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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **DENNIS O'BRIEN,**

3 Plaintiff-Appellee,

4 v.

NO. 34,287

5 **DENNIS W. MONTOYA,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

8 **Raymond Z. Ortiz, District Judge**

9 O'Friel and Levy, P.C.

10 Daniel J. O'Friel

11 Pierre Levy

12 Aimee Bevan

13 Santa Fe, NM

14 for Appellee

15 Santiago Juarez Attorney at Law

16 Santiago E. Juarez

17 Albuquerque, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **KENNEDY, Judge.**

1 {1} Numerous procedural inadequacies in a federal case's filing and service of
2 process have left Plaintiff, Dennis O'Brien (O'Brien) without decisive evidence
3 regarding the accrual of a claim for statute of limitations purposes. O'Brien contends
4 that the filing of a complaint in federal court gave rise to his claim for malicious abuse
5 of process. Six years after that original complaint was filed, O'Brien brought suit
6 against Defendant, Dennis Montoya (Montoya) in state district court, asserting
7 malicious abuse of process, and seeking application of the discovery rule to toll the
8 applicable four-year statute of limitations. Montoya objected, filing a motion for
9 summary judgment in which he asserted that the cause of action accrued
10 approximately six years earlier, and insisted that the statute of limitations had run.
11 Through summary judgment proceedings, the district court determined that O'Brien's
12 cause of action did not accrue until one year before he filed suit. The district court's
13 determination on this issue was based on Montoya's misspelling of O'Brien's name
14 in the complaint, mistakenly naming the City of Santa Fe rather than Santa Fe County
15 as a defendant in the case, and various serious irregularities in the service of process.
16 The district court proceeded to grant summary judgment for O'Brien, entering a
17 judgment totaling over \$500,000 in damages. Montoya appealed.

18 {2} Conflicting evidence exists regarding O'Brien's actual knowledge of the claim
19 and when he acquired it, and the application of the discovery rule therefore presents
20 a question of disputed material fact to be determined by a fact-finder. Because there

1 are disputed questions of material fact concerning when O'Brien became aware of the
2 lawsuit, whether he was actually served, and if his suit is barred by the statute of
3 limitations, we reverse the district court's order denying Montoya's second motion for
4 summary judgment based on the statute of limitations, and granting O'Brien's motion
5 for summary judgment on his malicious abuse of process claim. We remand for
6 further proceedings consistent with this Opinion.

7 **I. BACKGROUND**

8 {3} Walter Mitchell was involved in an altercation, during which he wielded a
9 sword at O'Brien. At the time, O'Brien was a sergeant with the Santa Fe County
10 Sheriff's Department. In response to Mitchell's actions, O'Brien fired his weapon
11 three times, hitting Mitchell. Mitchell was indicted for aggravated assault against a
12 peace officer and aggravated assault with a deadly weapon and found "guilty but
13 mentally ill" with regard to both offenses in 2004.

14 {4} On November 2, 2005, Montoya, representing Mitchell, filed a civil rights
15 action in the United States District Court for the District of New Mexico (hereinafter
16 *Mitchell v. City of Santa Fe*), listing O'Brien as a defendant. The complaint misspelled
17 O'Brien's name and incorrectly listed the City of Santa Fe as a defendant, rather than
18 Santa Fe County. Montoya filed a return of service, alleging that personal service of
19 the summons and complaint were made on "the defendant" at the Santa Fe County
20 Sheriff's Office on November 18, 2005. *Which* of the two defendants, or both, were

1 served was not specified in the document. It is not disputed that O'Brien was aware
2 of the existence of this lawsuit, as he had read about it in a newspaper article.
3 However, he took no further action in the matter.

4 {5} In April 2006, Montoya filed an amended complaint in *Mitchell v. City of Santa*
5 *Fe* that corrected the spelling of O'Brien's name, correctly identified the Santa Fe
6 Sheriff's Department as O'Brien's employer, and substituted the Board of County
7 Commissioners of Santa Fe for the City of Santa Fe. Montoya then submitted a notice
8 of filing through the federal court's e-filing system, in which he certified that a copy
9 of the amended complaint would be served on Santa Fe County, and that O'Brien was
10 in default. It is undisputed that Montoya never served Santa Fe County or O'Brien
11 with a copy of this amended complaint.

12 {6} Montoya applied for default judgment against O'Brien that the federal district
13 court granted on May 9, 2006. In December 2007, Montoya scheduled a trial in
14 federal district court on damages that resulted in a jury award to Mitchell of
15 \$2,500,000 in compensatory damages and \$500,000 in punitive damages against
16 O'Brien. Neither O'Brien nor Santa Fe County appeared at the trial. Montoya told the
17 Court that notice of the hearing had gone out via the e-filing system to all parties who
18 had entered appearances. Approximately two weeks after the damages trial concluded,
19 with a large judgment for Mitchell, Montoya dismissed Santa Fe County from

1 *Mitchell v. City of Santa Fe*, leaving O’Brien as the sole remaining defendant. On July
2 29, 2009, Montoya filed a *lis pendens* against O’Brien’s property.

3 {7} On February 22, 2010, an Assistant United States Attorney informed O’Brien
4 of the default judgment entered against him in *Mitchell v. City of Santa Fe*. Santa Fe
5 County, as well as counsel for O’Brien, brought suit in federal court to set aside the
6 default judgment (hereinafter *O’Brien v. Mitchell*).¹ *O’Brien v. Mitchell* ended when
7 the federal court entered an order vacating *ab initio* the final judgment in *Mitchell v.*
8 *City of Santa Fe* and dissolving the *lis pendens*. That order was the result of the
9 agreement and stipulation of the parties, and occurred prior to the scheduled jury trial
10 on the merits of *O’Brien v. Mitchell*.

11 {8} On December 22, 2011, O’Brien filed this action (*O’Brien v. Montoya*),
12 alleging Montoya engaged in malicious abuse of process when he filed the complaint
13 in *Mitchell v. City of Santa Fe*. Montoya filed a motion to dismiss based on collateral
14 estoppel and res judicata. That motion was denied. Montoya then filed two motions
15 for summary judgment. We do not consider the first motion that requested partial
16 summary judgment on any actions arising from the *lis pendens*. The second motion
17 requested summary judgment on all claims arising from any act that occurred prior to
18 December 22, 2007, based on the theory that such claims would be barred by the

19 ¹By this time, Mitchell had died from causes unrelated to this matter. Thus,
20 O’Brien brought suit against Mitchell’s estate.

1 statute of limitations. O'Brien also filed a motion for summary judgment on his
2 malicious abuse of process claim. Following briefing by the parties and a hearing on
3 the motions for summary judgment, the district court granted O'Brien's motion for
4 summary judgment and denied both of Montoya's motions for summary judgment.
5 Montoya now appeals the district court's order. We present additional facts as
6 necessary to our discussion of the issues below.

7 **II. DISCUSSION**

8 {9} The district court denied Montoya's motion for summary judgment based on
9 the statute of limitations barring O'Brien's claim, reasoning that no genuine issues of
10 material fact existed as to O'Brien first learning of the default judgment against him
11 on February 22, 2010, or Montoya's fraudulent concealment of the federal lawsuit
12 against O'Brien. Concluding that the limitation period began when O'Brien first
13 learned of the default judgment against him on February 22, 2010, enabled the district
14 court to consider the merits of O'Brien's motion for summary judgment on his
15 malicious abuse of process claim. Thus, in order to determine whether the district
16 court's granting of O'Brien's motion was proper, we first address Montoya's
17 contention that O'Brien's suit was barred by the statute of limitations.

18 {10} "Summary judgment is appropriate where there are no genuine issues of
19 material fact and the movant is entitled to judgment as a matter of law." *Self v. United*
20 *Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. On appeal, we

1 view the facts in the light most favorable to the non-moving party, and draw all
2 reasonable inferences in support of a trial on the merits. *See Romero v. Philip Morris*
3 *Inc.*, 2010-NMSC-035, ¶¶ 7-8, 10, 148 N.M. 713, 242 P.3d 280 (defining an inference
4 as “a logical deduction from facts proved” rather than guess work, conjecture, or
5 supposition (internal quotation marks and citation omitted)). “Our review is conducted
6 in light of our traditional disfavor of summary judgment and our preference for trials
7 on the merits[,]” which is founded on the principle that summary judgment is “a
8 drastic remedy to be used with great caution.” *Madrid v. Brinker Rest. Corp.*, 2016-
9 NMSC-003, ¶ 16, 363 P.3d 1197 (internal quotation marks and citation omitted);
10 *Romero*, 2010-NMSC-035, ¶ 9 (“Permitting trial courts a license to quantify or
11 analyze the evidence . . . would adversely impact our jury system and infringe on the
12 jury’s function as the trier of fact and the true arbiter of the credibility of witnesses.”
13 (internal quotation marks and citation omitted)).

14 {11} Montoya contends that the district court erred in denying his motion. According
15 to Montoya, O’Brien’s malicious abuse of process claim, filed six years after
16 Mitchell’s initial claim against O’Brien, was filed outside the four-year statute of
17 limitations and therefore untimely. In response, O’Brien relies on the “discovery rule,”
18 asserting that he did not learn of the default judgment against him until February 22,
19 2010, and that his suit filed in December 2011 was therefore timely. *See* NMSA 1978,
20 § 37-1-7 (1880).

1 {12} The parties agree that the applicable statute of limitations is four years. *See*
2 NMSA 1978, § 37-1-4 (1880) (applying to actions brought for relief upon the ground
3 of fraud and all other actions not otherwise provided for). Section 37-1-7 creates a
4 discovery rule, which provides that a cause of action does not accrue for the purpose
5 of calculating the statute of limitations period until the plaintiff discovers, or should
6 have discovered, the facts that underlie his or her claim. *Butler v. Deutsche Morgan*
7 *Grenfell, Inc.*, 2006-NMCA-084, ¶ 26, 140 N.M. 111, 140 P.3d 532. Sometimes
8 termed “inquiry notice,” the discovery rule’s standard requires “knowledge of facts,
9 conditions, or circumstances which would cause a reasonable person to make an
10 inquiry leading to the discovery of the concealed cause of action.” *Yurcic v. City of*
11 *Gallup*, 2013-NMCA-039, ¶ 9, 298 P.3d 500 (internal quotation marks and citation
12 omitted). “The key consideration under the discovery rule is the factual, not the legal,
13 basis for the cause of action.” *Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073, ¶
14 8, 306 P.3d 524 (internal quotation marks and citation omitted). In other words, the
15 action accrues when the plaintiff knew or should have known the relevant facts,
16 regardless of whether he knew that those facts were enough to establish a legal cause
17 of action. *See id.* The discovery rule carries an affirmative inquiry obligation, which
18 requires a plaintiff to exercise “reasonable diligence” in discovering a claim. *Williams*
19 *v. Stewart*, 2005-NMCA-061, ¶ 14, 137 N.M. 420, 112 P.3d 281 (internal quotation

1 marks and citation omitted). This “reasonable diligence” standard is measured
2 objectively. *Id.*

3 {13} Our courts have generally characterized the application of the discovery rule as
4 a jury question, *Yurcic*, 2013-NMCA-039, ¶ 10, and whether a claim has been timely
5 filed or whether good cause exists for delay in filing are questions of fact that become
6 issues of law only when the relevant facts are undisputed. *Id.* ¶ 9. “[W]here there are
7 disputed facts, it is generally the province of a jury to determine the date on which a
8 plaintiff became aware or should have become aware of the facts underlying his or her
9 claim.” *Butler*, 2006-NMCA-084, ¶ 27; *see Medina v. Fuller*, 1999-NMCA-011, ¶ 22,
10 126 N.M. 460, 971 P.2d 851 (stating the general rule that disputed questions of
11 material fact regarding whether a plaintiff is barred by the statute of limitations are to
12 be decided by a jury). Thus, whether O’Brien was put on inquiry notice prior to
13 February 22, 2010, is a question of fact that the district court could only resolve
14 through summary judgment if the facts associated therewith were undisputed.

15 **A. Inquiry Notice Through Newspaper Article**

16 {14} Montoya insists that the undisputed facts presented to the district court
17 demonstrated that O’Brien knew about the initial *Mitchell v. City of Santa Fe* action
18 in 2005. Montoya points to an article in the *Albuquerque Journal* that discussed the
19 shooting between of Mitchell by O’Brien, explained that O’Brien worked for the
20 Santa Fe County Sheriff’s Department, and explained that the *Mitchell v. City of Santa*

1 *Fe* suit incorrectly named the City of Santa Fe rather than the Santa Fe County
2 Sheriff's Department. The article also provided details of the shooting, describes an
3 account of the shooting as given by the complaint, and correctly identified O'Brien.
4 There is no dispute that O'Brien read the article the day it was published; O'Brien
5 admits to having done so. The article appeared in the newspaper on November 7,
6 2005, five days after Montoya filed *Mitchell v. City of Santa Fe*. The newspaper
7 article's explanation of the factual basis for the complaint in *Mitchell v. City of Santa*
8 *Fe* likely ran contrary to O'Brien's view of those facts. If the factual discrepancies
9 between the actual events, and the complaint's assertions were as drastic as O'Brien
10 now claims on appeal, they may have been reasonably adequate to trigger further
11 inquiry into the bases and grounds for such assertions, as well as the implications
12 thereof. It seems that irrespective of service of process, O'Brien could have known he
13 was involved in a lawsuit, what the claim was, and that there was a mistake in naming
14 a party involved in the suit.

15 {15} Once a defendant makes a prima facie showing that a claim is barred by the
16 statute of limitations, "a plaintiff attempting to invoke the discovery rule has the
17 burden of 'demonstrating that if he or she had diligently investigated the problem he
18 or she would have been unable to discover' the facts underlying the claim." *Butler*,
19 2006-NMCA-084, ¶ 28 (quoting *Martinez v. Showa Denko, K.K.*, 1998-NMCA-111,
20 ¶ 22, 125 N.M. 615, 964 P.2d 176) (alterations omitted). Montoya proffered evidence

1 that the complaint in *Mitchell v. City of Santa Fe* was filed on November 2, 2005. On
2 December 22, 2011, O'Brien filed his malicious abuse of process claim, *O'Brien v.*
3 *Montoya*, which was based on Montoya's filing of the complaint in *Mitchell v. City*
4 *of Santa Fe*. Based on the November 2005 date of the complaint, the date of the
5 newspaper article published five days later, O'Brien's acknowledgment that he read
6 the article, and O'Brien's complaint filed in December 2011, Montoya met his burden
7 of making a prima facie showing that O'Brien's claim was outside the four years
8 allowed by Section 37-1-4.

9 {16} To prevail, then, it was incumbent on O'Brien to demonstrate that, had he
10 diligently investigated his involvement in the *Mitchell v. City of Santa Fe* suit after
11 reading the newspaper article, he would have been unable to ascertain whether he was
12 listed in the lawsuit or whether the facts stated in the complaint were groundless.
13 O'Brien has failed to meet his burden. The two parties' assertions on appeal as to the
14 accrual date of O'Brien's cause of action are not mutually exclusive. While Montoya
15 credibly asserts O'Brien had knowledge of the *lawsuit's existence*, O'Brien asserts
16 that he first discovered the *default judgment* against him in 2010. However, O'Brien's
17 complaint alleges that it is the *complaint in Mitchell v. City of Santa Fe* that gives rise
18 to his malicious abuse of prosecution claim and not the outcome of those proceedings.
19 Therefore it is the lawsuit's existence, rather than later proceedings that are relevant
20 to our statute of limitations considerations here.

1 {17} O'Brien was certainly aware of the circumstances of the shooting. We conclude
2 that this evidence regarding the additional knowledge that *Mitchell v. City of Santa Fe*
3 had been filed, taken against O'Brien's asserted lack of knowledge regarding his
4 involvement in that case, leaves open a question of fact as to whether O'Brien had
5 knowledge sufficient to constitute inquiry notice for purposes of the discovery rule.
6 *Butler*, 2006-NMCA-084, ¶ 27 (“[W]here there are disputed facts, it is generally the
7 province of a jury to determine the date on which a plaintiff became aware or should
8 have become aware of the facts underlying his or her claim.”). It would therefore be
9 improper for the district court to have granted summary judgment on the basis of
10 knowledge based on the newspaper article alone.

11 **B. Inquiry Notice Through Service of Process**

12 {18} Looking to the other means of discovery—service of process—we note that the
13 facts provided by the parties involve an incredible amount of uncertainty and
14 remarkable lack of clarity regarding service of process in *Mitchell v. City of Santa Fe*.
15 In addition, the parties' manner of pleading below contains such selective disclosure
16 that it is difficult to parse any undisputed facts from the record, much less those that
17 are solidly at issue in this appeal. The summons accompanying the first complaint in
18 that case lists the City of Santa Fe, *et al.*, as the defendants in the case. As such,
19 O'Brien's name did not appear in the caption on the summons as a defendant. The
20 Summons stated that it was to be served on O'Brien and the Santa Fe County Sheriff's

1 Department. However, O'Brien's name was spelled incorrectly, and the Santa Fe
2 Police Department, while initially listed, was subsequently deleted and "Santa Fe
3 County Sheriff's Dept." was handwritten in its place.² The Summons was dated
4 November 15, 2005. On November 18, 2005, Montoya filed a return of service that
5 stated that it had been personally served "upon the defendant" at the Santa Fe County
6 Sheriff's Office, without any clarification of which defendant was served. The return
7 of service bore the signature of a Sergeant Johnson, whose deposition testimony
8 revealed that he had no independent memory or recollection regarding the service of
9 process in the case, including whether or not he served the documents on O'Brien.
10 The Santa Fe County Sheriff's internal records of service lists the plaintiff in this case
11 as Paula Montoya, lists the defendant as the City of Santa Fe, lists the attorney as pro
12 se, and states that the individual served was Dennis O'Brien (spelled correctly this
13 time). It is impossible to tell if Montoya legally served the first complaint.

14 {19} The essence of the summary judgment issues in this case are this: while
15 Montoya asserts something happened to trigger the statute of limitations in 2005,
16 O'Brien asserts that it did not. Both point to evidence that they assert proves a true and
17 undisputed set of facts. By virtue of their disagreement, however, a dispute exists. *See*
18 *O'Brien v. Mitchell*, 883 F. Supp. 2d 1055, 1064 n.9 (D.N.M. 2012). This dispute

19 ²It appears that this change was made before the summons was served.

1 concerns facts material to a decision of whether the discovery rule applies in 2005 or
2 2011. It is disturbingly likely that O'Brien was not served with Mitchell's suit. It is
3 equally conceivable, however, that he received the summons, but disregarded it
4 because it did not explicitly list him as a defendant. The latter possibility is troubling
5 in light of other evidence indicating his awareness of the suit through the newspaper
6 article, giving rise to the inference that O'Brien knew that he was involved in
7 Mitchell's lawsuit. Given these factually disparate, yet equally possible scenarios, a
8 dispute exists as to whether O'Brien knew or should have known facts sufficient to
9 place him on inquiry notice.

10 {20} Neither party has affirmatively demonstrated that inquiry notice existed in this
11 case. The facts do not clearly demonstrate whether O'Brien had enough knowledge
12 of the complaint and facts underlying the complaint to be placed on inquiry notice
13 sufficient to trigger the discovery rule in 2005. It is unclear from the evidence
14 presented during summary judgment whether O'Brien should be held to have actually
15 had knowledge or should have had knowledge of the suit against Santa Fe County.
16 Due to the conflicting testimony and evidence regarding the date on which the action
17 accrued, the issue of whether the discovery rule applies in this case is a question of
18 fact to be determined by the jury. *See Butler*, 2006-NMCA-084, ¶ 27. The district
19 court erred in making a factual determination on an issue that was disputed and
20 undeniably based on facts material to the case that were unproven. As such, we

1 reverse the district court’s order granting O’Brien’s motion for summary judgment
2 and denying Montoya’s motion for summary judgment.

3 **B. Equitable Tolling**

4 {21} O’Brien asserts that, even if his complaint was untimely, his claim should be
5 allowed to proceed either because the statute of limitations period was tolled by
6 Montoya’s fraudulent concealment of the claims against O’Brien, or because Montoya
7 should be equitably estopped from asserting the statute of limitations. O’Brien
8 suggests that, by not naming O’Brien in the summons, by failing to serve the
9 complaint and summons on the defendants, and by falsely representing that the
10 complaints and summons had been served, Montoya fraudulently concealed the claims
11 in *Mitchell v. City of Santa Fe*.

12 {22} As O’Brien acknowledges in his brief, however, we need only address these
13 arguments if we conclude the district court erred in finding O’Brien’s complaint was
14 timely. We make no such conclusion here. Instead, we hold that there exist disputed
15 issues of material fact as to the date on which O’Brien’s claims accrued. We draw no
16 conclusion on the merits of Montoya’s assertion that O’Brien’s claims are untimely.
17 Thus, we do not address O’Brien’s equitable estoppel or fraudulent concealment
18 arguments. In fact, to do so would be improper, as it would require a factual
19 determination regarding when O’Brien discovered the existence of *Mitchell v. City of*
20 *Santa Fe*. See *Cont’l Potash, Inc. v. Freeport-McMoran, Inc.*, 1993-NMSC-039, ¶ 30,

1 115 N.M. 690, 858 P.2d 66 (acknowledging that an element of fraudulent concealment
2 is the “*successful* concealment [of the cause of action] from the injured party”
3 (emphasis added), *holding limited on other grounds by Davis v. Devon Energy Corp.*,
4 2009-NMSC-048, ¶¶ 34-35, 147 N.M. 157, 218 P.3d 75). Making that factual
5 determination on appeal, in light of the disputes evident in the record, would be
6 improper. *See Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 825 P.2d
7 1241 (acknowledging that summary judgment is proper only where the facts are not
8 disputed and the legal effects of the facts is all that remains to be determined). We
9 reverse both the district court’s order denying Montoya’s motion for summary
10 judgment based on the theory that Plaintiff’s claims were barred by the statute of
11 limitations and also granting O’Brien’s motion for summary judgment on his
12 malicious abuse of process claim. We remand for further proceedings consistent with
13 this Opinion.

14 {23} **IT IS SO ORDERED.**

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RODERICK T. KENNEDY, Judge

17 **WE CONCUR:**

18

19 **M. MONICA ZAMORA, Judge**

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J. MILES HANISEE, Judge