OF HEARING

THIS MATTER having come before the New Mexico Department of Labor Human Rights Division on Complainant's request for waiver of right of hearing pursuant to N.M. Stat. Ann. §28-1-10(J) (Supp. 1995), the Director hereby approves said request and waives the hearing in the above-captioned matter before the New Mexico Human Rights Commission.

Dated: March 11, 2003.

NEW MEXICO DEPARTMENT OF LABOR  
HUMAN RIGHTS DIVISION

  
Francie Cordova  
Director

FIRST JUDICIAL DISTRICT COURT  
COUNTY OF SANTA FE  
STATE OF NEW MEXICO  
Case No. D-0101-CV-2003-00539

APR 4 2003

Santa Fe, N.M. 87501  
Law Offices of Daniel J. O'Friel, Ltd.  
P.O. Box 1000  
Santa Fe, N.M. 87501

PATRICIA LITTELL,

Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY  
and TODD AAKHUS,

Defendants.

**COMPLAINT FOR VIOLATIONS OF THE NEW MEXICO HUMAN RIGHTS ACT,**  
**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS,**  
**PRIMA FACIE TORT, RETALIATORY DISCHARGE,**  
**PUNITIVE DAMAGES, AND ATTORNEY'S FEES**

PLAINTIFF PATRICIA LITTELL, by and through her counsel of record, the Law Offices of Daniel J. O'Friel, Ltd., Pierre Levy, Esquire, brings her Complaint for Violations of the New Mexico Human Rights Act, N.M.S.A. 1978, § 28-1-1 (2000), Intentional Infliction of Emotional Distress, Prima Facie Tort, Retaliatory Discharge, Punitive Damages, and attorney's fees, and comes forth and states:

**GENERAL ALLEGATIONS COMMON TO ALL COUNTS**

1. Plaintiff PATRICIA LITTELL at all times material to the allegations of the Complaint was and is a resident of the County of Bernalillo, State of New Mexico, and worked for Defendant ALLSTATE INSURANCE COMPANY.

ME  
JAN

2. Defendant ALLSTATE INSURANCE COMPANY at all times material to the allegations of the Complaint was and is a corporation foreign to the State of New Mexico, but licensed to do business in the state.

3. Defendant ALLSTATE INSURANCE COMPANY at all times material to the allegations of the Complaint did and does maintain offices in Albuquerque, County of Bernalillo, State of New Mexico, and did and does business in the County of Santa Fe, State of New Mexico.

4. Defendant TODD AAKHUS, at all times material to the allegations of the Complaint was and is a resident of the County of Bernalillo, State of New Mexico.

5. Defendant TODD AAKHUS, at all times material to the allegations of the Complaint was Defendant ALLSTATE INSURANCE COMPANY's highest ranking employee in Defendant ALLSTATE INSURANCE COMPANY's Albuquerque litigation office.

6. At all times material to the allegations of the Complaint, Defendant TODD AAKHUS was the attorney in charge of Defendant ALLSTATE INSURANCE COMPANY's Albuquerque, New Mexico litigation office.

7. As Defendant ALLSTATE INSURANCE COMPANY's employee, Defendant TODD AAKHUS at all times material to the allegations of the Complaint did business in the County of Santa Fe, State of New Mexico.

8. At all times material to the allegations of the Complaint Plaintiff PATRICIA LITTELL was an employee of Defendant ALLSTATE INSURANCE COMPANY in the Albuquerque, New Mexico office.

9. At all times material to the allegations of the Complaint, Defendant TODD

AAKHUS was Plaintiff's, PATRICIA LITTELL, supervisor in the Albuquerque, New Mexico litigation office.

10. Shortly after Defendant TODD AAKHUS became Defendant ALLSTATE INSURANCE COMPANY's employee, in October, 1998, Defendant TODD AAKHUS began a pattern and practice of conduct that included sexual comments, sexual banter, and other conduct that discriminated against Plaintiff, PATRICIA LITTELL, because of her sex.

11. Beginning in October, 1998, Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS discriminated against Plaintiff PATRICIA LITTELL because of her sex, in violation of the New Mexico Human Rights Act, N.M.S.A. 1978, § 28-1-1 (2000).

12. Beginning in October, 1998, Defendant TODD AAKHUS and Defendant ALLSTATE INSURANCE COMPANY, acting through its other employees, some of whom were regional supervisors and some of whom were from the corporate headquarters, aided and abetted unlawful discriminatory practices directed against Plaintiff, PATRICIA LITTELL.

13. When Plaintiff PATRICIA LITTELL complained about Defendants' conduct to Defendant TODD AAKHUS and others within Defendant ALLSTATE INSURANCE COMPANY's corporate organization, Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS engaged in threats, reprisals, and discrimination against Plaintiff because she had opposed and continued to oppose discriminatory practices.

14. As a result of the discrimination and retaliation by Defendants TODD AAKHUS and ALLSTATE INSURANCE COMPANY, Plaintiff PATRICIA LITTELL resigned her employment with Defendant ALLSTATE INSURANCE COMPANY on February 28, 2002.

15. On August 14, 2002, Plaintiff PATRICIA LITTELL filed a charge of

discrimination against Defendants, ALLSTATE INSURANCE COMPANY and TODD AAKHUS, with the New Mexico Department of Labor, Human Rights Division. The charge was cross-filed with the United States Equal Employment Opportunity Commission.

16. On February 17, 2003, the New Mexico Human Rights Division issued a Determination of Probable Cause to Plaintiff, PATRICIA LITTELL.

17. On March 11, 2003, the Human Rights Division issued a Notice of Waiver of Hearing to Plaintiff, PATRICIA LITTELL.

18. On March 19, 2003, Plaintiff PATRICIA LITTELL timely filed a Notice of Appeal to this Court, pursuant to N.M.S.A. 1978, § 28-1-13 (2000), requesting a trial *de novo*.

19. Plaintiff PATRICIA LITTELL has exhausted all her administrative remedies, so that this action is proper in this Court.

20. The Court has jurisdiction over the subject matter and the parties.

### **COUNT I VIOLATIONS OF THE NEW MEXICO HUMAN RIGHTS ACT**

21. Plaintiff PATRICIA LITTELL incorporates the foregoing allegations of the Complaint as if fully set forth below, and for her first cause of action against Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS, for violations of the New Mexico Human Rights Act, N.M.S.A. 1978, § 28-1-1 (2000), states as follows:

22. The aforementioned actions of Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS violated the New Mexico Human Rights Act, N.M.S.A. 1978, § 28-1-1 (2000).

23. As a direct and proximate result of those actions, Plaintiff PATRICIA LITTELL

has suffered damages in an amount to be proven at trial.

**COUNT II**  
**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

24. Plaintiff PATRICIA LITTELL incorporates the foregoing allegations of the Complaint as if fully set forth below, and for her second cause of action against Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS, for intentional infliction of emotional distress, states as follows:

25. Defendant TODD AAKHUS frequently made jokes with inappropriate sexual overtones, frequently and commonly used the "F" word while at work, made occasional references to male body parts, made comments about women employees' being "hormonal," and distributed lewd jokes or filthy information from the Internet throughout Defendant ALLSTATE INSURANCE COMPANY's Albuquerque office, all within the presence of Plaintiff, PATRICIA LITTELL. Defendant TODD AAKHUS made prurient references to the sexual orientation of one of his employees' daughters, said "fuck you" to two women employees as they were leaving the office, openly ogled a paralegal in the office, was physical with and occasionally touching a secretary he had hired, took people's names and changed them to have sexually explicit connotations, and encouraged sexual bantering among Allstate employees, all within the presence of Plaintiff, PATRICIA LITTELL.

26. Throughout this time, Plaintiff PATRICIA LITTELL reported this conduct to Defendant ALLSTATE INSURANCE COMPANY many times. Despite being on actual notice of Defendant TODD AAKHUS' conduct, Defendant ALLSTATE INSURANCE

COMPANY refused to act, and allowed Defendant TODD AAKHUS to continue his behavior.

27. Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS retaliated against Plaintiff by refusing to repair her computer, compelling her to move out of an office that subsequently remained vacant for many months, by refusing to address ergonomic issues that were plaguing Plaintiff PATRICIA LITTELL, by micro-managing Plaintiff's, PATRICIA LITTELL work time to an unreasonable degree, by giving her poor performance appraisals without cause, by including a "requires improvement" notice in her personnel file, by pressuring her to respond to the notice and then refusing to include this response in her file, by reassigning cases in an effort to increase her work load and stress levels, by denying her leave, against Defendant ALLSTATE INSURANCE COMPANY's own policies, when she had a death in her family, and by generally making her work conditions intolerable.

28. Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS acted intentionally or recklessly.

29. The conduct of Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS was extreme and outrageous under the circumstances.

30. As a direct and proximate result of the intentional and reckless extreme and outrageous conduct of Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS Plaintiff PATRICIA LITTELL has experienced severe emotional distress and has had damages in an amount to be proven at the time of trial.

**COUNT III  
PRIMA FACIE TORT**

31. Plaintiff PATRICIA LITTELL incorporates the foregoing allegations of the Complaint as if fully set forth below, and for her third cause of action against Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS, for prima facie tort, states as follows:

32. Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS intended to cause harm to Plaintiff, PATRICIA LITTELL.

33. Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS caused severe emotional harm to Plaintiff, PATRICIA LITTELL.

34. The conduct of Defendants, ALLSTATE INSURANCE COMPANY and TODD AAKHUS, was not justifiable under all the circumstances.

35. As a direct and proximate result of the unjustified conduct of Defendants, ALLSTATE INSURANCE COMPANY and TODD AAKHUS, Plaintiff PATRICIA LITTELL has suffered damages in an amount to be proven at trial.

**COUNT IV  
RETALIATORY DISCHARGE**

36. Plaintiff PATRICIA LITTELL incorporates the foregoing allegations of the Complaint as if fully set forth below, and for her fourth cause of action against Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS, for retaliatory discharge, states as follows:

37. Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS made

working conditions so difficult for Plaintiff PATRICIA LITTELL that a reasonable person in her position would feel compelled to resign.

38. As a result of Defendants' conduct, Plaintiff PATRICIA LITTELL was compelled to resign her employment with Defendant ALLSTATE INSURANCE COMPANY.

39. The actions of Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS in forcing Plaintiff PATRICIA LITTELL to resign by making her work conditions intolerable because she spoke out against illegal employment practices, are in violation of New Mexico law and public policy.

40. As a direct and proximate result of Defendants' actions, Plaintiff PATRICIA LITTELL has suffered damages in an amount to be proven at trial.

#### **COUNT-V PUNITIVE DAMAGES**

41. Plaintiff PATRICIA LITTELL incorporates the foregoing allegations of the Complaint as if fully set forth below, and for her fifth cause of action against Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS, for punitive damages, states as follows:

42. The aforesaid actions of Defendants ALLSTATE INSURANCE COMPANY and TODD AAKHUS, and each of them, were willful, wanton, malicious, reckless and grossly negligent so as to warrant an additional award of punitive damages as punishment and to deter others from committing like offenses.

WHEREFORE, Plaintiff PATRICIA LITTELL has stated her Complaint for Violations

of the New Mexico Human Rights Act, Intentional Infliction of Emotional Distress, Prima Facie Tort, Retaliatory Discharge, Punitive Damages, as aforesaid, and prays for damages in an amount to be proven at the time of trial, pre-judgment interest, post-judgment interest, costs, attorney's fees as allowed by N.M.S.A. 1978, § 28-1-13(D), and any other relief the Court deems just and proper.

Respectfully Submitted By:

LAW OFFICES OF DANIEL J. O'FRIEL, LTD.  
Attorneys for Plaintiff

By 

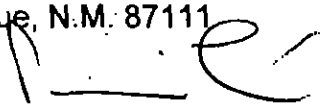
Pierre Levy, Esquire  
P.O. Box 2084  
Santa Fe, New Mexico 87504-2084  
(505) 982-5929

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed via first class mail, postage prepaid, to the following person(s) on this 7th day of April, 2003:

Lisa Mann, Esq.  
Modrall, Sperling, Roehl,  
Harris & Sisk, P.A.  
P.O. Box 2168  
Albuquerque, NM 87103-2168

Todd Aakhus, Esq.  
4820 Yucatan Dr. NE  
Albuquerque, N.M. 87111

  
Pierre Levy, Esquire

FIRST JUDICIAL DISTRICT COURT  
COUNTY OF SANTA FE  
STATE OF NEW MEXICO  
Case No. D-0101-CV-2003-00539

ENDORSED  
First Judicial District Court

APR 9 2003

Ca. Rio Arriba &  
1998 Ed. 1111111111  
Box 2288  
Santa Fe, NM 87504-2288

PATRICIA LITTELL,

Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY  
and TODD AAKHUS,

Defendants.

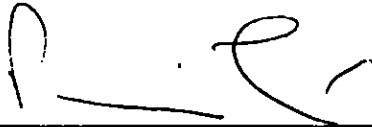
**DEMAND FOR JURY TRIAL**

COMES NOW the Plaintiff, PATRICIA LITTELL, by and through her undersigned attorneys, the Law Offices of Daniel J. O'Friel, Ltd., by Pierre Levy, Esquire, pursuant to Rule 1-038, NMRA 2001, and hereby demands a trial by jury of six (6) persons in this case and herewith deposits the sum of One Hundred Dollars (\$100.00).

Submitted By:

LAW OFFICES OF DANIEL J. O'FRIEL, LTD.  
Attorneys for Plaintiff

By

  
Daniel J. O'Friel, Esquire  
Pierre Levy, Esquire  
Post Office Box 2084  
Santa Fe, New Mexico 87504-2084  
(505) 982-5929

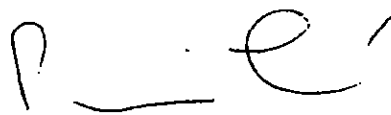
Certificate of Service

I, Pierre Levy, Esquire, of the Law Offices of Daniel J. O'Friel, Ltd., Attorneys for Plaintiff, hereby certify that I caused to be mailed, by first-class mail, postage prepaid, a copy of the foregoing pleading, to the following persons on this 9<sup>th</sup> day of April, 2003:

Lisa Mann, Esquire  
Modrall, Sperling, Roehl,  
Harris & Sisk, P.A.  
P.O. Box 2168  
Albuquerque, NM 87103-2168

Todd Aakhus, Esquire  
4820 Yucatan Dr. N.E.  
Albuquerque, N.M. 87111

Ms. Francie Cordova, Director  
Human Rights Division  
Department of Labor, State of New Mexico  
1596 Pacheco Street  
Santa Fe, New Mexico 87505-3979



---

Pierre Levy, Esquire

**MEDINA v. PACHECO**

**DOCKET-NUM: 95-1004**

**TYPE: CIVIL**

**NAME: MEDINA v. PACHECO**

**JUDGE: John E. Conway**

**DATE-FILED: 1996/06/06**

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

ED MEDINA, LUPE MEDINA,  
individually and on behalf of the  
ESTATE OF JOE CISNEROS,  
and as guardians and next friends  
of FAITH CISNEROS, and ROMAN  
CISNEROS, minors,

Plaintiffs,

vs.

CIV 95-1004 JC/JHG

DANNY PACHECO, individually and  
in his official capacity; FRANK GALLEGOS,  
individually and in his official capacity; THE  
VILLAGE OF QUESTA; LAWRENCE  
GALLEGOS, in his individual and official  
capacities; DENNIS RUIZ, in his individual  
capacity; and JAMES LUCERO, in his  
individual capacity.

Defendants.

**MEMORANDUM OPINION**

THIS MATTER came on for consideration of Defendants' Danny Pacheco, Frank Gallegos, The Village of Questa, and Lawrence Gallegos Motion to Dismiss, filed October 11, 1995. The Court has reviewed the motion, the memoranda submitted by the parties, and the relevant law. The Court finds that the motion is well taken in part and will be granted in part.

**BACKGROUND**

On September 11, 1993, Joe Cisneros, along with his children Faith and Roman, were

**EXHIBIT**

*B*

visiting the home of the children's maternal grandparents, James and Dolores Martinez. During the course of the visit, James Martinez refused to allow Joe Cisneros to take the children back to his place of residence, the home of Ed and Lupe Medina. During this dispute, Dolores Martinez called the Questa police and spoke with Police Chief Danny Pacheco. Thereafter, Chief Pacheco spoke with Joe Cisneros and told Joe that if he took the kids, he would be arrested for kidnaping.

Undeterred, Joe Cisneros proceeded to take his children back to the home of Ed and Lupe Medina in Cerro, New Mexico. Police Chief Pacheco and Officer Frank Gallegos followed. Upon arrival at the Medinas' home, Chief Pacheco and Officer Gallegos ordered that the children be surrendered to them. At this time, Ed Medina inquired whether the officers had either a warrant or a court order requiring the release of the children. The officers responded that they had neither. Nonetheless, the officers threatened to arrest the adults.

At this point, Chief Pacheco and Officer Gallegos called the Taos County Social Services office of the Children, Youth, and Families Department (CYF). After speaking with them, Chief Pacheco asked Ed Medina to talk to CYF. Ed Medina spoke with Dennis Ruiz, the on-call person that day. Dennis Ruiz told Ed Medina that he had papers in front of him saying that the children should be turned over to the police. Based on this conversation, Ed Medina finally acquiesced to surrendering the children to the officers.

Two days later, Ed Medina went to the Taos County Social Services office and spoke with County Manager James Lucero and Dennis Ruiz concerning this situation. James Lucero denied knowing anything about the matter, and Dennis Ruiz denied having any papers or ever saying that he had papers concerning Faith and Roman Cisneros. Later that day, Joe Cisneros and the Medinas retained counsel and sued for the return of the children. The following day, on September 14, 1993, the Eighth Judicial District Court ordered the return of the children. Nearly two years later, Plaintiffs filed suit in this Court alleging violations of their civil and constitutional rights pursuant to 42 U.S.C. § 1983.

## ANALYSIS

### A. Standard for Consideration of a Motion to Dismiss

Generally, motions to dismiss for failure to state a claim are viewed with disfavor and are therefore rarely granted. 5 Wright and Miller, Federal Practice and Procedure § 1357 (1990). In ruling on a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff, and take the allegations asserted in the complaint as true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

The district court should not grant a motion to dismiss for failure to state a claim unless it “appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Therefore, “the issue is not whether a plaintiff will ultimately prevail but whether claimant is entitled to offer evidence to support the claims.” Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

### B. Survival of Joe Cisneros Claims

Ed and Lupe Medina filed this action pursuant to 42 U.S.C. § 1983, individually and on behalf of the estate of Joe Cisneros, alleging violations of their constitutional and civil rights. While the pleadings are not explicit on this point, it is clear that Joe Cisneros died prior to this lawsuit being filed. Defendants argue that the claims on behalf of Joe Cisneros died with him. The survivability of claims in a § 1983 action is determined by state law. Moor v. County of Alameda, 411 U.S. 693, 702 n.14 (1973); Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961); Roberts v. Rowe, 89 F.R.D. 398, 399 (S.D.W.V. 1981).

The New Mexico Survival Statute provides that

In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same. The cause of action for wrongful death and the cause of action for personal injuries, shall survive the death of the party responsible therefore.

NMSA 1978, § 37-2-1 (Repl. Pamp. 1990). The claims on behalf of Joe Cisneros for violation of his constitutional and civil rights are best characterized as intentional torts. Since these claims are

not specifically enumerated in the statute, this Court must look to the common law to determine whether they survive. At common law, a cause of action based in tort generally did not survive the death of a plaintiff, unless property or contract rights were involved. 1 Am.Jur.2d Abatement, Survival and Revival, § 58.

In 1976, the New Mexico Court of Appeals adopted a new common law allowing tort actions based upon negligence claims to survive the death of the plaintiff. See Rodgers v. Ferguson, 89 N.M. 688, 694 (Ct. App. 1976). However, the Court explicitly refused to rule on the survival of other actions under the common law. Id. The Court in Rodgers based their opinion in part because the “historical application of the non-survival rule was to violent and intentional torts,” not negligence. Id. at 691.

The question of whether an intentional tort survives the unrelated death of a plaintiff is one of first impression in New Mexico. A federal court, applying state law, must ascertain and apply that law so that the outcome in federal court is identical to the result reached in state court. See Adams-Arapahoe Sch. Dist. No. 28-J v. GAF Corp., 959 F.2d 868, 870 (10th Cir. 1992) (federal court sitting in diversity). Where “the state’s highest court has not addressed the issue presented, the federal court must determine what decision the state court would make if faced with the same facts and issue.” Armijo v. Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1988).

The New Mexico Court of Appeals has held that “absent specific justification, the [non-survival] rule should not apply to torts which did not exist when the rule developed.” Rodgers, 89 N.M. at 691. A cause of action for an intentional tort is one of the oldest existing actions at common law. It was well known and often used during the period in which the non-survival rule evolved. Consequently, since intentional torts existed at the time the non-survival rule developed, this Court finds that non-survival rule applies to intentional torts. Therefore, all § 1983 claims on behalf of Joe Cisneros shall be dismissed.

### C. Interference with Intimate Familial Relations

#### 1. Causation

The Questa Defendants contend that Plaintiffs' claims for interference with intimate familial associations should be dismissed for a lack of causation. In essence, they argue that since it was ultimately Ed Medina's conversation with Dennis Ruiz that led to the surrender of the children, they did not cause the interference. The Court finds that this argument is without merit.

For a claim of interference with intimate familial relations to be actionable, a "defendant must direct his or her statements or conduct at the intimate relationship with knowledge that the statements or conduct will adversely affect that relationship." Griffin v. Strong, 983 F.2d 1544, 1548 (10th Cir. 1993). The complaint, when considered in the light most favorable to the Plaintiffs, clearly satisfies this requirement. Chief Pacheco and Officer Gallegos repeatedly demanded the surrender of the children, followed Joe Cisneros home, and threatened to arrest him and the Medinas. Further, it was Chief Pacheco that initiated the call to Dennis Ruiz which led to the surrender of the children. To merely consider the final conversation Ed Medina had with Ruiz as the cause of the children's surrender would be to overlook the significant contact Chief Pacheco and Officer Gallegos had with the Plaintiffs. Based on the allegations in the complaint, Defendants had knowledge that their actions would adversely affect the familial relationship. Therefore, Defendants' Motion to Dismiss the interference with intimate familial associations shall be denied.

## 2. Facts Sufficient

Defendants further contend that Plaintiffs have failed to allege a familial relationship sufficient to invoke Fourteenth Amendment protections. Specifically, Defendants maintain there was no parental relationship between the Medinas and the children until after the incident. However, "[m]any courts have recognized liberty interests in familial relationships other than strictly parental ones." Trujillo v. Board of County Commissioners, 768 F.2d 1186, 1188 (10th Cir. 1985) (citations omitted). In this case, the Medinas are the great aunt and uncle of Faith and Roman Cisneros. Moreover, they were all living together as a family unit in the same house at the time of the incident. Therefore, Defendants' Motion to Dismiss for failure to allege sufficient facts shall be denied.

## D. Seizure

The Questa Defendants argue that there was no seizure of the children; therefore, there was no Fourth Amendment violation. Defendants' argument is based on the contention that Plaintiffs voluntarily surrendered the children after their conversation with Dennis Ruiz. The Supreme Court has held that for a § 1983 claim to be actionable pursuant to the Fourth Amendment, there must be a "willful" seizure and it must be unreasonable. Brower v. County of Inyo, 489 U.S. 593 (1989). The Court distinguished between accidental and intentional seizures in finding that only unreasonable intentional detentions violate the Constitution. Id. at 599.

The facts alleged in the complaint support the conclusion that Defendants acted willfully and unreasonably. Chief Pacheco ordered the surrender of the children, followed Joe Cisneros from Questa to Cerro, threatened to arrest the adults, and finally called the CYF office in Taos without independently examining the rightful custody of the children. This negates any hint of voluntariness in the surrender of Faith and Roman. To the contrary, it leads to the determination that their actions were both willful and unreasonable. Therefore, Defendants' Motion to Dismiss Plaintiffs' claim for lack of seizure shall be denied.

#### E. Interference With Access to the Courts

Defendants argue that Plaintiffs have failed to allege sufficient facts to maintain a claim for intentional interference with access to the courts. Plaintiffs, however, respond that their complaint specifically alleges that the police defendants denied them the right to have a judge determine whether the original removal of the children was appropriate.

The vast majority of cases dealing with a person's right of access to the courts involve a prison inmate claiming some type of infringement on his ability to bring an action in court. See e.g., Bounds v. Smith, 430 U.S. 817 (1976). This matter presents an entirely different situation. Nonetheless, Defendants did nothing that prevented Plaintiffs from seeking redress in the courts. The complaint acknowledges that Plaintiffs filed their custody suit two days after the children were taken. There is no evidence that Defendants interfered in any way with either that action or the present one. Finally, there is no support for the claim that the police denied Plaintiffs the right of

a custody hearing before a judge immediately. In actuality, Plaintiffs are alleging an unconstitutional interference with intimate familial relations. Therefore, Defendants' Motion to Dismiss the claim for interference with access to the courts shall be granted.

#### F. Violation of State Law

Plaintiffs' complaint alleges claims for violations of New Mexico state law. The first claim is based upon the state constitution, and the second is based upon assault, battery, and false imprisonment. Defendants argue the complaint fails to state a cause of action for which relief may be granted. In their response brief, Plaintiffs concede that their state constitutional law claims are barred because immunity has not been waived. See Lucero v. Salazar, 117 N.M. 804 (Ct. App. 1994).

Defendants further contend that the assault, battery, and false imprisonment claims are unsupported by the facts alleged in the complaint. The complaint, however, when examined in the light most favorable to the plaintiff, sufficiently alleges offensive touching, apprehension of such touching and unreasonable interference with a person's freedom of movement. Therefore, the Defendants' Motion to Dismiss Plaintiffs' state constitutional claims shall be granted, and their Motion to Dismiss the claims of assault, battery, and false imprisonment shall be denied.

#### G. Immunity for Lawrence Gallegos as Mayor of Questa

Defendants maintain that Lawrence Gallegos, as the Mayor of Questa, is immune from suit for failure to properly hire, train, and supervise Chief Pacheco and Officer Gallegos. They argue that since Lawrence Gallegos was not a law enforcement officer, he is immune from suit under the New Mexico Tort Claims Act. In Montes v. Gallegos, Judge Parker determined that Mayor Gallegos was not a law enforcement officer under the Act, and therefore immune from suit. 812 F. Supp. 1159, 1172 (D.N.M. 1992). This Court can see no reason to depart from that analysis. Therefore, Defendants' Motion to Dismiss the Claims against Lawrence Gallegos shall be granted.

An order in accordance with this opinion shall be entered.

CHIEF UNITED STATES DISTRICT JUDGE

Counsel for Plaintiffs:

Jeffrey J. Buckels  
814 Marquette, NW  
Albuquerque, NM 87102

Robert J. Jacobs  
P.O. Box 879  
Ranchos de Taos, NM 87557-0879

Counsel for Defendants:

Gregory L. Biehler  
6715 Academy Rd., NE  
Albuquerque, NM 87109

Robert D. Castille  
P.O. Box 4160  
Santa Fe, NM 87502-4160

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

ED MEDINA, LUPE MEDINA,  
individually and on behalf of the  
ESTATE OF JOE CISNEROS,  
and as guardians and next friends  
of FAITH CISNEROS, and ROMAN  
CISNEROS, minors,

Plaintiffs,

vs.

CIV 95-1004 JC/JHG

DANNY PACHECO, individually and  
in his official capacity; FRANK GALLEGOS,  
individually and in his official capacity; THE  
VILLAGE OF QUESTA; LAWRENCE  
GALLEGOS, in his individual and official  
capacities; DENNIS RUIZ, in his individual  
capacity; and JAMES LUCERO, in his  
individual capacity,

Defendants.

**ORDER**

THIS MATTER came on for consideration of Defendants' Danny Pacheco, Frank Gallegos, The Village of Questa, and Lawrence Gallegos Motion to Dismiss, filed October 11, 1995. A memorandum opinion was entered this date.

Wherefore,

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss (Doc. # 6) the claims brought on behalf of Joe Cisneros be, and hereby is, **granted**.

IT IS FURTHER ORDERED that the Defendants' Motion to Dismiss (Doc. # 6) Plaintiffs' claims for interference with intimate familial relations be, and hereby is, **denied**.

IT IS FURTHER ORDERED that the Defendants' Motion to Dismiss (Doc. # 6) Plaintiffs' claim for violation of their Fourth Amendment rights be, and hereby is, **denied**.

IT IS FURTHER ORDERED that the Defendants' Motion to Dismiss (Doc. # 6) Plaintiffs' claim for interference with access to the courts be, and hereby is, **granted**.

IT IS FURTHER ORDERED that the Defendants' Motion to Dismiss (Doc. # 6) Plaintiffs' claim based upon violation of the state constitution be, and hereby is, **granted**.

IT IS FURTHER ORDERED that the Defendants' Motion to Dismiss (Doc. # 6) Plaintiffs' claim based upon assault, battery, and false imprisonment be, and hereby is, **denied**.

IT IS FURTHER ORDERED that the Defendants' Motion to Dismiss (Doc. # 6) Plaintiffs' claims against Lawrence Gallegos be, and hereby is, **granted**.

DATED April \_\_\_\_, 2003.

CHIEF UNITED STATES DISTRICT JUDGE

**C**  
NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use F1 CTA10 Rule 36.3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Tenth Circuit.

Ed MEDINA; Lupe Medina, individually and on behalf of the estate of Joe Cisneros, and as guardians and next friends of Faith Cisneros and Roman Cisneros, minors; Joe Cisneros, Est; Faith Cisneros; Roman Cisneros,  
Plaintiffs-Appellants,

v.

Danny PACHECO, individually and in his official capacity; Frank Gallegos, individually and in his official capacity; The Village of Questa, Defendants-Appellees,  
and

Dennis RUIZ, in his individual capacity; James Lucero, in his individual capacity; Lawrence Gallegos, individually and in his official capacity,  
Defendants.

No. 97-2013.  
(D.Ct.No. CIV-95-1004-JC)

Sept. 14, 1998.

Before TACHA, BRORBY, and BRISCOE, Circuit Judges.

#### ORDER AND JUDGMENT [FN\*]

FN\* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

\*\*1 Ed and Lupe Medina appeal several of the district court's rulings concerning their 42 U.S.C. § 1983 claims against a number of state officials. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

On September 11, 1993, Joe Cisneros took his two children to visit the home of their maternal grandparents, James and Delores Martinez. During that visit, Mr. Cisneros got into an argument with the children's mother (who was living in a trailer behind her parents' house). As a result of the argument, Mr. Cisneros decided to leave with his children. After he left, he brought the children back to the home of his great uncle and aunt, Ed and Lupe Medina, where he and the children were living at the time.

The children's maternal grandmother, Mrs. Martinez, did not want Mr. Cisneros to take them from her home, so she called the local police. After speaking to Mr. and Mrs. Martinez, the Chief of Police, defendant Danny Pacheco, and another officer, defendant Frank Gallegos, went to the Medina home to resolve the dispute. Upon arrival, the officers told the Medinas and Mr. Cisneros that they would be taking the children. The Medinas protested, so the officers called an official, defendant Dennis Ruiz, at the Taos County Social Services office of the Children, Youth, and Families Department. Mr. Ruiz spoke with Mr. Medina, and as a result of that phone call, Mr. Medina apparently agreed to turn over the children to the officers. The officers took the children to the home of their maternal grandparents, the Martinezes. Two days later, the Medinas successfully sued for return of the children, and they were reunited three days after the officers removed the children from the Medinas' home.

The Medinas filed a complaint in federal district court, on behalf of themselves, the children, and the estate of Mr. Cisneros (who died in an unrelated accident before complaint was filed). Their complaint asserted numerous claims based on 42 U.S.C. § 1983 and New Mexico state law. The lawsuit named as defendants the two police officers, two Children, Youth, and Families Department officials, the Village of Questa, which employed the police officers, and the Mayor of the Village of Questa. [FN1] Prior to trial, the district court dismissed the claims filed on behalf of Mr. Cisneros' estate, finding they did not survive his death. The court also dismissed all claims against the mayor, the claims against one of the

**Unpublished Disposition**

(Cite as: 161 F.3d 18, 1998 WL 647784 (10th Cir.(N.M.)))

Children, Youth, and Families Department officials, and various state law claims. The parties then proceeded to trial on the remaining claims. The jury returned a verdict in favor of the defendants on all claims. The Medinas appeal several of the district court's decisions leading up to, and during, the trial.

FN1. For various reasons, the only defendants involved in this appeal are Officer Pacheco, Officer Gallegos, and the Village of Questa. The court will refer to these three collectively as "the defendants."

The Medinas raise five issues: FN2 (1) whether the district court gave an improper jury instruction on "interference with intimate familial relationship;" (2) whether the district court erred in refusing to give a proposed jury instruction on consent; (3) whether the district court erred by allowing a defense expert to testify too broadly concerning the Medinas' alleged injuries; (4) whether the district court erred in ruling Mr. Cisneros' claims did not survive his death; and (5) whether the district court erred in excluding evidence concerning possible prior misconduct by two of the defendants. *Inadequate record on appeal*

FN2. In their brief, the Medinas raised a sixth issue: the district court erred in failing to direct a verdict in their favor on the claim of interference with intimate familial relationship. This issue was abandoned during oral argument.

**\*\*2** We must address a preliminary matter before dealing with any of the specific issues on the merits. Defendants argue the Medinas have failed to preserve all but two of the issues they raise because they supplied an incomplete record. FN3 See *King v. Unocal Corp.*, 58 F.3d 586 (10th Cir.1995). In large part, we agree.

FN3. There is no question this court can consider the legal issue whether Mr. Cisneros' claims survive his death. Thus, we will address appellant's fourth issue on the merits.

During oral argument, counsel for the defendants suggested review of all the other issues was precluded for lack of an adequate

record. In the defendants' brief, however, there is no suggestion that this court cannot reach the question of whether the jury instruction on intimate familial relationships misstated the law. We believe an adequate record exists to decide this, appellants' first issue, as well.

"It is the appellant's responsibility to provide us with a proper record on appeal." FN4 *King*, 58 F.3d at 587 (citing *Fed. R.App. P. 10(b)(2)*; *Yarrington v. Davies*, 992 F.2d 1077, 1080 (10th Cir.1993)). Counsel must "see that the record excerpts are sufficient for consideration and determination of the issues on appeal and the court is under no obligation to remedy any failure of counsel to fulfill that responsibility." *Id.* (quoting *Deines v. Fermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir.1992)).

FN4. Counsel for the Medinas claims he submitted a partial transcript in an effort to comply with the court's Rule 10.1, which cautions parties not to order unnecessary transcripts. That rule states, however, "[i]t is the appellant's responsibility to order and provide *all portions* of the transcript necessary to give the court of appeals a complete and accurate record of the proceedings insofar as such proceedings relate to the issues raised on appeal." 10th Cir. R. 10.1.1 (emphasis added). Counsel should not interpret "complete and accurate" to mean only that testimony or evidence that supports appellants' position.

With respect to their second issue--whether the district court erred in refusing to give a proposed jury instruction on consent--the Medinas state, without citing to any relevant portions of the record: "During the course of the trial, defendants relied heavily on the assertion that when the defendant officers wanted to take Faith and Roman Cisneros into custody, ... the Medinas gave the children up voluntarily." Unfortunately, they do not provide a transcript of the defendants' side of the trial. Counsel justifies this by saying it is clear that the issue was contested from opening statements and the testimony of one witness. The question is not only whether the issue was contested. When deciding whether a court improperly instructed a jury, "we consider all the jury heard, and from the standpoint of the jury, decide ... whether

it had [an] understanding of the issues and its duty to determine these issues." King, 58 F.3d at 587 (quoting Considine v. Newspaper Agency Corp., 43 F.3d 1349, 1365 (10th Cir.1994)). Without all the relevant portions of the record, we simply cannot determine whether the court properly denied the challenged instruction. See id. at 587-88 (citing Shamrock Drilling Fluids, Inc. v. Miller, 32 F.3d 455, 460 (10th Cir.1994)). For that reason, we will not address this issue on the merits.

With respect to their third issue--whether the district court erred by allowing a defense expert to testify too broadly--the Medinas argue the expert's testimony went far beyond what was required to make the defendants' case on damages. The defendants argue the expert's testimony was necessary to rebut evidence presented by the Medinas. The Medinas did not provide us a record of any evidence pertaining to damages other than the expert's testimony they now challenge (e.g., the testimony of the Medinas concerning their injuries). Counsel for the Medinas argues nothing more is needed because the point they raise on appeal is that the expert should have been limited to discussing damages. Again, evidentiary decisions rarely are made in a vacuum. There simply is no way for this court to determine whether the district court abused its discretion in allowing the full breadth of the expert's testimony without reviewing all the previously admitted evidence relevant to the Medina's damages claim. Accordingly, we will not address the merits of this issue.

\*\*3 Finally, the defendants challenge the sufficiency of the record with respect to the Medinas' fifth issue--whether the district court erred in excluding evidence concerning possible prior misconduct by two of the defendants. We have sufficient material to resolve this issue. [FN5] Consequently, we will address it on the merits.

[FN5] Although not for the reason offered by counsel, Counsel for the Medinas argues the record is sufficient on this issue because the record contains the opening statements and the pre-trial pleadings. Counsel should know such statements and pleadings are not evidence. The district court based its ruling on the evidence produced at trial. Likewise, our review of that decision must be based on the evidence produced at trial.

*Jury Instruction on Interference with Intimate  
Familial Relations*

With respect to the claim of interference with intimate familial relations, the district court instructed the jury it must find, among other things, "that the conduct of the government constituted an undue burden on the Plaintiffs' right to intimate familial relations." The Medinas argue this instruction was incorrect as a matter of law.

"[W]e review de novo the question of whether the court's instructions, considered as a whole, properly state the applicable law and focus the jury on the relevant inquiry." Thomas v. Denny's, Inc., 111 F.3d 1506, 1509 (10th Cir.1997) (quoting York v. American Tel. & Tel. Co., 95 F.3d 948, 953 (10th Cir.1996), cert. denied, 118 S.Ct. 626 (1997)). "No particular form of words is essential if the instruction as a whole conveys the correct statement of the applicable law." Considine, 43 F.3d at 1365 (alteration in original) (quotation omitted). We reverse for a faulty jury instruction when "we have substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations." Mason v. Oklahoma Turnpike Auth., 115 F.3d 1442, 1454 (10th Cir.1997), but only if the error was prejudicial. Dikeman v. National Educators, Inc., 81 F.3d 949, 955 (10th Cir.1996).

The language used in the instruction comes from this court's decision in Griffin v. Strong, 983 F.2d 1544 (10th Cir.1993). In Griffin, we determined that in order to decide if a plaintiff's familial association rights have been violated, we apply a balancing test weighing the state's interests in protecting children against the family member's interests in his or her familial right of association. Id. at 1547. Examining the parties' interest in light of the facts of the case, we weigh those interests to determine whether the state official's conduct constitutes an "undue burden" on the family member's rights. Id.

The district court used the "undue burden" standard in the jury instruction, but it did not provide any discussion or explanation of the competing interests to be balanced by the jury. The Medinas argue the term "undue burden" inadequately captures the required balancing test. They contend an instruction that explicitly "balance[d] the interests of the Plaintiffs' right to be free from interference with intimate familial relations against the state's interest in protecting powerless children to be free from abuse and neglect" would have done a better job of

forcing the jury to focus on the State's interest in this case (or lack thereof), as well the burden it imposed. [FN6] They suggest the "undue burden" test eliminates any sense of balancing--that it led the jury to focus on whether the officers' actions were intrusive without also considering the Medinas' equally important protected family interest. Without an explicit reference to the counter-balancing interest, they argue, the instruction failed to give the jury any frame of reference for determining exactly what might be "undue."

**FN6.** A large part of the Medinas' discussion regarding this issue boils down to an implicit argument they are entitled to a directed verdict based on insufficiency of the evidence because the state officials did not believe the children were abused, neglected, abandoned, or in danger. As noted earlier, during oral argument counsel conceded the Medinas are not entitled to a directed verdict. We will assume that concession also applies to their related discussion on this issue.

**\*\*4** We agree with the Medinas that the instruction provided by the district court was incomplete. [FN7] However, on review, our role is not to determine what instruction we would have given, it is to decide whether the instruction may have misled the jury. On this point we must disagree with the Medinas. The word "undue" connotes the balancing test required because it only has meaning in the context of weighing one thing against another. One cannot determine if some action was due or undue without considering the circumstances. Clearly, the officers' actions imposed a "burden" on the Medinas' associational rights. The jury instruction focused the jurors' attention on that burden and required them to decide if it was excessive in light of the facts. Because the competing interests at stake were fairly obvious--the instruction establishes the Medinas had a right to intimate familial association entitled to constitutional protection--and the word "undue" requires a balancing analysis, we do not have substantial doubt whether this instruction led the jury to conduct the required balancing test. For this reason, we affirm the district court's ruling.

**FN7.** For example, the court should have used something along these lines:

The right to family integrity or association protects family relationships. The interest in protecting the family is counterbalanced by two competing interests, the interest of a child within the family to be free from abuse, and the government's interest in protecting powerless children who may be subject to abuse. [You must weigh these interests to determine whether the officers' conduct in this case constituted an undue burden on the Medinas' associational rights.] Griffin, 983 F.2d at 1549 n. 6.

#### *Joe Cisneros' Claims*

Following the incident in question, but before the filing of the complaint in this case, the father of the children, Mr. Cisneros, died. Mr. Medina, acting as Administrator of Mr. Cisneros' estate, asserted the rights of Mr. Cisneros in the complaint.

Prior to trial, the district court dismissed the claims brought on behalf of Mr. Cisneros' estate, finding they did not survive his death. The court analogized Mr. Cisneros' claims to intentional torts, which it determined do not survive the death of the victim in New Mexico. The Medinas challenge that decision. "We review *de novo* a district court's dismissal of a cause of action for failure to state a claim upon which relief can be granted." Chemical Weapons Working Group, Inc. v. United States Dep't. of the Army, 111 F.3d 1485, 1490 (10th Cir.1997).

Survival of § 1983 actions after a plaintiff's death is governed by state law, as long as the state law is "not inconsistent with the Constitution and laws of the United States." Robertson v. Wegmann, 436 U.S. 584, 588-90, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978); Hopkins v. Oklahoma Public Employees Retirement System, 150 F.3d 1155, ---, 1998 WL 348407, \*2 (10th Cir. Jun.30, 1998); 42 U.S.C. § 1988(a). Therefore, we must look first to New Mexico state law to determine if Mr. Cisneros' claims survive.

The New Mexico survival statute states, in part:

In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

**\*\*5 N.M. Stat. Ann. § 37-2-1.** [FN8] Because Mr. Cisneros' § 1983 claims are not in the nature of any

of the listed actions, we must look to common law to see if they survive.

FN8. Counsel for the Medinas bases his argument on the final sentence of this statute (not quoted above). He misreads the sentence. The sentence applies to the death of the tortfeasor, not the victim, and, as such, is inapplicable.

First, however, we must determine how to classify the claims. The Supreme Court has determined § 1983 claims are analogous to tort, or personal injury, actions. See Wilson v. Garcia, 471 U.S. 261, 277, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). The district court considered the claims intentional torts for purposes of determining survivability. [FN9] We agree with this analogy. The actions underlying a § 1983 claim do not have to be intentional (e.g., driving a police car in a chase with reckless indifference and injuring a bystander or recklessly seizing the wrong person pursuant to a warrant). Section 1983 claims based on unintentional actions would be most closely analogous to negligence-based torts for survivability purposes. The actions alleged to be in violation of § 1983 in this case, however, were intentional: the removal and transportation of the children. Therefore, the closest analogy would be to intent-based torts.

FN9. The Medinas urge this court to consider Mr. Cisneros' claims as personal injury actions, in light of the Supreme Court's decision in Wilson, 471 U.S. at 280. Unfortunately, Wilson is of limited use for our purposes. In Wilson, the Supreme Court had to classify § 1983 claims for statute of limitation purposes. Id. at 262. The court determined the claims best fit the category of personal injury actions. Id. at 276. The court then looked to the various statute of limitations provisions in New Mexico law and applied the limitations period "for an injury to the person or reputation of any person." Id. at 280 (quoting N.M. Stat. Ann. § 37-1-8).

The universe of personal injury actions includes negligence-based torts and intentional torts. See Maestas v. Overton, 86 N.M. 609, 526 P.2d 203, 204 (N.M.Ct.App.1974) ("New Mexico recognizes interspousal immunity for

nonintentional personal injury actions."), *rev'd on other grounds*, 87 N.M. 213, 531 P.2d 947 (N.M.1975); Owens v. Okure, 488 U.S. 235, 236, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989) (considering question arising "where a State has one or more statutes of limitations for certain enumerated intentional torts, and a residual statute for all other personal injury actions"). The Supreme Court did not have occasion in Wilson to consider whether § 1983 claims were more closely analogous to the intent- or negligence-based subcategories of personal injury actions because that distinction did not make a difference to the result--the statute of limitations provisions in New Mexico law do not provide for different limitations periods for intentional- and negligence-based personal injury actions. See N.M. Stat. Ann. §§ 37-1-1 to 37-1-30.

The Supreme Court was faced with this question in Owens, a case not raised by the Medinas. Owens, 488 U.S. at 236. In Owens, the Court determined that § 1983 claims should not be treated as intentional torts for statute of limitations purposes. Id. at 249-50. However, in reaching this decision the Court expressed the importance of establishing a simple standard in light of the "multiplicity of state intentional tort statutes of limitations" and the "wide spectrum of claims which § 1983 has come to span." Id. at 248-50. A similar concern does not exist in the survivability context because there is no comparable multiplicity of options. In this case, we are faced only with the question of whether the claim should fall into one of two categories--negligence-based torts that are exempt from the nonsurvival rule or intentional-based torts that are subject to the nonsurvival rule--and we are presented with a claim (improper seizure) that is clearly analogous to common-law intentional torts. For these reasons, we do not believe the Owens statute of limitations analysis controls our analysis here.

At common law, torts did not survive the death of the victim. See Rodgers v. Ferguson, 89 N.M. 688, 556 P.2d 844, 846-48 (N.M.Ct.App.1976). The New Mexico Court of Appeals, however, has decided that a damage claim based on personal injuries due to

negligence should survive the victim's death. *Id.* at 849-50. We must decide, then, if the New Mexico courts would place the claims in this case into the general category that do not survive under the common law, or into the category already carved out by the courts that do survive. [FN10]

FN10. The district court noted the question of whether an intentional tort survives the unrelated death of a plaintiff is one of first impression in New Mexico. As such, the district court, and this court, must attempt to resolve the issue as the New Mexico Supreme Court would. See *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir.1988).

The district court distinguished Mr. Cisneros' § 1983 claims from those carved out in *Rodgers* based on their intentional nature. The court correctly noted the foundation of the underlying claim in negligence was a decisive aspect of the *Rodgers* decision. *Rodgers*, 556 P.2d at 846-48 (distinguishing cases involving "serious intentional wrongs"). Indeed, the court in *Rodgers* stated: "The rule that a claim for personal injury does not survive the death of the victim is not applicable to conditions in New Mexico because the tort of negligence did not exist when the rule developed." *Id.* at 848. Given the emphasis the state court placed on the element of negligence in deciding *Rodgers*, we agree with the district court that the New Mexico Supreme Court probably would decide this case differently. [FN11]

FN11. In *Padilla v. Estate of Griego*, 113 N.M. 660, 830 P.2d 1348 (N.M.Ct.App.1992), the New Mexico Court of Appeals decided, under a different procedural footing, not to distinguish between the survivability of torts based in negligence and those based in intent. However, that case was based on statutory interpretation of the last sentence of § 37-2-1 (dealing with death of tortfeasor, not victim), not common law principles. *Id.* at 1352 ("We see no reason why the legislature would wish to permit a claim for injuries caused by negligence to survive the death of the tortfeasor while not permitting survival of a claim for compensatory damages arising from an

[intentional tort]."). This distinction causes us to doubt whether the logic would extend to the situation in this case. Because this case is based on a reading of New Mexico common law, we think the language in *Rodgers* providing for survival of negligence-based claims controlling.

The Medinas argue, if this court finds the claims would not survive under New Mexico law, as we now have, the court should not apply state law because it would fail to effectuate the goals of § 1983. They argue the operation of New Mexico survival law deprives Mr. Cisneros' estate of a proper claim, and deprives § 1983 of its full deterrent effect. Obviously, § 1983 claims can fail to survive or we would not bother looking to state law. [FN12] See *Pietrowski v. Town of Dibble*, 134 F.3d 1006, 1008-09 (10th Cir.1998) (holding § 1983 malicious prosecution claim abates after death of defendant, giving deference to state statute). In addition, this ruling should have no effect on the deterrent value of § 1983, because Mr. Cisneros' death was unrelated to the actions of the defendants. It is hard to believe state officials will violate the constitutional rights of New Mexico's citizens with impunity in the hopes that the citizens will die before filing suit. [FN13]

FN12. The Supreme Court has already rejected the types of arguments made by the Medinas:

That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. *Robertson*, 436 U.S. 593.

FN13. The Medinas cite exclusively to *Berry v. City of Muskogee, Oklahoma*, 900 F.2d 1489 (10th Cir.1990), in the section of their brief devoted to this argument. That

case differs significantly, however, because the challenged action was directly related to the death of the plaintiff. *Id.* at 1502.

\*\*6 For the above reasons, we affirm the district court's dismissal of Mr. Cisneros' claims.

*Exclusion of the Notice of Termination and  
Offense/Incident Report*

Prior to trial, the defendants filed two motions in limine, pursuant to Federal Rules of Evidence 401, 402, and 403, seeking to prevent the Medinas from introducing Tort Claims Notices against the police department, testimony from several witnesses concerning prior incidences of alleged misconduct by the officers, and evidence related to Officer Pacheco's subsequent, unrelated termination from the police department. The district court granted the motions. "We review a district court's exclusion of evidence for an abuse of discretion. In reviewing a court's determination for abuse of discretion, we will not disturb the determination absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." Carter v. Jackson, 59 F.3d 1046, 1048 (10th Cir.1995).

The Medinas argue the Tort Claims Notices and the witness testimony regarding other instances of alleged misconduct would have been relevant to the question of supervisory liability. The district court excluded the Tort Claims Notices and the witness testimony, finding such evidence to be insufficiently similar to the claims being tried. The court has reviewed the Tort Claims Notices and the Medinas' explanation to the district court of the witness testimony. We cannot find that the court's decision manifests a clear error of judgment or was based on a clearly erroneous finding of fact or an erroneous conclusion of law. The incidents in question were in no way related to how officers should act when confronted with a family dispute over which household should have custody of children. Furthermore, the incidents do not relate to the proper type of training required for police officers who might find themselves in such a situation. We suspect the evidence was intended to damage the image of the defendants and we find the district court did not abuse its discretion in excluding it.

The Medinas suggest the evidence related to Officer Pacheco's subsequent, unrelated termination from the

police department would have shown Officer Pacheco tended to lie, rather than accept responsibility for his actions. The district court granted the motion in limine, finding the termination not to be relevant to what happened three years earlier in a totally unrelated matter. FN14

FN14 In his discussion of this specific point, as in many places throughout his brief, counsel for the Medinas mis cited to the record. Specifically, he directed this court to a point in the record where he asked the district court to reconsider its decision, rather than to the point where the district court made its initial ruling.

The Medinas argue on appeal the district court's ruling was contrary to Rule 608(b) of the Federal Rules of Evidence and they should have been allowed to refer to these materials in their cross-examination of the officer. Rule 608(b) provides: "Specific instances of the conduct of a witness . . . may, . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness..." Fed R.Evid. 608(b). One key aspect of this rule is that its application is explicitly within the discretion of the district court. The advisory committee notes to the rule warn courts "[e]ffective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial." *Id.* advisory committee notes. Consequently, the note says, courts need to employ safeguards, including disallowing the use of instances that are remote in time. *Id.* Furthermore, the note acknowledges the overriding protections of Rule 403 still apply. *Id.*

\*\*7 This court has reviewed the documents excluded by the district court and cannot find any significant evidence that would be probative of Officer Pacheco's truthfulness or untruthfulness. The only item that comes close to being probative is the officer's questionable answers on a claim form for unemployment payments. We agree with the district court, however, that evidence of this relatively minor incident was not sufficiently probative of Officer Pacheco's credibility concerning the claims at issue and thus should not have been allowed. The district court did not abuse its discretion in excluding this evidence.

161 F.3d 18 (Table)  
98 CJ C.A.R. 4834  
**Unpublished Disposition**  
(Cite as: 161 F.3d 18, 1998 WL 647784 (10th Cir.(N.M.)))

Page 8

The Medinas also contend the cumulative effect of the errors they appeal unduly prejudiced their case. As we have found no errors, there can be no compound effect.

Accordingly, we AFFIRM the disposition below.

161 F.3d 18 (Table), 1998 WL 647784 (10th Cir.(N.M.)), 98 CJ C.A.R. 4834 Unpublished Disposition

END OF DOCUMENT

DANIEL J. O'FRIEL  
PIERRE LEVY

LAW OFFICES OF DANIEL J. O'FRIEL, LTD.

ATTORNEYS AT LAW  
644 DON GASPAR AVENUE  
SANTA FE, NEW MEXICO 87505  
TELEPHONE (505) 982-5929  
FACSIMILE (505) 988-5973  
POST OFFICE BOX 2084  
SANTA FE, NEW MEXICO 87504-2084

BERTRAND B. PRINCE  
1914-1998

February 25, 2003

Via Facsimile  
**(505) 848-1889**

Lisa Mann, Esquire  
Modrall, Sperling, Roehl, Harris & Sisk, P.A.  
Post Office Box 2168  
Albuquerque, New Mexico 87103-2168

Re: Patricia L. Littell v. Allstate Insurance Company and Todd Aakhus

Dear Ms. Mann:

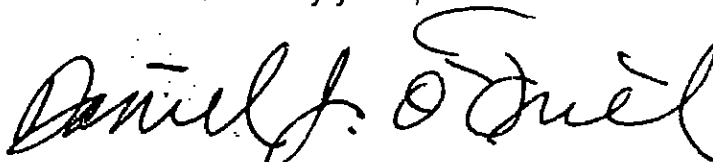
This will confirm our recent discussion in this case. I have authority to accept the sum of \$150,000.00, in full and final settlement of all claims.

If this is acceptable to your client, please let us know. We agree to sign a General Release of all Claims to bring this matter through to a full and final conclusion.

You have also inquired about the likelihood of settlement in the other pending cases. The answer is that we are interested in the resolution of those claims as well. Suitable demands and documentation will be presented shortly.

Thank you.

Sincerely yours,



Daniel J. O'Friel

DJO/mbb  
cc: Patricia L. Littell

EXHIBIT

C

BUY™

SELL™

SHOP™



Downloaded From  
[www.TextBookDiscrimination.com](http://www.TextBookDiscrimination.com)



**SELL YOUR OWN SAMPLES**

(help others get the justice that they deserve)



**BUY™**

**SELL™**

**SHOP™**

[www.TextBookDiscrimination.com](http://www.TextBookDiscrimination.com)

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.