FILED
United States Court of Appeals
Tenth Circuit

November 2, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JESSICA ADAMS,

Plaintiff - Appellant,

v.

C3 PIPELINE CONSTRUCTION INC.; ALPHA CRUDE CONNECTOR, LLC; PLAINS ALL AMERICAN PIPELINE, LP, as Successor in Interest to Alpha Crude Connector, LLC; PLAINS ALL AMERICAN GP, LLC, as Successor in Interest to Alpha Crude Connector, LLC; PLAINS GP, LLC, as Successor in Interest to Alpha Crude Connector, LLC; PLAINS PIPELINE, LP, as Successor in Interest to Alpha Crude Connector, LLC,

Defendants - Appellees.

No. 20-2055

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 2:18-CV-00925-KG-GBW)

Timothy J. Atler, Atler Law Firm, P.C., Albuquerque, New Mexico, (Jazmine J. Johnston, Atler Law Firm, P.C., Albuquerque, New Mexico; and Samantha Peabody Estrello, Killion Law Firm PC, Lubbock, Texas, with him on the briefs), for Plaintiff – Appellant.

Kelsey D. Green, (Paula G. Maynes with her on the brief), Miller Stratvert P.A., Santa Fe, New Mexico, for Defendants - Appellees.

Before **MATHESON**, **BRISCOE,** and **EID**, Circuit Judges.

MATHESON, Circuit Judge.

Appellant Jessica Adams worked for C3 Pipeline Construction, Inc. ("C3") on a pipeline construction crew. C3 provided construction and maintenance services under a contract with Alpha Crude Connector, LLC ("Alpha Crude" or "ACC") on an ACC pipeline system in New Mexico and Texas. Ms. Adams alleges that three C3 workers sexually harassed her while they were working on this project in New Mexico. She sued C3 and Plains Defendants, Alpha Crude's corporate successors,[1] under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; the New Mexico Human Rights Act, N.M. Stat. Ann. § 28-1-7; and New Mexico tort law.

When Plains Defendants answered the complaint, they moved for summary judgment. They attached their Master Service Agreement ("MSA") with C3 and affidavits from managers stating that Plains Defendants did not "employ" C3's workers. Ms. Adams opposed the motion with a memorandum and her affidavit, moved under Federal Rule of Civil Procedure 56(d) to take discovery on her alleged "employment" relationship with Plains Defendants, and argued for the first time that Plains Defendants should be liable for breaching their duty to keep her safe on their premises. The district court granted summary judgment to Plains Defendants, denied

[1] The parties refer to these companies as "Plains Defendants" because the successors to Alpha Crude named in the complaint are Plains All American Pipeline, LP; Plains All American GP, LLC; Plains GP, LLC; and Plains Pipeline, LP.

Ms. Adams's Rule 56(d) motion, and construed her premises liability argument as a motion to amend her complaint and denied it as futile.

That same day, the district court ordered Ms. Adams to serve a summons and the complaint on C3, which she did. When C3 did not answer the complaint, the court entered a default judgment against C3 and ordered it to pay Ms. Adams $20,050,000. Within 30 days of this order, Ms. Adams appealed the district court's grant of summary judgment to Plains Defendants.

Exercising jurisdiction under 28 U.S.C. § 1291, we (1) deny Plains Defendants' motion to dismiss this appeal as untimely, (2) affirm the district court's summary judgment and Rule 56(d) rulings, and (3) vacate its denial of Ms. Adams's motion to amend and remand for further proceedings.

I. BACKGROUND

A. *Factual Background*

C3 is a Louisiana company that employed Ms. Adams on a pipeline construction crew. She worked for C3 in New Mexico and Ohio in 2015 and 2016. C3 also employed Mike Carrithers, Danny Robertson, and Craig Arnault.

Plains Defendants are successors in interest to Alpha Crude, an LLC that operated a 515-mile crude oil pipeline system in New Mexico and Texas. C3 provided construction and maintenance services on this system under a contract with Alpha Crude. Frontier Energy Services, LLC, managed the construction of pipeline on behalf of Plains Defendants.

A Master Service Agreement ("MSA") governed the relationship between Plains Defendants and C3. The MSA specified the "WORK TO BE DONE" by C3 on the pipeline project. ROA, Vol. I at 159. It also provided:

> [C3], is and will remain an independent contractor in the performance of this Agreement and in the performance of any Work for [Plains Defendants]. [C3's] employees will be the employees of [C3] and will be subject to [C3's] sole and exclusive supervision, direction, and control and under no circumstances will an employee of [C3] be deemed an employee of [Plains Defendants]. All Work contemplated hereunder, however, shall meet the approval of [Plains Defendants] and shall be subjected to the general right of inspection.

Id. at 164.

The MSA further provided that "[C3] agree[d] to furnish all materials, furnish and perform all work and labor and furnish all working tools and equipment, including special tools if required, and all transportation of persons, materials, and equipment necessary or required to execute and complete the Work." *Id.* at 161. It said Plains Defendants "may, but [were] not obligated to, from time to time, furnish to [C3] materials and services related to the Work to be performed under this Agreement or a specific Work Order." *Id.* at 162.

B. ***Procedural Background***

1. **Ms. Adams's Allegations**

Ms. Adams sued Plains Defendants and C3 in New Mexico state district court for violating Title VII, the New Mexico Human Rights Act, and various New Mexico tort laws. In her complaint, she alleged that "Mike Carrithers, Purchasing Manager

for C3, Danny Robertson, and Craig Arnault, Foreman of the C3 Pipeline crew based out of Hobbs, New Mexico, all while acting during and within the course and scope of their employment, sexually harassed [her] and made it a condition of her employment with C3 and [Alpha Crude] that she perform sexual favors for them in order to keep her job." *Id.* at 46. She further alleged that "Arnault unlawfully harassed [her] by sending her offensive and unwanted pornographic images, by making sexually explicit comments, by engaging in unwanted touching, by making comments with reference to [her] participating in sexual activity, and by forcing [her] to participate in sexual activity with him in order to keep her job with Defendants." *Id.*

Ms. Adams also alleged that "she and other employees contacted corporate management for Defendants to complain of the sexually harassing conduct," and that, "[i]n response to her complaints and defiance, Arnault repeatedly threatened to fire [her] for complaining and also when she refused to perform sexual acts with him." *Id.* at 47. She claimed "[n]one of the Defendants named herein took action to investigate the complaints made by [her]." *Id.*

Ms. Adams invoked the "joint-employer" doctrine against Plains Defendants:

> [Plains Defendants] and C3 are all considered employers of Adams for Title VII purposes under the joint employer doctrine as that term is known under federal case law. As Adams, Carrithers, Robertson, and Arnault were laying and building pipeline for C3/[Plains Defendants], C3/[Plains Defendants] constantly had supervisors and inspectors on site supervising the activities, the jobs, and the work being performed by employees of C3. [Plains Defendants] set the hours that Adams, her supervisors, and

> coworkers began the work and ended the work each day. [Plains Defendants] began each work day with a conference call with C3 supervisors, managers, and foremen, including Arnault, to discuss the job, the spread of pipeline, or the project that Adams and her crew would be working on for the day. Adams complained of the quid pro quo sexual harassment to members of management at [Plains Defendants], but they, too, refused to stop the unlawful treatment.

Id. at 51. Ms. Adams alleged she "complained to [a representative of Plains Defendants named] Casey about the quid pro quo treatment to which she had been subjected," and that "Casey responded by stating 'everybody has to do it,' and instructed Adams to 'get over it' and 'suck it up.'" *Id.* at 52.

Finally, Ms. Adams claimed she "complained of the quid pro quo treatment to inspectors from Renegade," a contractor Plains Defendants hired to inspect the pipeline project, "as well as inspectors from [Plains Defendants]," but the inspectors "refused to listen to [her], and the general response from each of the inspectors to [her] was 'I need my job, and if you need yours, you will go back to working and not complain.'" *Id.* She alleged that she "believed that the supervisors from [Plains Defendants] were her bosses because her supervisors at C3 had told her that the supervisors from [Plains Defendants] were 'the bosses' of the C3 crew because the work that C3 was performing was for [Plains Defendants] and subject to the instruction, supervision, design, and control of [Plains Defendants]." *Id.*

2. **Proceedings Against Plains Defendants**

a. *Plains Defendants' summary judgment motion*

In response to the complaint, Plains Defendants removed the suit to federal court. They next filed an answer and a contemporaneous motion for summary judgment. In their memorandum in support of the motion, they argued "[they] did not employ [Ms. Adams], Carrithers, Robertson, or Arnault," and that "these individuals were solely employed by C3." *Id.* at 110.

Plains Defendants attached the MSA to their summary judgment motion, and an affidavit from Kenneth Benton, Vice President of Engineering at Frontier. He attested that

- "[C3 was] solely responsible for hiring and employing the necessary personnel to perform the work set forth in the construction specifications." *Id.* at 135.
- "[Plains Defendants] did not specify, dictate, or manage the work hours, leave, compensation, benefits, or conditions of employment for employees of [C3]." *Id.*
- "[C3 was] solely responsible for the payment of all salaries, wages, retirement benefits, employment taxes, social security taxes, and other benefits earned by their employees," and "for the management and discipline of the personnel that [C3] hired to perform work on the project." *Id.* at 137.
- "[C3] made all decisions regarding their employee's [sic] work duties, assignments, disciplinary actions, and work hours," and that "[Plains Defendants] did not provide or pay any type of salary, wages, leave, or fringe benefits to the individuals employed by [C3]." *Id.*
- "[Plains Defendants] and the third party inspectors [they contracted] had no authority or right to hire, retain, fire, discipline, or otherwise manage the employees of [C3]." *Id.*

- "[C3 was] responsible for supplying [its] employees with all tools and equipment necessary to perform the work set forth in the construction specifications." *Id.* at 136.[2]

b. *Ms. Adams's response*

Ms. Adams opposed Plains Defendants' motion and also moved for discovery under Federal Rule of Civil Procedure 56(d). In her opposition, she raised a new theory of liability under New Mexico premises liability law, arguing that Plains Defendants owed her a duty to prevent harmful acts by third parties. She attached an affidavit from herself stating that

- "[She] understood that if [she] did not have sex on demand with [Mr. Carrithers, Mr. Robertson, and Mr. Arnault] and do what they wanted, [she] would be fired or not given work." *Id.* at 219.

- "The persons with [Plains Defendants]/Frontier whom [she] told about the harassment include[d] a woman named Casey and several inspectors for [Alpha Crude] or Renegade/Frontier to [sic] include men named Dave, Tyler, and Blake . . . ." *Id.*

- "No one at [Plains Defendants] or Frontier did anything to stop the abuse. Instead, they told [her] that 'everybody has to do it', 'get over it', 'suck it up' and 'if you need your job, you will go back to work and not complain about it.'" *Id.*

---

[2] Plains Defendants also provided an unsigned affidavit from Jason Pottridge, Construction Manager for Frontier. *See Flemming v. Corr. Corp. of Am.*, 143 F. App'x 921, 925 n.1 (10th Cir. 2005) (unpublished) ("An unsigned affidavit . . . does not constitute evidence under Fed. R. Civ. P. 56(e).") (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)).

Plains Defendants further attached affidavits from (1) a "Construction Manager," an independent contractor for Plains Defendants, who attested that he "did not manage, supervise, or direct the work of the employees of the pipeline contractors," App., Vol. I at 147; and (2) Plains Defendants' "Information Governance and Litigation Support Manager," who confirmed the validity of the MSA, *id.* at 151-52.

- "No one at [Plains Defendants] or Frontier to whom [she] reported the harassment and hostility ever told [her] that they were not [her] boss or that they were the wrong person to tell. They did not indicate in any way that they didn't have the authority or obligation to stop the harassment." *Id.* Instead, "[t]hey indicated to [her] that submitting to the conduct and having to have sex with the boss was required if [she] wanted to keep [her] job." *Id.*

- "[Plains Defendants] and Frontier acted like they were my bosses by often giving me specific instructions on how and when to do my job. [Alpha Crude] and its inspectors regularly told us that we had to work Sundays, holidays and overtime. They often gave me detailed directives about my work. [Plains Defendants] and Frontier were so picky about how I did my job, I felt like they were bullying me as the only woman on the job site. For example, my job sometimes involved digging and we would often encounter caliche in the dirt. More than once, a Frontier inspector gave me detailed commands on how to break up and remove the caliche including what tools to use. Frontier also stopped my work and told me how Frontier/[Plains Defendants] wanted me to off-load pipe from trucks including directions on using clamps, straps and knots. [Alpha Crude] inspectors told me how to perform coding and once checked and controlled the coarseness of grit on my sandpaper. Many of the detailed instructions from the inspectors had no relationship to safety. The inspectors would walk around and tell us what specific tasks we had to finish and what part of the project we were going to work on next. One time, either Blake or Ron instructed me to get out of the ditch I was in and told me I had to move an individual rock. I was mad and felt like I was being picked on for no reason and kicked the rock away with my foot. Another time, Blake told me I had to move my truck. He stated I could leave the job site if I didn't move it." *Id.* at 219-20.

Ms. Adams attached a second affidavit from her attorney, Samantha Peabody Estrello, who said that

- "As demonstrated by Ms. Adams' affidavit and by the facts and arguments in Plaintiffs Rule 56(d) Motion and Memorandum in Support thereof, allowing discovery in this matter would allow Ms. Adams the opportunity to gather additional evidence to further develop genuine issues of material fact to oppose Defendants' Motion for Summary Judgment." *Id.* at 223.

- "Ms. Adams' affidavit sufficiently contradicts Defendants' claims to justify discovery," and that "Ms. Adams has not had adequate time for discovery

because just seven days after removing this case to federal court, Defendants filed their motion for summary judgment." *Id.*

- "On behalf of Ms. Adams, I would propound written discovery and set depositions for multiple topics, including: the relationships and responsibilities between the multiple Defendants and inspectors; the actions of the Defendants and inspectors in determining the terms and conditions of Ms. Adams' employment, including controlling the details of the work to be performed; actions of the multiple Defendants and inspectors in determining the terms and conditions of general employment for workers on the jobsite; details of the ownership and operation of the jobsite property; Defendants' knowledge of the harm to Ms. Adams occurring on their property; Defendants' and inspectors' actions and inactions after learning of the recurrent harm on their property; and responsibilities for safety at the jobsite." *Id.*

c. *District court's decision*

In a "partial summary judgment and order of dismissal," the district court granted summary judgment to Plains Defendants and denied Ms. Adams's Rule 56(d) motion seeking discovery. *See id.* at 264. It concluded that "Plains Defendants did not 'employ' Adams, Carrithers, Robertson, or Arnault for Title VII or state law purposes." *Id.* at 260. It also said "Adams' Rule 56(d) affidavit [fell] short" because it "[did] not address the employment status of Carrithers, Robertson, or Arnault." *Id.* Finally, the court treated Ms. Adams's premises liability theory as a request to amend the complaint under Federal Rule of Civil Procedure 15(a) to add a new state law claim. It denied leave to amend as futile because Ms. Adams had not alleged facts to state a plausible claim for relief. *Id.* at 255-59.

3. **Suit Against C3**

The day it entered the summary judgment order, the district court ordered Ms. Adams to "either effect service [on C3 in two weeks] or provide the Court with a

written explanation why service has not been effected." *Id.* at 263. Otherwise, "this action will be dismissed without prejudice." *Id.*

Ms. Adams served C3, but C3 failed to answer. She moved for a default judgment, which the district court granted. A jury reached a damages verdict against C3 awarding Ms. Adams $55 million, which the court reduced to $20,050,000. App., Vol. II at 400. The court entered a "final judgment" that addressed only Ms. Adams's claims against C3. *Id.*

4. **Appeal**

Ms. Adams appeals the order granting summary judgment to Plains Defendants and denying her Rule 56(d) motion. She filed her notice of appeal more than 10 months after the summary judgment order in favor of the Plains Defendants, but only three weeks after the "final judgment" against C3. App., Vol. II at 401-02.

II. APPELLATE JURISDICTION – TIMELINESS OF APPEAL

Plains Defendants moved to dismiss Ms. Adams's appeal as untimely. They argue that Ms. Adams needed to appeal within 30 days of the order granting them summary judgment because it was final. Ms. Adams responds that the order was not final and appealable because the claims against C3 had not yet been resolved. Because she filed her notice of appeal within 30 days of the final judgment with respect to C3, she argues her appeal is timely. We agree with Ms. Adams and deny the motion.

The table below provides the relevant dates:

Date	Event
May 23, 2019	District court grants summary judgment to Plains Defendants, enters "partial summary judgement," and orders Ms. Adams to serve C3 within two weeks
May 30, 2019	Ms. Adams serves C3
April 1, 2020	District court enters "final judgment" against C3
April 24, 2020	Ms. Adams appeals the May 23, 2019 order granting summary judgment to Plains Defendants

As explained below, we deny Plains Defendants' motion to dismiss because the district court's April 1, 2020 order was the only final and appealable order, not the May 23, 2019 order granting summary judgment to Plains Defendants.

A. ***Legal Background***

"In general, federal circuit courts have jurisdiction to review only 'final decisions' of district courts." *New Mexico v. Trujillo*, 813 F.3d 1308, 1316 (10th Cir. 2016) (quoting 28 U.S.C. § 1291). After the district court issues a final decision, a prospective appellant ordinarily has 30 days to file a notice of appeal. Fed. R. App. P. 4(a)(1)(A).

"A final decision must dispose of all claims by all parties, except a decision may otherwise be considered final if it is properly certified as a final judgment under Federal Rule of Civil Procedure 54(b)." *Trujillo*, 813 F.3d at 1316. "Rule 54(b) allows a district court to 'direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just

reason for delay.'" *Id.* (quoting Fed. R. Civ. P. 54(b)). "This determination must appear in the district court's order certifying the matter for appeal." *Id.*[3]

In *Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986), the district court granted summary judgment to 18 of 21 defendants named in the complaint. Two of the remaining defendants were never served. We said that "[t]he fact that [these two defendants] were not considered in the order or judgment does not prevent the decision of the district court from being final." *Id.* Rather, "[t]hese unserved defendants were never made parties to this lawsuit," so "[i]t was not necessary for the district court to enter an order dismissing them prior to its entry of the order and judgment." *Id.* The third remaining defendant in *Bristol* had been served. *Id.* at 848. We held the district court's failure to dismiss that defendant "prior to the entry of the order and judgment *does* prevent the decision from being final and appealable." *Id.* Because Rule 54(b) requires the court to expressly determine that there is no just reason for delay when it resolves "fewer than all the claims," and it had not done so, the court's judgment could not be final while the served party remained. *Id.* (quotations omitted).

[3] "We have interpreted the 'expressly determines' language of the rule to require district courts to make two explicit determinations in the certification order." *Trujillo*, 813 F.3d at 1316. "First, the district court must determine the judgment is final." *Id.* "Second, it must determine there is no just reason for delay of entry of its judgment." *Id.* "In doing so, district courts should clearly articulate their reasons and make careful statements based on the record supporting their determination of 'finality' and 'no just reason for delay' so that we can review a 54(b) order more intelligently and thus avoid jurisdictional remands." *Id.* (quotations partially omitted).

In *Moya v. Schollenbarger*, 465 F.3d 444, 449 (10th Cir. 2006), we explained that "whether an order of dismissal is appealable generally depends on whether the district court dismissed the *complaint* or the *action*." (quotations omitted). "A dismissal of the complaint is ordinarily a non-final, nonappealable order (since amendment would generally be available), while a dismissal of the entire action is ordinarily final." *Id.* (quotations omitted). We noted that "[d]espite our use of this complaint/action terminology, we have long recognized that the requirement of finality imposed by section 1291 is to be given a practical rather than a technical construction." *Id.* (quotations omitted). "In evaluating finality, therefore, we look to the *substance* and *objective intent* of the district court's order, not just its terminology." *Id.*

In *Kaplan v. Central Bank of the Islamic Republic of Iran*, 896 F.3d 501, 507 (D.C. Cir. 2018), the D.C. Circuit held that "when a district court makes plain that it foresees further proceedings on unresolved claims against defendants who have yet to be properly served, a decision resolving all the claims against the properly served defendants is not a final, appealable judgment." It observed that "[i]n that situation, any appeal should await resolution of the contemplated further proceedings on the claims against the as-yet-unserved defendants." *Id.* The district court contemplated further proceedings when it "repeatedly referred to [unserved defendants] as 'the remaining defendants,' and the . . . claims against them as the 'remaining claims.'" *Id.* It "also discussed the failed previous attempts at service and ordered the plaintiffs to serve [the unserved defendants] through diplomatic channels within

twenty-one days." *Id.* "[I]n its order accompanying the opinion, the court dismissed the claims against the [served defendants] in two lines and then devoted a full page to describing how the plaintiffs should 'commence service of process via diplomatic channels' for their 'remaining claims.'" *Id.* "In short," *id.*, the D.C. Circuit concluded, "both the [district court's] opinion and order ma[d]e clear the district court's expectation that the remaining defendants could be properly served and the claims against them would then proceed to resolution (which in fact happened)," *id.* at 507-08.

In sum, (1) under *Bristol*, a district court's failure to consider unserved defendants in an order and judgment "does not prevent" the court's decision from being final, 789 F.2d at 847; (2) under *Moya*, whether the judgment is final depends on the district court order's "*substance* and *objective intent*," 465 F.3d at 449; and (3) under *Kaplan*, the dismissal of served defendants is not final and appealable when the district court "makes clear" it "expect[s]" further proceedings against unserved defendants, 896 F.3d at 508.[4]

[4] Here, the most *Bristol* tells us is that existence of an unserved defendant, C3, "does not prevent" the summary judgment order in favor of the Plains Defendants "from being final." 789 F.2d at 847. But it does not tell us how to determine whether the order was final under those circumstances. To answer that question, we draw on *Moya* and *Kaplan* for the rule that the district court's expectation of further proceedings against unserved defendants means its dismissal of served defendants is not final.

Our concurring colleague finds in *Bristol* a "general rule that a judgment such as the one here *is* final." Concurring Op. at 2. But *Bristol*'s dictum that the existence of unserved, undismissed defendants "does not prevent the decision of the district court from being final" cannot be read so definitively. 789 F.2d at 847. The Fifth Circuit, in contrast, has adopted a bright line rule that "where a judgment of dismissal

B. ***Analysis***

Ms. Adams's appeal was timely because the district court contemplated further proceedings against C3 when it granted summary judgment to Plains Defendants. Ms. Adams had 30 days to file her notice of appeal after the court entered a final decision. *See* Fed. R. App. P. 4(a)(1)(A). She did so after the district court's "final judgment" resolving the claims against C3, which was the final decision for the following reasons.

On the day it granted "partial" summary judgment to Plains Defendants, the district court ordered Ms. Adams to either serve C3 or explain why service has not yet been effected. Failure to do so would result in dismissal of the case without prejudice.[5] As in *Kaplan*, this "ma[d]e clear the district court's expectation that the

---

is rendered as to all served defendants and only unserved, nonappearing defendants remain, the judgment is final." *Fed. Sav. & Loan Ins. Corp. v. Tullos-Pierremont*, 894 F.2d 1469, 1473 (5th Cir. 1990). In an unpublished opinion, we "decline[d] to adopt" the Fifth Circuit's "brightline rule" and instead followed *Bristol*. *Brown v. Fisher*, 251 F. App'x 527, 533 (10th Cir. 2007) (unpublished); *see also Insinga v. LaBella*, 817 F.2d 1469, 1469-70 (11th Cir. 1987) (When "final judgment has been entered as to all defendants who have been served with process and only unserved defendants remain the district court's order *may* be considered final under 28 U.S.C. § 1291 for purposes of perfecting an appeal." (emphasis added)).

[5] In its order to show cause, the court noted that C3 "has not been served," and then said:

> IT IS THEREFORE ORDERED that, no later than fourteen (14) days from the date of this order, Plaintiff must either effect service or provide the Court with a written explanation why service has not been effected. **If Plaintiff fails to respond within the time allotted, this action will be dismissed without prejudice.**

App., Vol. I at 263.

remaining defendant[] could be properly served and the claims against [it] would then proceed to resolution (which in fact happened)." 896 F.3d at 508. We agree with the D.C. Circuit's reasoning in *Kaplan* that "when a district court makes plain that it foresees further proceedings on unresolved claims against defendants who have yet to be properly served, a decision resolving all the claims against the properly served defendants is not a final, appealable judgment." *Id.* at 507.[6] Ms. Adams served C3, and the case against C3 proceeded to judgment, as the district court contemplated.

Consistent with the district court's expectation of further proceedings against C3, the court designated its May 21, 2019 order as a "partial summary judgment," and specified that it granted summary judgment only to "Plains Defendants." App., Vol. I at 264. Although "we look to the *substance* and *objective intent* of the district court's order, not just its terminology," *Moya*, 465 F.3d at 449, the court's language showed it expected the case to continue after it granted summary judgment to the Plains Defendants. The partial summary judgment order stands in contrast to the April 1, 2020 order, which was labeled a "final judgment." App., Vol. II at 400.

Plains Defendants' principal argument to the contrary is unpersuasive. They contend that, under *Bristol*, the district court's "partial" summary judgment order was

[6] In their reply brief in support of their motion to dismiss this appeal, Plains Defendants argue that the "partial summary judgment" order "contain[s] no mention regarding anticipation of further litigation against C3," and that "this case is [therefore] distinct from *Kaplan*." Doc. 10745401 at 7. But this argument ignores the court's contemporaneous order requiring Ms. Adams to serve C3.

final and appealable because it resolved Ms. Adams's claims against all defendants that had been served. But *Bristol* said only that, even if unserved defendants remain after a district court's order resolving claims against all served defendants, this "does not prevent" the court's decision from being final. 789 F.2d at 847. It did not hold that an order dismissing claims against all served defendants is always or even presumptively final when unserved defendants remain. As we have explained, that depends on whether the district court plainly contemplated further proceedings against the unserved defendant. Here it plainly did.

* * * *

We deny Plains Defendants' motion to dismiss. Ms. Adams's appeal was timely noticed. We have jurisdiction under 28 U.S.C. § 1291.

III. **ISSUES ON APPEAL**

We turn to the issues Ms. Adams raises on appeal—whether the district court erred when it:

(A) granted summary judgment to Plains Defendants by concluding they were not an "employer" under Title VII and New Mexico law;

(B) denied Ms. Adams's Rule 56(d) motion for discovery; and

(C) declined leave for Ms. Adams to amend her complaint to add a premises liability claim under New Mexico law.

A. ***Summary Judgment for the Plains Defendants***

We review a district court's grant of summary judgment de novo. *Fenn v. City of Truth or Consequences*, 983 F.3d 1143, 1147 (10th Cir. 2020). "[A] court shall grant summary judgment if the movant shows that there is no genuine dispute as to

any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine when 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party,' and a fact is material when it 'might affect the outcome of the suit under the governing substantive law.'" *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (alteration omitted)). "In applying this standard, [the court] view[s] the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party." *Parker Excavating, Inc. v. Lafarge W., Inc.*, 863 F.3d 1213, 1220 (10th Cir. 2017) (quotations omitted).

1. **Title VII Claim**

a. *Legal background*

i. "Employer" requirement

"Title VII of the Civil Rights Act of 1964 makes it unlawful for an 'employer' to 'discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment' on account of sex." *Knitter v. Corvias Mil. Living, LLC*, 758 F.3d 1214, 1225 (10th Cir. 2014) (quoting 42 U.S.C. § 2000e-2(a)(1)). "Title VII defines an 'employer' as 'a person engaged in an industry affecting commerce who has fifteen or more employees.'" *Id.* (quoting 42 U.S.C. § 2000e(b)). "An 'employee,' in turn, is 'an individual employed by an employer.'" *Id.* (quoting 42 U.S.C. § 2000e(f)).

"If a plaintiff cannot meet her burden to prove the defendant was her employer," her "claims necessarily fail." *Id.* "Factfinders must decide whether a defendant is an employer for purposes of Title VII when doubts exist as to (1) whether a plaintiff is an employee or an independent contractor, or, alternatively, (2) which one(s) of multiple individuals or entities is (are) the plaintiff's employer." *Id.*; *see also Bristol v. Bd. of Cnty. Comm'rs of Cnty. of Clear Creek*, 312 F.3d 1213, 1217-18 (10th Cir. 2002).

"[T]his circuit chooses among three different tests to determine whether a defendant is an employer depending on the situation: (i) the hybrid test; (ii) the joint employer test; and (iii) the single employer test." *Knitter*, 758 F.3d at 1225-26. "[T]he joint employer test . . . is the appropriate test to use when," as here, "an employee of one entity seeks to hold another entity liable as an employer." *Id.*; *see also Bristol*, 312 F.3d at 1218.[7] "Under the joint employer test, two entities are considered joint employers if they 'share or co-determine those matters governing the essential terms and conditions of employment.'" *Knitter*, 758 F.3d at 1226 (quoting *Bristol*, 312 F.3d at 1218). "Both entities are employers if they both 'exercise significant control over the same employees.'" *Id.* (quoting *Bristol*, 312 F.3d at 1218). "An independent entity with sufficient control over the terms and conditions

[7] The district court applied the joint-employer test. The parties do not dispute that it is the appropriate test here.

of employment of a worker formally employed by another is a joint employer within the scope of Title VII." *Id.* (quotations omitted).

"Most important to control over the terms and conditions of an employment relationship is the right to terminate it under certain circumstances." *Id.* (quoting *Bristol*, 312 F.3d at 1219). "Additional factors courts consider for determining control under the joint employer test include the ability to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; day-to-day supervision of employees, including employee discipline; and control of employee records, including payroll, insurance, taxes and the like." *Id.* (quotations and alterations omitted).

ii. Knitter v. Corvias Military Living, LLC

The district court here relied heavily on *Knitter* for its summary judgment ruling. Because *Knitter* controls the outcome of this appeal, we provide the following summary.

In *Knitter*, the plaintiff worked for a "handyman company" that operated as an independent contractor for a property management company. *Id.* at 1219. The management company paid the handyman company flat fees for projects. *Id.* The management company did not pay the employees of the handyman company directly, nor provide their W-2 forms. *Id.* at 1220.

The property management company did, however, "provide a mandatory hazard awareness program for all . . . subcontractors," and "handymen . . . receive[d] their assignments [and instructions] from [the management company's supervisors]."

Id. For example, the management company "notified [the plaintiff] which jobs needed to be done on which days and the priority of those jobs." *Id.* (quotations omitted). It also provided the handyman company's workers with "specialized equipment." *Id.* at 1221.

Although the handyman company's workers were "generally . . . unsupervised unless they needed assistance," the management company's "supervisors conducted walk-throughs to ensure all work had been properly completed." *Id.* "Occasionally, [the plaintiff's] work did not satisfy [the management company's] maintenance supervisors," at which point "a supervisor either contacted [the handyman company's operator] to notify him that [the plaintiff] had not completed her work satisfactorily or contacted [the plaintiff] directly to rectify the errors." *Id.*

The management company's "supervisors testified they never formally disciplined any . . . handymen, including [the plaintiff]." *Id.* The plaintiff's husband, "however, stated that if he and [the plaintiff] were caught without wearing a safety harness, they were fined and that money went directly to [the management company]." *Id.* (quotations and alteration omitted). "He also stated that [the management company's] head safety officer . . . once observed [him and the plaintiff] wearing shorts on a job," and told them "if he ever caught [them] wearing shorts again, [they] would be gone." *Id.*

The plaintiff sued the management company. She alleged gender discrimination and sexual harassment under Title VII. *Id.* at 1224. The company

moved for summary judgment, arguing it was not the plaintiff's employer. *Id.* The district court granted summary judgment, and we affirmed. *Id.* at 1224, 1231-32.

First, we agreed that no reasonable jury could find that the management company had the authority to fire the plaintiff, which we considered the "most important" factor under the joint employer test. *Id.* at 1228 (quotations and alteration omitted). We noted that the management company's "managers repeatedly testified they did not believe they had the power to fire vendor handymen and instead were required to direct issues with handymen to the vendor companies." *Id.* at 1229.

Second, we noted that the handyman company "had almost exclusive control over [the plaintiff's] personnel records and payment," as it "provided [her] with W-2 forms, withheld taxes from her income, and issued [her] paychecks." *Id.*

Third, we observed that although the management company supervised the plaintiff to a degree, its "supervision was limited to directing the [plaintiff] on how to perform certain tasks to its satisfaction, much like an individual hiring a moving company to move his or her belongings into an apartment might direct the movers on where to place items or how to protect items that are particularly fragile." *Id.* at 1230. We explained that this sort of supervision, as well as safety-related supervision, was "consistent with a client-vendor relationship, not an employer-employee relationship." *Id.*

Fourth, we rejected the plaintiff's argument that the management company could discipline her. Although a management company officer told her she would "be gone" if she violated the dress code, *id.* at 1230, "this [did] not mean [the

management company] had the actual authority to [fire her] or that it did discipline her," *id.* at 1231. We concluded that the management company "exerted insufficient control over these matters to be [the plaintiff's] joint employer." *Id.*

b. *Analysis*

Plains Defendants did not "employ" C3's workers—including Ms. Adams—under Title VII. Application of the *Knitter* factors to the summary judgment record before the district court shows that no reasonable jury could have found Plains Defendants "exercise[d] significant control over" C3's employees. *Id.* at 1226. Plains Defendants were thus not a "joint employer."

i. Authority to fire

Plains Defendants lacked the authority to fire C3 employees. In *Knitter*, we considered this the "most important" factor under the joint employer test. *Id.* at 1228 (quotations and alteration omitted).

The MSA provided that "[C3's] employees will be the employees of [C3] and will be subject to [C3's] sole and exclusive supervision, direction, and control and under no circumstances will an employee of [C3] be deemed an employee of [Plains Defendants]." App., Vol. I at 164.

Mr. Benton attested that "[Plains Defendants] and the third party inspectors [they contracted] had no authority or right to hire, retain, fire, discipline, or otherwise manage the employees of [C3]." *Id.* at 137. And "[C3 was] solely responsible for hiring and employing the necessary personnel to perform the work set forth in the construction specifications." *Id.* at 135.

Ms. Adams argues the district court "brushed aside [her] sworn statements concerning [Plains Defendants'] employees and agents on the project 'acting like they were [her] bosses' and stating that [she] 'could leave the job site' if she did not follow their instructions." Aplt. Br. at 40. (alteration omitted). And "when she complained of the harassment to [Plains Defendants] personnel, they told her to stop complaining and submit to it *if she wanted to keep her job*." *Id.* at 41.

But even if Ms. Adams *believed* that Plains Defendants could fire her, her statements do not support the claim that Plains Defendants had such authority. We rejected a similar argument in *Knitter*, explaining that although a management company officer told the plaintiff she would "be gone" if she violated the dress code, 758 F.3d at 1230, "this [did] not mean [the management company] had the actual authority to [fire her] or that it did discipline her," *id.* at 1231. Here, the evidence shows Plains Defendants could not fire Ms. Adams. Her belief otherwise does not create a genuine dispute of fact.

ii. Control of payroll

Plains Defendants did not control the payroll, tax documents, or benefits of C3 employees. The MSA required Plains Defendants to pay C3 according to invoices C3 prepared. *See* App., Vol. I at 168, 175-86. It did not require Plains Defendants to pay C3's employees directly. Mr. Benton confirmed that "[C3 was] solely responsible for the payment of all salaries, wages, retirement benefits, employment taxes, social security taxes, and other benefits earned by their employees." *Id.* at 137. He also said "[Plains Defendants] did not specify, dictate, or

manage . . . compensation, benefits, or conditions of employment for employees of [C3]." *Id.* at 135. Finally, he said "[Plains Defendants] did not provide or pay any type of salary, wages, leave, or fringe benefits to the individuals employed by [C3]." *Id.* at 137.

As in *Knitter*, C3 "had almost exclusive control over [the plaintiff's] personnel records and payment." 758 F.3d at 1229. Ms. Adams did not state otherwise in her affidavit.

iii. Supervision

Plains Defendants did not supervise Ms. Adams or her co-workers. The MSA provided that "[C3's] employees will be the employees of [C3] and will be subject to [C3's] sole and exclusive supervision, direction, and control and under no circumstances will an employee of [C3] be deemed an employee of [Plains Defendants]." App., Vol. I at 164.

The MSA also provided that Plains Defendants "may, but [were] not obligated to, from time to time, furnish to [C3] materials and services related to the Work to be performed under this Agreement or a specific Work Order." *Id.* at 162. Mr. Benton stated that "[Plains Defendants] did not specify, dictate, or manage the work hours, [or] leave," of C3 employees. *Id.* at 135.

By contrast, Ms. Adams stated that "[Plains Defendants] and Frontier acted like they were my bosses by often giving me specific instructions on how and when to do my job. [Alpha Crude] and its inspectors regularly told us that we had to work

Sundays, holidays and overtime. They often gave me detailed directives about my work." *Id.* at 219. She said

> [Plains Defendants] and Frontier were so picky about how I did my job, I felt like they were bullying me as the only woman on the job site. For example, my job sometimes involved digging and we would often encounter caliche in the dirt. More than once, a Frontier inspector gave me detailed commands on how to break up and remove the caliche including what tools to use. Frontier also stopped my work and told me how Frontier/[Plains Defendants] wanted me to off-load pipe from trucks including directions on using clamps, straps and knots. [Alpha Crude] inspectors told me how to perform coding and once checked and controlled the coarseness of grit on my sandpaper. Many of the detailed instructions from the inspectors had no relationship to safety. The inspectors would walk around and tell us what specific tasks we had to finish and what part of the project we were going to work on next. One time, either Blake or Ron instructed me to get out of the ditch I was in and told me I had to move an individual rock. I was mad and felt like I was being picked on for no reason and kicked the rock away with my foot. Another time, Blake told me I had to move my truck. He stated I could leave the job site if I didn't move it.

Id. at 219-20.

These assertions resemble the plaintiff's evidence in *Knitter*, where the defendant's "supervision was limited to directing the [plaintiff] on how to perform certain tasks to its satisfaction, much like an individual hiring a moving company to move his or her belongings into an apartment might direct the movers on where to place items or how to protect items that are particularly fragile." 758 F.3d at 1230. The plaintiff in *Knitter* "argue[d] [the defendant] supervised her work on a daily basis by demonstrating how tasks were to be performed and instructing her to redo

them if she had done them unsatisfactorily." *Id.* "She also point[ed] out she worked on [the defendant's] premises, took her assignments from [the defendant], was required to submit to [the defendant's] dress code, and notified [the defendant] when she was going to be absent from work." *Id.*

Further, the management company in *Knitter* "notified [the plaintiff] which jobs needed to be done on which days and the priority of those jobs," provided the handyman company's workers with "specialized equipment," and "conducted walk-throughs to ensure all work had been properly completed." *Id.* at 1220-21 (quotations omitted). This level of supervision, which we said "was consistent with a client-vendor relationship, not an employer-employee relationship," *id.* at 1230, resembles Ms. Adams's statements here. To the extent her and Plains Defendants' accounts on supervision differ, the difference is not material under *Knitter*.[8]

iv. Authority to discipline

Mr. Benton stated the "[Plains Defendants] and the third party inspectors [they contracted] had no authority or right to hire, retain, fire, discipline, or otherwise manage the employees of [C3]." App., Vol. I at 137. He said C3 was responsible "for the management and discipline of the personnel that [C3] hired to perform work on the project" and that "[C3] made all decisions regarding their employee's [sic]

[8] Ms. Adams's allegation that "[Plains Defendants] and [their] inspectors regularly told [Ms. Adams] that [she] had to work Sundays, holidays and overtime," App., Vol. I at 219, is her strongest evidence of supervision but does not overcome the other *Knitter* factors.

work duties, assignments, disciplinary actions, and work hours. *Id.* Ms. Adams offered nothing contrary in her affidavit.

* * * *

Application of the *Knitter* factors shows Plains Defendants did not jointly employ C3's workers and therefore could not be liable under Title VII. The most important fact is that Plains Defendants could not fire Ms. Adams. *See Bristol*, 312 F.3d at 1219. We therefore affirm summary judgment in favor of Plains Defendant's on Ms. Adams's Title VII claim.

2. **New Mexico Human Rights Act and State Tort Claims**

a. *Legal background*

Like Title VII, the New Mexico Human Rights Act prohibits certain forms of discrimination by "employer[s]." N.M. Stat. Ann. § 28-1-7. Similarly, under New Mexico tort law, "the employer of an independent contractor is [generally] not liable for injuries to an employee of the independent contractor." *Valdez v. Cillessen & Son, Inc.*, 734 P.2d 1258, 1262 (N.M. 1987). The district court said that Ms. Adams's "state law claims turn on whether Adams, Carrithers, Robertson, and Arnault, or any of them individually, are considered employees of the Plains Defendants rather than independent contractors under New Mexico law." App., Vol. I at 251. The parties do not dispute this statement.

"New Mexico courts have employed an agency analysis to determine whether an individual is acting as an independent contractor or as an employee." *Celaya v. Hall*, 85 P.3d 239, 242 (N.M. 2004). The New Mexico Supreme Court has "adopted

the Restatement (Second) of Agency § 220 (1958) to identify an independent contractor" as opposed to an employee. *Id.* "Under an agency analysis, the principal's right to control the individual performing the work often distinguishes an employee from an independent contractor." *Id.*

"A right to control analysis focuses on whether the principal exercised sufficient control over the agent to hold the principal liable for the acts of the agent." *Id.* "[T]he right to control analysis is more complex, and demands a more nuanced approach, than simply determining the degree of control over the details or methods of the work." *Id.* at 243. New Mexico courts consider:

> (1) "whether the parties intended to create an employment relationship;"
>
> (2) "the method of payment, whether by time or job;"
>
> (3) "whether the employer supplies the instrumentalities or tools for the person doing the work;"
>
> (4) "the length of time the person is employed;"
>
> (5) "the degree of control the principal exercises over the details of the agent's work[;]"
>
> (6) "the type of occupation and whether it is usually performed without supervision;"
>
> (7) "the skill required for the occupation;"
>
> (8) "whether the work is part of the regular business of the employer;" and
>
> (9) "whether the principal is engaged in business."

Id.

"[N]o particular factor should receive greater weight than any other, except when the facts so indicate, nor should the existence or absence of a particular factor be decisive." *Harger v. Structural Servs., Inc.*, 916 P.2d 1324, 1334 (N.M. 1996). "Rather, the totality of the circumstances should be considered in determining whether the employer has the right to exercise essential control over the work or workers of a particular contractor." *Id.*

"Normally, the existence of an employment relationship is a question of fact." *Headley v. Morgan Mgmt. Corp.*, 110 P.3d 1076, 1079 (N.M. Ct. App. 2005). "However, where reasonable people cannot differ on the issue, the court may grant summary judgment." *Id.*

b. *Analysis*

Just as Plains Defendants were not joint employers of C3's workers—including Ms. Adams—under *Knitter*, C3's workers were independent contractors and not employees of Plains Defendants under New Mexico law. The following applies the factors New Mexico courts consider in distinguishing between independent contractors and employees to the C3 workers. Each material factor shows Plains Defendants did not employ C3's workers and that C3's workers were independent contractors.

i. Intent to create an employment relationship

The MSA, signed by C3 and Plains Defendants, provided that

> [C3], is and will remain an independent contractor in the performance of this Agreement and in the performance of any Work for [Plains Defendants]. [C3's] employees will

> be the employees of [C3] and will be subject to [C3's] sole and exclusive supervision, direction, and control and under no circumstances will an employee of [C3] be deemed an employee of [Plains Defendants]. All Work contemplated hereunder, however, shall meet the approval of [Plains Defendants] and shall be subjected to the general right of inspection.

App., Vol. I at 164. Ms. Adams submitted no evidence showing she or Plains Defendants intended to create an employment relationship. Under the MSA, the parties plainly intended that C3 and its employees would remain as independent contractors and that Plains Defendants would not employ C3's workers.

ii. Method of payment, whether by time or job

As noted above, Plains Defendants did not pay C3's workers. The MSA provided that Plains Defendants would pay C3 based on its completing steps in the pipeline project.

In his affidavit, Mr. Benton confirmed that "[C3 was] solely responsible for the payment of all salaries, wages, retirement benefits, employment taxes, social security taxes, and other benefits earned by their employees," *id.* at 137, and that "[Plains Defendants] have never issued paychecks to Ms. Adams, Mr. Carrithers, Mr. Robertson, or Mr. Arnault," *id.* at 138. He also said, "[Plains Defendants] did not specify, dictate, or manage . . . compensation, benefits, or conditions of employment for employees of [C3]." *Id.* at 135. Finally, he said, "[Plains Defendants] did not provide or pay any type of salary, wages, leave, or fringe benefits to the individuals employed by [C3]." *Id.* at 137. Thus, "the method of

payment, [was] by . . . job." *Celaya*, 85 P.3d at 243. Ms. Adams does not contradict this evidence in her complaint or affidavit.

iii. Whether the employer supplies the instrumentalities or tools for the person doing the work

The MSA provided that "[C3] agree[d] to furnish all materials, furnish and perform all work and labor and furnish all working tools and equipment, including special tools if required, and all transportation of persons, materials, and equipment necessary or required to execute and complete the Work." App., Vol. I at 161. It also said Plains Defendants "may, but [were] not obligated to, from time to time, furnish to [C3] materials and services related to the Work to be performed under this Agreement or a specific Work Order." *Id.* at 162. Mr. Benton reported that "[C3 was] responsible for supplying [its] employees with all tools and equipment necessary to perform the work set forth in the construction specifications." *Id.* at 136.

Ms. Adams does not contradict this evidence in her complaint or affidavit. She contends only that "[m]ore than once, a Frontier inspector gave me detailed commands on how to break up and remove the caliche including what tools to use." *Id.* at 219. She does not claim Plains Defendants supplied those tools.

iv. Length of time the person is employed

Ms. Adams worked for C3 in 2015 and 2016 on two projects. One was the Plains Defendants' project. As the district court noted, her movement between these

projects during this period shows she was an employee of C3 and not of Plains Defendants. *Id.* at 253.

v. Degree of control the principal exercises over the details of the agent's work

Ms. Adams asserted that "[Plains Defendants] acted like they were my bosses by often giving me specific instructions on how and when to do my job," and that "[Alpha Crude] and its inspectors regularly told us that we had to work Sundays, holidays and overtime." *Id.* at 219. But as discussed above, the record shows Plains Defendants had no authority to fire C3 employees. Nor did they control the details of C3 employees' work, such as the terms of their employment, their payment and benefits, and their discipline. Moreover, "no particular factor should receive greater weight than any other, except when the facts so indicate." *Harger*, 916 P.2d at 1334.

vi. Remaining factors

Ms. Adams made no arguments regarding "whether the work [C3 performed] is part of the regular business of [Plains Defendants]"; "whether [Plains Defendants were] engaged in business"; "the type of occupation and whether it is usually performed without supervision"; or "the skill required for the occupation."

* * * *

The evidence before the district court so plainly showed C3's workers were independent contractors rather than employees of Plains Defendants that "reasonable people cannot differ on the issue." *Headley*, 110 P.3d at 1079. We therefore affirm

the district court's summary judgment in favor of Plains Defendants on Ms. Adams's state law claims.

B. ***Rule 56(d) Discovery***

Ms. Adams challenges the district court's denial of her Rule 56(d) motion to defer ruling on summary judgment until it allowed her to conduct discovery.

"We review the denial of a Rule 56(d) motion for an abuse of discretion—a standard that implies a degree of discretion invested in judges to render a decision based upon what is fair in the circumstances and guided by the rules and principles of law." *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 904 (10th Cir. 2016) (quotations and alterations omitted). "[E]ven though the general rule is that summary judgment should not be entered where the nonmoving party has not had the opportunity to discover information that is essential to his opposition, we will not reverse a ruling denying discovery unless it exceeds the bounds of the rationally available choices given the facts and the applicable law in the case at hand." *Id.* at 904-05 (quotations, citation, and alteration omitted). "[T]he party requesting deferral of judgment shoulders the burden of demonstrating an abuse of discretion." *Gutierrez v. Cobos*, 841 F.3d 895, 908 (10th Cir. 2016) (quotations and alteration omitted).

1. **Legal Background**

Although Rule 56 does not require discovery before summary judgment is granted,[9] Federal Rule of Civil Procedure 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

"In the Tenth Circuit, a non-movant requesting additional discovery under Rule 56(d) must specify" in the affidavit "(1) the probable facts not available, (2) why those facts cannot be presented currently, (3) what steps have been taken to obtain these facts, and (4) how additional time will enable the party to obtain those facts and rebut the motion for summary judgment." *Gutierrez*, 841 F.3d at 908 (quotations and alteration omitted).

"We expect Rule 56(d) motions to be robust, and we have observed that an affidavit's lack of specificity counsels against a finding that the district court abused its discretion in denying a request for additional discovery under the rule." *Ellis v.*

[9] *See Brown v. Chaffee*, 612 F.2d 497, 504 (10th Cir. 1979); *see also FDIC v. Arciero*, 741 F.3d 1111, 1113 (10th Cir. 2013) (affirming summary judgment granted "before . . . discovery"); *Weir v. Anaconda Co.*, 773 F.2d 1073, 1081 (10th Cir. 1985) ("There is no requirement in [Rule 56] that summary judgment not be entered until discovery is complete.").

J.R.'s Country Stores, Inc., 779 F.3d 1184, 1206 (10th Cir. 2015) (quotations and alteration omitted). Even when an appellant's "summary judgment response arguably contains the information required in Rule 56(d)," "we may not look beyond the affidavit in considering a Rule 56(d) request." *Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1110 (10th Cir. 2017).

On the other hand, "sufficient time for discovery is especially important when relevant facts are exclusively in the control of the opposing party." *Weir*, 773 F.2d at 1081. "[S]ummary judgment should not be based on the deposition or affidavit of an interested party as to the facts known only to him—a situation where demeanor evidence might serve as real evidence to persuade a trier of fact to reject his testimony." *Id.* (quotations and alteration omitted). But "[w]hile the movant's exclusive control of desired information is a factor favoring relief under [Rule 56(d)], it is not sufficient on its own to justify that relief, especially where the other requirements of [Rule 56(d)] have not been met." *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 784 (10th Cir. 2000).[10]

We have affirmed denial of Rule 56(d) motions when appellants' affidavits fail to identify evidence they would need to prevail on their claims. For example, in *FDIC v. Arciero*, 741 F.3d 1111, 1113 (10th Cir. 2013), the FDIC sued borrowers for failure to repay loans. The relevant statute required the borrowers to "produce (1) a

[10] "Until December 2010, the substance of Rule 56(d) was embodied in Rule 56(f)." *Ellis*, 779 F.3d at 1205 n.12. When we discuss cases involving the latter, we use brackets to replace "Rule 56(f)" with "Rule 56(d)."

written agreement executed by [a bank] and one of the Borrowers and (2) [the bank's] minutes approving the agreement." *Id.* at 1116. The district court granted summary judgment to the FDIC without allowing any discovery. *Id.* We affirmed denial of the borrowers' Rule 56(d) motion because "no Borrower attested to signing such an agreement[,] gave any reason to believe that such an agreement existed," nor "claim[ed] that they [we]re missing any Bank minutes." *Id.* Although the "Borrowers state[d] in their opening brief that they ha[d] identified people who could and likely would provide evidence which would ultimately bring this case outside of [the statutory requirements of a written agreement and board minutes]," "the[ir] brief [did] not go on to explain what that evidence might be or how the evidence would create a defense not governed by [the statute]." *Id.* (quotations omitted). We concluded that the district court did not abuse its discretion because "[s]peculation cannot support a Rule 56(d) motion." *Id.*

2. **Analysis**

Although Ms. Adams may have had a plausible basis to seek pre-summary judgment discovery, the district court did not abuse its discretion in denying her motion. Her counsel's Rule 56(d) affidavit failed to "state with specificity" how discovery would yield "probable facts" that would "rebut the summary judgment motion." *Trask v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006) (quotations and alteration omitted). To the extent the affidavit identified "probable facts" discovery might reveal, they would not rebut Plains Defendants' evidence or change the outcome.

In the affidavit, Ms. Adams's attorney attested that she

> would propound written discovery and set depositions for multiple topics, including: the relationships and responsibilities between the multiple Defendants and inspectors; the actions of the Defendants and inspectors in determining the terms and conditions of Ms. Adams' employment, including controlling the details of the work to be performed; actions of the multiple Defendants and inspectors in determining the terms and conditions of general employment for workers on the jobsite; details of the ownership and operation of the jobsite property; Defendants' knowledge of the harm to Ms. Adams occurring on their property; Defendants' and inspectors' actions and inactions after learning of the recurrent harm on their property; and responsibilities for safety at the jobsite.

App., Vol. I at 223.

Although the affiant described these topics to address through discovery, she "neither identifie[d] any *probable facts* not available, nor state[d] with specificity *how* the additional material will rebut the summary judgment motion." *Trask*, 446 F.3d at 1042 (quotations and citation omitted) (emphasis added). Ms. Adams argues that "[f]acts concerning employment relationships and supervision sometimes do not lend themselves to a concise list and broader categories of information can still satisfy the rule." Aplt. Br. at 48 (quotations omitted). But as noted in *Ellis*, "[w]e expect Rule 56(d) motions to be robust, and . . . an affidavit's lack of specificity counsels against a finding that the district court abused its discretion in denying a request for additional discovery under the rule." 779 F.3d at 1206 (quotations and alteration omitted). The affidavit speculates that discovery would yield useful

evidence, and "[s]peculation cannot support a Rule 56(d) motion." *Arciero*, 741 F.3d at 1116.

Ms. Adams contends that, combined with her own affidavit, her counsel's affidavit identifies "probable facts not available." Aplt. Br. at 49. Together the affidavits "propos[ed] to discover facts that go to the Plains Defendants' control over (1) the details of [Ms. Adams's] work, (2) the terms and conditions of her employment, including whether she would remain employed if she continued to complain about the harassment, and (3) the worksite, including ensuring the safety of those working there and preventing (or contributing to) a hostile work environment." *Id.* at 49.

Ms. Adams's affidavit did not remedy the shortcomings of her counsel's affidavit, which needed to say what probable facts exist that could entitle her to relief. *See Arciero*, 741 F.3d at 1116. As explained above, the facts she asserted in her own affidavit in opposition to summary judgment would not overcome Plains Defendants' evidence that they could not fire, could not discipline, and did not pay C3 employees. She did not say Plains Defendants paid her salary, provided her benefits, or handled her tax forms. She did not say Plains Defendants had actual authority to fire her, the "most important factor indicating an employer is a joint employer" for Title VII purposes. *Knitter*, 758 F.3d at 1229. Her statement that Plains Defendants supervised some aspects of her work would not, under *Knitter* or New Mexico state law, overcome the overwhelming evidence that C3 was an independent contractor. In short, even if discovery could substantiate every assertion

in Ms. Adams's affidavit, Plains Defendants would be entitled to summary judgment under *Knitter* and New Mexico state law.

Ms. Adams argued to the district court in opposition to summary judgment that "[t]he actual responsibilities of the parties conflicted with the terms of the [MSA]." App., Vol. I at 208. She pointed out that "Mr. Pottridge attested that his job as Inspector required him to make the safety requirements available to the contractor, superintendents and foremen," and that "[his] responsibility for safety requirements conflicts with the [MSA] because the [MSA] provides that []C3 will be wholly responsible for the method to be followed in performance of the Work and for the safety thereof." *Id.* at 207-08 (quotations omitted). We see no conflict between Mr. Pottridge's providing safety requirements to C3 and C3 being responsible for "the method to be followed" in safe "performance of the Work." More important, neither Ms. Adams's affidavit nor her counsel's states how discovery on this matter would elicit evidence to oppose summary judgment. *See Cerveny*, 855 F.3d at 1110 (noting that even when an appellant's "summary judgment response arguably contains the information required in Rule 56(d)[,] . . . we may not look beyond the affidavit in considering a Rule 56(d) request").

Finally, Ms. Adams urges the existence of an employment relationship is largely a factual determination. But the district court rejected her Rule 56(d) motion because she failed to specify "probable facts" discovery could yield that would have been material. Her "Rule 56(d) affidavit [thus fell] short of [the] standard." App., Vol. I at 260. Ms. Adams failed to submit a sufficiently "robust" affidavit under the

rule. *Ellis*, 779 F.3d at 1206. As the court explained, "Adams' proposed topics for discovery do not address the employment status of Carrithers, Robertson, or Arnault." App., Vol. I at 260. And her "affidavit fail[ed] to provide a description of the particular discovery needed or an explanation of how that discovery would preclude summary judgment." *Id.*

Our standard of review is abuse of discretion. "[W]hatever decision we might've made ourselves were we behind the district court's bench," our review is limited to whether the district court "exceed[ed] the bounds of the rationally available choices given the facts and the applicable law in the case at hand." *Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1096 (10th Cir. 2010) (quotations omitted); *Sup. Ct. of N.M.*, 839 F.3d at 904-05 (same). Because Adams failed to "shoulder[] the burden of demonstrating an abuse of discretion," *Gutierrez*, 841 F.3d at 908 (quotations omitted), we affirm the district court's denial of her rule 56(d) motion.

C. ***Premises Liability Amendment***

In her opposition to the motion for summary judgment, Ms. Adams argued for the first time that Plains Defendants breached their duty of care to keep their premises safe for her and prevent harm from third parties. The district court construed this as "a request to amend the complaint." App., Vol. I at 255.[11] The

[11] Ms. Adams did not expressly make a request to amend the complaint or characterize her premises liability argument as a new claim. In their reply, Plains

court denied it as futile because "Adams [did] not allege that she told someone specifically from the Plains Defendants" about the harassment, nor "how the sexual harassment by her direct supervisors, . . . was proximately caused by the Plains Defendants' failure to exercise control over the jobsite in a reasonable manner." *Id.* at 259 (quotations omitted).

Below, we review New Mexico law on premises liability and apply it to Ms. Adams's claim, drawing reasonable inferences from her allegations. Because the district court misread Ms. Adams's affidavit and failed to consider all available materials when denying leave to amend, we vacate its denial of leave to amend. On remand, given the absence of any remaining federal claim, the district court may exercise its discretion to decline to exercise supplemental jurisdiction over a possible premises liability claim.

1. **Legal Background**

a. *Leave to amend, futility, standard of review*

"[O]ur cases interpret the inclusion of new allegations in a response to a motion for summary judgment, as a potential request to amend the complaint." *Martinez v. Potter*, 347 F.3d 1208, 1211 (10th Cir. 2003).[12] The district court treated

---

Defendants pointed out that Ms. Adams had not previously claimed premises liability and argued that an amendment to her complaint to do so would be futile.

[12] Other circuits have taken a more restrictive view. For example, the Sixth Circuit holds that a plaintiff may not raise new claims for the first time in response to a summary judgment motion. *See Bridgeport Music, Inc. v. WM Music Corp.*, 508 F.3d 394, 400 (6th Cir. 2007); *see also Tucker v. Union of Needletrades, Indus. & Textile Emps.*, 407 F.3d 784, 788 (6th Cir. 2005) ("A non-moving party plaintiff may

Ms. Adams's asserting premises liability in her opposition to summary judgment as an "implicit motion to amend the Complaint" under Federal Rule of Civil Procedure 15(a) and denied the request. App., Vol. I at 259.

"We ordinarily apply the abuse-of-discretion standard when reviewing a denial of leave to amend." *Moya v. Garcia*, 895 F.3d 1229, 1239 (10th Cir. 2018). "But [when] the district court denie[s] leave to amend based on futility," "our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Id.* (quotations omitted).

"A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir. 1999). "The futility question is functionally equivalent to the question whether a complaint may be dismissed for failure to state a claim . . . ." *Id.* "To survive a motion to dismiss [for failure to state a claim], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).[13] "A claim has facial plausibility when the plaintiff pleads

---

not raise a new legal claim for the first time in response to the opposing party's summary judgment motion. At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Rule 15(a)." (quotations and citation omitted)); *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188, 1200 (11th Cir. 2015) (stating "plaintiffs may not raise new claims at the summary judgment stage" (quotations omitted)).

[13] When, as here, a case is removed to federal court, federal pleading standards govern. *See Leiser v. Moore*, 903 F.3d 1137, 1139 n.1 (10th Cir. 2018); *accord Karnatcheva v. JPMorgan Chase Bank, N.A.*, 704 F.3d 545, 548 (8th Cir. 2013) ("We

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

"In ruling on a motion to dismiss for failure to state a claim, all well-pleaded *facts*, as distinguished from conclusory allegations, must be taken as true, and the court must liberally construe the pleadings and make all reasonable inferences in favor of the non-moving party." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1105 (10th Cir. 2017) (quotations and alteration omitted).

b. *New Mexico law on premises liability*

In New Mexico, "the employer of an independent contractor [generally] is not liable for injuries to an employee of the independent contractor." *Valdez*, 734 P.2d at 1262. But "there are exceptions, including two scenarios: where the employer controls the premises on which the work is being performed or where the employer retains control over the independent contractor's performance of its work." *Sherman v. Cimarex Energy Co.*, 318 P.3d 729, 731 (N.M. Ct. App. 2013).

As the New Mexico Supreme Court has explained, "The owner/occupier [of a premises] owes a duty of ordinary care under the circumstances, including the duty to exercise ordinary care to prevent harmful conduct from a third person, even if the third person's conduct is intentional." *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 326 P.3d 465, 468-69 (N.M. 2014) (citations omitted). "The extent of the

---

apply federal pleading standards—Rules 8 and 12(b)(6)—to the state substantive law to determine if a complaint makes out a claim under state law.").

landowner's duty may vary according to the degree of control exercised by the owner over the premises, the details of the work being performed, and the extent to which the landowner knows or should expect that an invitee will not discover or realize such danger." *Requarth v. Brophy*, 801 P.2d 121, 124 (N.M. Ct. App. 1990).

This duty extends to businesses like Plains Defendants: "[B]usinesses must exercise reasonable care to discover and prevent dangerous conditions caused by people on their premises." *Encinias v. Whitener Law Firm, P.A.*, 310 P.3d 611, 618 (N.M. 2013). The premises owner "does not have the duty to do everything that might be done, but it can be liable for the violent acts of a third party if [it] reasonably should have discovered and could have prevented the incident." *Id.* at 619 (quotations and citation omitted). The "duty to protect visitors arises from a foreseeable risk that a third person will injure a visitor and, as the risk of danger increases, the amount of care to be exercised also increases." *Id.* (quotations and alteration omitted).

To establish premises liability, a plaintiff "must . . . show that his injury was proximately caused by the owner's failure to exercise [its] control in a reasonable manner, that the owner knew or by the exercise of reasonable care should have discovered the dangerous condition, that such hazard involved an unreasonable risk of harm to plaintiff, and the landowner should have expected that the employee would not discover or realize the danger, or would fail to protect himself against it." *Requarth*, 801 P.2d at 124-25.

In a case involving the employer of an independent contractor, the New Mexico Court of Appeals noted that an "employer is directly liable for its own negligence in exercising or failing to exercise control over the work of the contractor, and this duty extends to employees of those contractors when injury proximately results." *Hinger v. Parker & Parsley Petroleum Co.*, 902 P.2d 1033, 1046 (N.M. Ct. App. 1995). The defendants-companies in *Hinger* were thus "at fault for their own direct negligence in failing to supervise, failing to promulgate and implement safety policies, and failing to exercise retained control over [their employee supervising the subcontractor's workers], after [they] knew or should have known of the dangerous condition." *Id.*

In *Coca v. Arceo*, 376 P.2d 970, 974 (N.M. 1962), the New Mexico Supreme Court held that a bar could be liable for injuries a patron suffered in a fight with another patron. The court held that "[i]t is a question of fact as to whether the original disturbance was or was not within the knowledge of defendants' agent, the bartender." *Id.* at 975. And "whether, if he did have, or should have had, such knowledge, he failed to exercise the degree of care commensurate with the danger to be avoided." *Id.*[14]

[14] It noted that "other factors must be considered, such as": (1) "whether the premises were so large that the defendants' agent or agents were unable to hear or observe the events that transpired before the assault;" (2) "whether the bartender was unusually busy, or distracted during the pertinent times;" and (3) "if the action or non-action of the bartender was that of a reasonable man, depending upon the circumstances." *Coca*, 376 P.2d at 975. It concluded that "these . . . are the types of

Similarly, in *Reichert v. Atler*, 875 P.2d 379, 379-80 (N.M. 1994), a lounge patron assaulted and killed another patron on the premises. The court held the lounge "owner's duty to protect patrons extends to all foreseeable harm regardless of whether that harm results from intentional or negligent conduct" by a third party. *Id.* at 382. It thus held "that the owner's negligent failure to protect patrons from foreseeable harm may be compared to the conduct of the third party and that the owner is responsible only for its percentage of fault." *Id.*[15]

2. **Analysis**

The district court's brief, two-paragraph analysis of Ms. Adams's implied request to amend was lacking in two respects. First, it misread Ms. Adams's affidavit and failed to "make all reasonable inferences in [her] favor." *Brokers' Choice of Am., Inc.*, 861 F.3d at 1105. Second, it failed to account for all relevant available materials in determining whether Ms. Adams could state a premises liability claim.[16]

---

questions that will be material in determining whether the proper degree of care was exercised." *Id.*

[15] *See also Barth v. Coleman*, 878 P.2d 319, 322 (N.M. 1994) (holding a bar and its manager could be comparatively liable for a patron's injuries sustained in a fight on the premises because they "failed to take any action designed to control the conduct of the individuals confronting [the plaintiff] or to otherwise protect [her] from injury after repeatedly being appraised [sic] of the impending confrontation").

[16] The district court appeared to conclude that someone in Ms. Adams's circumstances—an employee of a contractor performing work for the defendant who alleges sexual harassment by the contractor's employees on the defendant's premises—could potentially state a claim for premises liability under New Mexico law. App., Vol. I at 255-59. We assume without deciding this is an accurate view of

a. *Ms. Adams's affidavit*

Ms. Adams stated in her affidavit that Plains Defendants controlled the premises on which at least some of the harassment occurred.[17] She thus sufficiently alleged that Plains Defendants "ha[d] a duty of reasonable care to protect [her] from unreasonably dangerous conditions." *Hinger*, 902 P.2d at 1042. The more difficult questions are whether she plausibly alleged Plains Defendants breached that duty and proximately caused her injury.

Ms. Adams alleged that "Mike Carruthers [sic], purchasing manager for C-3, Danny Robertson and Craig Arnault foreman of the C-3 pipeline crew based in Hobbs, New Mexico sexually harassed [her] and made [her] perform sexual acts for them in order to keep [her] job." App., Vol. I at 219. This allegation, by itself, does not establish that Plains Defendants had reason to foresee the harassment, let alone that Plains Defendants' control over the premises proximately caused it. *See Sherman*, 318 P.3d at 731; *Requarth*, 801 P.2d at 124-25.

---

state law and focus our review on the district court's conclusion that Ms. Adams had failed to present sufficient facts to state a claim.

[17] Although Plains Defendants may be right that "the allegations of [Ms. Adams's] Complaint and the attachments thereto indicate that these acts largely occurred in private residences, hotels, and off site locations," Aplee. Br. at 38, Ms. Adams also argued in her opposition to summary judgment that she "alerted numerous [Alpha Crude] personnel that she was being abused and harassed by a third party *on the jobsite they owned and controlled*," App., Vol. I at 210 (emphasis added).

But Ms. Adams also alleged she reported the harassment to representatives of Plains Defendants and "[t]hey indicated to [her] that submitting to the conduct and having to have sex with the boss was required if [she] wanted to keep [her] job." App., Vol. I at 219. As explained in *Reichert*, an "owner's duty to protect patrons extends to all foreseeable harm regardless of whether that harm results from intentional or negligent conduct" by a third party. 875 P.2d at 382. Taken as true, Ms. Adams's allegation creates "a question of fact as to whether" the harassment "was or was not within the knowledge of defendants' agent," and "whether, if [the agent] did have, or should have had, such knowledge," Plains Defendants "failed to exercise the degree of care commensurate with the danger to be avoided." *Coca*, 376 P.2d at 975.

The district court said "Adams [did] not . . . allege for which company the[] individuals [to whom she reported the harassment] worked." App., Vol. I at 259. But this overlooks Ms. Adams's allegation that "[t]he persons with [Alpha Crude]/Frontier whom I told about the harassment include a woman named Casey and several inspectors for [Alpha Crude] or Renegade/Frontier . . . named Dave, Tyler, and Blake." *Id.* at 219. As the district court acknowledged in a footnote, Ms. Adams "[did] allege that 'Casey' worked for the Plains Defendants." *Id.* at 259 n.3.

The district court discounted the allegation that "Casey" worked for Plains Defendants because "Pottridge state[d] [in his affidavit] that the only 'Casey' he knew was an assistant office administrator and not a manager." *Id.* But, as previously noted, Mr. Pottridge's affidavit is unsigned. *See Flemming*, 143 F. App'x

at 925 n.1 ("An unsigned affidavit . . . does not constitute evidence under Fed. R. Civ. P. 56(e).") (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)). Even if it were signed, we analyze the futility of a proposed amendment under the "failure to state a claim" standard, so a single self-serving affidavit from the defendant outside the four corners of the putative amended complaint does not establish futility or defeat the claim. And even if "Casey" was an office administrator rather than a manager, Ms. Adams's allegation supports a reasonable inference that "Casey" was a Plains Defendants' "agent."

The district court determined "Adams [did] not allege how the sexual harassment by her direct supervisors, also C3 employees, 'was proximately caused' by the Plains Defendants' failure to exercise control over the jobsite in a reasonable manner." App., Vol. I at 259. But the New Mexico Supreme Court has "recognized that a premises owner has an important duty to protect patrons from [foreseeable] injury caused by third parties." *Barth*, 878 P.2d at 321. Ms. Adams alleged she alerted Plains Defendants' representatives to the harassment and they told her to "suck it up." App., Vol. I at 219.

b. *Relevant materials*

As previously noted, Ms. Adams raised her new premises liability claim in her memorandum in opposition to Plains Defendants' summary judgment motion. The district court elected to treat this as an implied request to amend the complaint. But because Ms. Adams did not submit a proposed amended complaint, the district court needed to piece together from other materials whether an amended complaint would

state a claim for premises liability. The court examined Ms. Adams's affidavit but did not account for allegations already appearing in the original complaint or points made in the opposition memorandum to summary judgment.

For example, Ms. Adams alleged in her original complaint that "she and other employees contacted corporate management for Defendants to complain of sexually harassing conduct," and "[n]one of the Defendants named herein took action to investigate the complaints made by Plaintiff." *Id.* at 47. She also alleged that she "complained of the quid pro quo sexual harassment to members of management at ACC/Plains, but they, too, refused to stop the unlawful treatment." *Id.* at 51. In her opposition to summary judgment, Ms. Adams said "[t]he Plains Defendants took no steps to keep their premises safe for Ms. Adams even after they knew of the abuse." *Id.* at 211. In short, the court's consideration of the implicit request to amend was incomplete.

* * * *

Based on the shortcomings in the district court's consideration of Ms. Adams's affidavit and the court's failure to consider allegations in the original complaint and the opposition to summary judgment, we could examine the affidavit and other materials ourselves to determine whether allowing Ms. Adams to amend her complaint would be futile. *See Ohlander v. Larson*, 114 F.3d 1531, 1538 (10th Cir. 1997) (after determining district court erred, considering on appeal defendant's motion to dismiss rather than remand for reasons of efficiency and judicial economy). But we think the better course is to vacate the district court's denial of leave to

amend and remand. On remand, the district court would not need to revisit whether the premises liability claim is futile because, especially in the absence of any federal claim, it may exercise its discretion to decline supplemental jurisdiction over any potential state law claim. *See Carlsbad Tech. Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639-40 (2009); *Strain v. Regalado*, 977 F.3d 984, 997 (10th Cir. 2020); *see also* 28 U.S.C. § 1367(c)(3) (permitting a district court to decline supplemental jurisdiction over a state law claim if "the district court has dismissed all claims over which it has original jurisdiction").

IV. **CONCLUSION**

We deny Plain Defendants' motion to dismiss this appeal as untimely filed. We affirm the district court's grant of summary judgment to Plains Defendants on Ms. Adams's federal and state law claims and its denial of Ms. Adams's motion for discovery under Federal Rule of Civil Procedure 56(d). We vacate the district court's denial of Ms. Adams's implied request to amend her complaint to allege a claim for premises liability under New Mexico law. We remand for further proceedings consistent with this opinion.

No. 20-2055, *Adams v. C3 Pipeline Constr. Inc.*

EID, J., concurring in part and concurring in the judgment in part.

I join the majority on the merits. I write separately because I have a different perspective on the motion to dismiss for lack of jurisdiction due to untimeliness. While I agree that the motion should be denied because the appeal is timely, I disagree with how the majority sets out the legal framework. In *Bristol v. Fibreboard Corp.*, we held that when a district court decision leaves claims unadjudicated that only relate to unserved, nonparty defendants, the judgment is final as to the served, party defendants. 789 F.2d 846, 847 (10th Cir. 1986) (per curiam). In my view, the majority improperly downgrades *Bristol*'s general rule into a mere suggestion of finality. Maj. op. at 15 ("[U]nder *Bristol*, a district court's failure to consider unserved defendants in an order and judgment 'does not prevent' the court's decision from being final."). And while there is an exception to *Bristol*'s general rule that determines this case—namely, where the district court's order "makes plain" there are to be further proceedings regarding the unserved, nonparty defendants, *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 507 (D.C. Cir. 2018)—I disagree with how the majority converts this limited exception into a general guide through the ambiguity created by its misreading of *Bristol*. Because the majority's approach throws uncertainty into finality—an issue that calls out for certainty—I respectfully concur only in the judgment with respect to jurisdiction.

My objection to the majority's approach is that it turns *Bristol*'s general rule that a judgment such as the one here *is* final into the mere possibility that it *might be*. Where the majority sees an indefinite proposition supplemented by a few guiding principles, I

simply see a rule and its exception. The majority states: "*Bristol* said only that, even if unserved defendants remain after a district court's order resolving claims against all served defendants, this 'does not prevent' the court's decision from being final. [*Bristol*] did not hold that an order dismissing claims against all served defendants is always or even presumptively final when unserved defendants remain." Maj. op. at 18 (citation omitted); *see also id.* at 15 (stating that such a judgment "'does not prevent' the court's decision from being final"). This misreads *Bristol* by placing too much weight on the "does not prevent" phrasing and introduces unnecessary ambiguity into our analysis. Indeed, in that case, we specified exactly what question we were answering: "The issue presented is whether the order and judgment . . . *are final* in light of the fact that three of the defendants listed in the complaint are not considered in either of these documents." *Bristol*, 789 F.2d at 847 (emphasis added). We therefore framed the question as whether the judgment *was* final, not whether it *could be* final. Our analysis proceeded in two steps.

First, we reasoned that a decision is final when it covers all served, party defendants but not an unserved, nonparty defendant. *Id.* "The fact that [unserved, nonparty defendants] were not considered in the order or judgment does not prevent the decision of the district court from being final." *Id.* We observed that the "unserved defendants were never made parties to this lawsuit," so it was "not necessary for the district court to enter an order dismissing them prior to its entry of the order and judgment." *Id.* Second, we concluded that a decision is not final when it omits a served, party defendant. *Id.* at 848. "The failure of the district court to dismiss [the remaining

served, party defendant] prior to the entry of the order and judgment *does* prevent the decision from being final and appealable." *Id.* We reasoned that the "order and judgment specifically rule in favor of every served defendant with the exception of [the remaining served, party defendant]. As such, the order and judgment do not adjudicate the plaintiffs' claims against all of the defendants who are parties to this suit." *Id.* That conclusion, however, did not wash away the principle we articulated to get that far—namely, that a decision is final where unadjudicated claims relate only to unserved, nonparty defendants.

The majority misinterprets *Bristol*'s conclusion that the presence of unserved, nonparty defendants "[did] not prevent" the judgment from being final, while the presence of served defendants did. *Id.* at 847. The majority believes this language creates a limbo of finality to be interpreted through the "*substance* and *objective intent*" of the relevant district court order, including whether it contemplated further proceedings. Maj. op. at 15 (quoting *Moya v. Schollenbarger*, 465 F.3d 444, 449 (10th Cir. 2006)). In contrast, I believe this language creates a rebuttable presumption of finality that necessarily leaves thirty days for the district court to make clear that it contemplates further proceedings before the order's finality is set in stone. I see a rule and an exception. The majority sees a possibility of finality that must be determined on a case-by-case basis.

My first concern with the majority's approach is that it requires an improbable reading of *Bristol*'s "does not prevent" language. We made it abundantly clear that the only reason the judgment was not final where two of the unaddressed defendants were

unserved was that the third defendant was served. If the final defendant was also never served, "nothing would have prevented" us from exercising jurisdiction. Our phrasing with respect to the unserved defendants—"[t]he fact that Johns-Manville and Unarco were not considered in the order or judgment does not prevent the decision of the district court from being final"—directly paralleled our phrasing with respect to the served defendant—"[t]he failure of the district court to dismiss Ryder prior to the entry of the order and judgment *does* prevent the decision from being final and appealable." *Bristol*, 789 F.2d at 847–48. Although I admit that the majority's rival reading is not literally inconsistent with the words of *Bristol*, the fact that *Bristol* said nothing about how to resolve the ambiguity resulting from the majority's reading confirms that my reading is correct. *See* maj. op. at 15 n.4.

The majority says that *Bristol* "cannot be read so definitively" as I propose because we have rejected my "brightline rule" before. *Id.* at 16 n.4; *see Brown v. Fisher*, 251 F. App'x 527, 533 (10th Cir. 2007) (unpublished) (discussing *Fed. Sav. & Loan Ins. Corp. v. Tullos-Pierremont*, 894 F.2d 1469, 1473 (5th Cir. 1990)). But, putting aside the fact that *Brown v. Fisher* is nonprecedential, I do not agree with the majority's characterization of the case. For one thing, while *Brown* may have stated that it declined to adopt the Fifth Circuit's approach, it seems to have done just that. First, according to *Brown*, the Fifth Circuit's rule was that "where a judgment of dismissal is rendered as to all served defendants and only unserved, nonappearing defendants remain, the judgment is final, and therefore, appealable." *Brown*, 251 F. App'x at 532–33 (quoting *Fed. Sav. & Loan Ins. Corp.*, 894 F.2d at 1473). *Brown* endorsed the following, effectively identical

rule: "an order finally disposing of the interests of all defendants who have been served *is* appealable because the unserved defendant was never made a proper party to the action." *Id.* at 533 (emphasis added). Second, *Brown* stated that the Fifth Circuit had "rejected a 'further adjudication test' which would have meant a judgment of dismissal is only rendered final as to all served defendants if further adjudication as to the unserved defendants is unlikely." *Id.* But right after saying it "decline[d] to adopt the brightline rule," *Brown* reasoned that "the mere fact that there may be subsequent adjudication [involving the unserved party] does not prevent the judgments as to [the served parties] from being final." *Id.* As a result, the majority's argument that *Brown* forecloses my position is unpersuasive because *Brown* appears to have used the very approach it insisted that it didn't. The argument is also incorrect because my rule is not as "brightline" as the majority suggests. It has an important exception, found in *Kaplan*.

The majority's supporting citation to an Eleventh Circuit case in its discussion of *Brown* is misleading. Maj. op. at 16 n.4. In *Insinga v. LaBella*, 817 F.2d 1469 (11th Cir. 1987), the Eleventh Circuit applied exactly the rule that I maintain *Bristol* requires us to deploy here. According to the Eleventh Circuit, if a "final judgment has been entered as to all defendants who have been served with process and only unserved defendants remain, the district court's order may be considered final." *Insinga*, 817 F.2d at 1469–70. The majority emphasizes the word "may," as if to suggest *Insinga* intended the word's permissive meaning, as opposed to its mandatory meaning, maj. op. at 16 n.4, but the Eleventh Circuit clearly understood the rule exactly how I do. *Insinga*, 817 F.2d at 1470 ("[W]here an action is dismissed as to all defendants who have been served and only

unserved defendants remain, the district court's judgment may be considered a final appealable order."). Again, while the majority is technically correct that "may" has a permissive meaning in addition to a mandatory one, the context makes clear that the Eleventh Circuit meant the word in the latter sense. *Id.* at 1470 (concluding that the district court's judgment "is" final and appealable). The court engaged in no real discussion of other factors or considerations, apparently content to view *Bristol* and other "unanimous authority" on this issue as creating a *rule*. *Id.*

Overall, it is strange that the majority relies on *Brown* to refute my understanding of *Bristol*, maj. op. at 16 n.4, because *Brown* both shares my reading of *Bristol* and applies it. Indeed, *Brown* distilled *Bristol*'s holding as follows: "an order finally disposing of the interests of all defendants who have been served *is appealable* because the unserved defendant was never made a proper party to the action." *Brown*, 251 F. App'x at 532 (emphasis added). That is exactly my takeaway from *Bristol*. Not only did *Brown* use *Bristol*'s "does not prevent" language interchangeably with that kind of unambiguous rule statement, bolstering my conclusion that the majority reads far too much into that language, but it concluded that, under *Bristol*, a judgment against served, party defendants was final where the remaining defendant was never properly served. *Id.* at 533. Were the majority correct about the proper order of operations, one would expect *Brown* to engage in a follow-up inquiry informed by *Moya v. Schollenbarger* before

contenting itself with the order's finality. Instead, *Brown* straightforwardly applies *Bristol* just as I have described it.[1]

But the majority does not feel bound by the general rule in *Bristol*, a case that is directly on point. Instead, the majority converts *Bristol*'s first principle from a "must" into an indefinite "maybe" and addresses the resulting ambiguity by adopting an approach to finality from *Moya*. Maj. op. at 14. But *Moya* did not involve the situation we have here; there were no unadjudicated claims against unserved, nonparty defendants. Instead, a district court's order of dismissal without prejudice was "ambiguous" as to whether it dismissed the complaint or the entire action, and we noted that, in assessing finality, we generally ask whether a court's order evidenced an intent to "extinguish the plaintiff's cause of action" and "whether the plaintiff has been effectively excluded from federal court under the present circumstances." *Moya*, 465 F.3d at 450 (citations and alterations omitted). But nothing in the opinion suggests it modified *Bristol*'s general rule governing unadjudicated claims against unserved, nonparty defendants. *Moya* did not even cite to *Bristol*. It is unlikely, then, that the case overruled or modified *Bristol* to apply a general intent-based inquiry to all questions of finality.

The majority next discusses *Kaplan*. Maj. op. at 14–15. I agree with the majority's reliance on *Kaplan* but disagree with how it connects that case to *Bristol*. Properly understood, *Bristol* stands for the rule that we infer a district court's judgment is

[1] *Brown* does cite *Moya*, but only in a separate discussion, to which *Moya* is directly on point, about whether a dismissal without prejudice was final. *Brown*, 251 F. App'x at 531–32.

final if it disposes of all claims against served parties and does not address claims against unserved parties. That inference or presumption encourages certainty with respect to the timing of finality. But this *Bristol* inference has a practical exception, encapsulated in *Kaplan*, where it is plain that a district court, despite concluding the proceedings with respect to all served defendants, is not finished with the case. *See Bristol*, 789 F.2d at 847 (unserved defendants "not considered" in the operative trial court documents); *see also Kaplan*, 896 F.3d at 507. As a practical matter, a district court may demonstrate that it contemplates further proceedings at any time before the thirty-day deadline to appeal the otherwise presumptively final judgment elapses. In that sense, *Bristol* creates a presumption that is rebuttable for a limited time. Accordingly, I view *Kaplan* as an exception to the rule in *Bristol*, whereas the majority seems to view *Kaplan* as relevant to the inquiry that *Bristol* requires by way of *Moya*. Maj. op. at 14–15.

Although these two approaches may seem similar, and indeed will often get to the same place in the same manner, as in this case, there is an important difference between them. Consider a variation of this case where the only signal that the district court contemplated further proceedings is a show cause order referring to serving the remaining defendants. What if, instead of being issued the same day as the potentially final summary judgment disposing of the served defendants, that order came the next day, or a week later, or three weeks later? As the majority describes the analysis, the initial summary judgment is not necessarily final under *Bristol* and courts should look at "the district court order's '*substance* and *objective intent*'" to decide whether it actually is final. *Id.* at 15 (quoting *Moya*, 465 F.3d at 449). The problem is that this rule focuses

only on the order being appealed from, and the order in this example says nothing about the remaining defendants. Moreover, it is not so close in time with the show cause order as to allow them to be viewed together, as the majority does in this case. *Id.* at 17 n.6. In contrast, I would view the judgment in such a case as presumptively final because it meets the *Bristol* criteria, allowing thirty days for the district court to contemplate further proceedings so that the *Kaplan* exception applies.

Turning briefly to the majority's analysis of finality, I fully agree with the majority's conclusion that the holding in *Kaplan* should control this case and will add only two points. First, I think another clear sign that further proceedings were contemplated was that, upon granting partial summary judgment, the district court ordered the Plains Defendants "dismissed *from this lawsuit*." App'x Vol. I at 265 (emphasis added). This suggested that the lawsuit would continue in some form. The district court reinforced this suggestion that same day by issuing the order to show cause about serving C3. In that order, the district court discussed the potential dismissal of "this action," making it clear that the case was not yet over. *Id.* at 263.

Second, I note that if Plains Defendants are correct that the judgment was final on May 23, 2019, Adams could never have appealed the adverse grant of partial summary judgment while still proceeding in the district court against C3 pursuant to the show cause order. Without a Rule 54(b) determination, we would have dismissed such an appeal for lack of jurisdiction because of the pending district court proceedings. That the outcome sought by Plains Defendants would make it effectively impossible for Adams to appeal a judgment in their favor confirms that we have jurisdiction now, with all

proceedings complete, but that we lacked it in 2019, when Adams was prosecuting her default action against C3.

The greatest difference between my analysis and the majority's, although the substantive questions we ask may be the same, is that I think we are applying an exception to a rule, while the majority thinks we are illustrating a standard. Because of this difference, I concur only in its judgment regarding jurisdiction and timeliness, and join the remainder of its opinion.