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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VINCENT S. MORENO; JEANIE R. MORENO,

Plaintiffs - Appellants,

v.

EDWARD DOYLE ZIMMERMAN, M.D.,

Defendant - Appellee.

No. 21-8066
(D.C. No. 2:20-CV-00086-NDF)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **MATHESON**, and **ROSSMAN**, Circuit Judges.

Plaintiffs-Appellants Vincent and Jeanie Moreno ("Mr. Moreno" and "Mrs. Moreno," respectively, and collectively "the Morenos") appeal from the district court's denial of their motion to alter or amend the judgment or for a new trial under Federal Rules of Civil Procedure 59(e) and 59(a), as well as the district court's entry of judgment against them in their medical negligence suit against Defendant-Appellee Dr. Edward Zimmerman ("Dr. Zimmerman"). The district court entered judgment against the Morenos after a jury found that Dr. Zimmerman was a public

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

employee of a Wyoming State governmental entity—a state hospital—acting within the scope of his duties at the time he treated Mr. Moreno, and so the Morenos' action was subject to the Wyoming Governmental Claims Act ("WGCA") and its notice-of-claim requirement. Under the WGCA' s notice-of-claim requirement, a claimant must provide a written notice of claim to the subject governmental entity within a two-year limitations period, as set forth in Wyoming Statute § 1-39-113(a) ("Wyo. Stat. § 1-39-113(a)"). Because the Morenos had not complied with this requirement in pursuing their action against Dr. Zimmerman, the district court entered judgment for Dr. Zimmerman and denied the Morenos' motion to alter or amend that judgment or for a new trial.

The Morenos now appeal, arguing that the plain language of Wyo. Stat. § 1-39-113(a) shows that the notice-of-claim requirement applies *only* to suits brought "against a governmental entity." Because the statute makes no mention of claims brought solely against a public employee, such as their action against only Dr. Zimmerman, they contend that the WGCA's notice-of-claim requirement does not apply, and the district court thus erred. Relatedly, the Morenos ask this court to certify to the Wyoming Supreme Court the question of whether Wyo. Stat. § 1-39-113(a) applies to actions brought solely against a public employee and not against the governmental entity employer.

We conclude that the Wyoming Supreme Court has spoken with sufficient clarity regarding the coverage of the WGCA's notice-of-claim requirement and demonstrated that it applies even when the claim is brought solely against a public

employee. Even if there were some ambiguity regarding this matter, we are comfortable predicting—based on the Wyoming Supreme Court's existing notice-of-claim precedent—that it would determine that the notice-of-claim requirement applies to suits brought solely against a public employee.

Therefore, exercising jurisdiction under 28 U.S.C. § 1291, we reject the Morenos' arguments and **affirm** the district court's entry of judgment in favor of Dr. Zimmerman and its denial of the Morenos' motion to alter or amend the judgment or for a new trial. We also **deny** the Morenos' motion for certification to the Wyoming Supreme Court.

I

A

In enacting the WGCA in 1979, the Wyoming state legislature "abrogated the common law of sovereign immunity in Wyoming, and established sovereign immunity as a legislative construct." *Campbell Cnty. Mem'l Hosp. v. Pfeifle*, 317 P.3d 573, 578 (Wyo. 2014). Under the WGCA, governmental entities and their public employees acting within the scope of their duties are generally immune from liability for the torts they commit. *See* Wyo. Stat. § 1-39-104(a) ("A governmental entity and its public employees while acting within the scope of duties are granted immunity from liability for any tort except as provided by W.S. 1-39-105 through 1-39-112."). However, certain enumerated activities are excepted from the general immunity rule. *See* Wyo. Stat. §§ 1-39-105 to -112. In particular, the WGCA provides that "[a] governmental entity is liable for damages resulting from bodily

injury, wrongful death or property damage caused by the medical malpractice of health care providers who are employees of the governmental entity . . . while acting within the scope of their duties." Wyo. Stat. § 1-39-110(a); *see Stroth v. N. Lincoln Cnty. Hosp. Dist.*, 327 P.3d 121, 125 (Wyo. 2014).

If such a tort claim is alleged against a public employee who was acting within the scope of his or her duties, the WGCA then requires that the governmental entity provide a defense to the public employee at its expense, and further requires the governmental entity to assume and pay any judgment or settlement rendered. *See* Wyo. Stat. § 1-39-104(b)-(d).

However, there are certain procedural requirements to bringing suit against a governmental entity or public employee under the WGCA. Among those procedural requirements is the notice-of-claim requirement specified in Wyo. Stat. § 1-39-113(a), which provides the following:

> (a) No action shall be brought under this act against a governmental entity unless the claim upon which the action is based is presented to the entity as an itemized statement in writing within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:
>
> > (i) Not reasonably discoverable within a two (2) year period; or
> >
> > (ii) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

As characterized by the Wyoming Supreme Court, the notice-of-claim requirement of Wyo. Stat. § 1-39-113(a) is a "condition precedent" to bringing suit under the WGCA. *Harmon v. Star Valley Med. Ctr.*, 331 P.3d 1174, 1188 (Wyo. 2014). Accordingly, failure to file a claim in compliance with the WGCA's notice-of-claim requirement typically will result in dismissal. *See id.*; *see also Duran v. Bd. of Cnty. Comm'rs of Sweetwater Cnty.*, 787 P.2d 971, 974 (Wyo. 1990) ("[F]ailure to timely file a claim, as required by W.S. 1-39-113(a) . . . is a bar to the filing of a lawsuit against a governmental entity."); *Stroth*, 327 P.3d at 125 ("Wyoming precedent is unequivocal in holding that failure to file a claim with the governmental entity within the two-year period provided in § 1-39-113(a) is an absolute bar to suit." (quoting *Rawlinson v. Cheyenne Bd. of Pub. Utils.*, 17 P.3d 13, 15 (Wyo. 2001))).

B

On May 12, 2018, Mr. and Mrs. Moreno were driving through Wyoming, on their way from Wisconsin to California, when Mr. Moreno became ill. They drove to the Memorial Hospital of Carbon County ("MHCC"), a Wyoming state hospital, where Mr. Moreno was admitted to the Emergency Department and treated by Dr. Zimmerman. Dr. Zimmerman then released Mr. Moreno with prescriptions for nausea and vertigo, and the Morenos continued their drive to California. Four days later, Mr. Moreno again fell ill. After he was admitted to a hospital in California, it was determined that Mr. Moreno had suffered two strokes.

On May 21, 2020, the Morenos brought a medical negligence action against Dr. Zimmerman in the District of Wyoming. The Morenos alleged that Dr.

Zimmerman failed to diagnose Mr. Moreno's impending stroke or administer appropriate preventive measures and, as a result, Mr. Moreno suffered permanent injury. Importantly, the Morenos did not present a notice of claim to the MHCC or any other governmental entity pursuant to Wyo. Stat. § 1-39-113(a) prior to filing suit.

In his answer, Dr. Zimmerman alleged as an affirmative defense that he was a public employee of MHCC acting within the scope of his duties at the time that he cared for Mr. Moreno, and thus the Morenos' claims were barred because they had failed to present a notice of claim within the two-year statutory period prescribed by Wyo. Stat. § 1-39-113(a).

However, the Morenos claimed that Dr. Zimmerman was an independent contractor, not a hospital employee, at the time that he cared for Mr. Moreno. More specifically, in their amended complaint, the Morenos alleged that Dr. Zimmerman was not an employee of MHCC or Carbon County when he treated Mr. Moreno and that a notice of claim pursuant to the WGCA was therefore not necessary because they had not sued a governmental entity. In short, the Morenos reasoned that the WGCA was not applicable to their action. Nonetheless, they served notices of claim on the MHCC Board of Trustees and Carbon County Clerk on August 24, 2020, and alleged that they were in compliance with Wyo. Stat. § 1-39-113(a). However, this notice of claim came more than two years after Dr. Zimmerman examined Mr. Moreno.

Dr. Zimmerman then moved for summary judgment on the ground that he was a public employee acting within the scope of his duties when he treated Mr. Moreno, and thus the Morenos' suit was barred because they had failed to comply with the notice-of-claim requirement of Wyo. Stat. § 1-39-113(a). The district court denied the motion, determining that there existed disputes of material fact concerning whether Dr. Zimmerman was an employee of MHCC.

The district court then bifurcated the jury trial into two separate phases. The first phase of the trial would address whether Dr. Zimmerman was a public employee of MHCC when he saw Mr. Moreno and whether the Morenos had timely filed a notice of claim. The proceedings would advance to a second phase, involving a trial on the merits if one of two scenarios materialized: first, if the jury determined that Dr. Zimmerman was not a public employee—in which case the WGCA and its notice requirement would not apply; *or* second, if the jury found that Dr. Zimmerman was a public employee but nevertheless determined that the Morenos' notice of claim was timely.

The first phase of the trial lasted for four days.[1] The jury found that Dr. Zimmerman was an employee of MHCC on May 12, 2018, the day he examined Mr.

[1] Shortly before trial was scheduled to begin, the Morenos requested that the district court certify several questions of state law to the Wyoming Supreme Court, including the question of whether the notice-of-claim requirement of Wyo. Stat. § 1-39-113(a) applies when an action is brought solely against a public employee and not against a governmental entity. The district court summarily denied the motion to certify, stating that "the issue under Wyo. Stat. § 1-39-113(a) . . . is [not] so complex or unique as to require certification to the Wyoming Supreme

Moreno, that his employment relationship with MHCC was reasonably discoverable by the Morenos on or before May 12, 2020 (i.e., the two-year period from the date Dr. Zimmerman examined Mr. Moreno), and that the Morenos failed to exercise reasonable diligence to discover the relationship by May 12, 2020. The Morenos' action against Dr. Zimmerman was thus subject to the WGCA. Because they had not provided a notice of claim within the two-year limitations period, it necessarily followed that the Morenos' action was barred under the WGCA. Accordingly, the district court entered judgment in favor of Dr. Zimmerman.

The Morenos subsequently filed a motion to alter or amend the judgment or for a new trial under Federal Rules of Civil Procedure 59(e) and 59(a), respectively, arguing that the WGCA's notice-of-claim requirement did not apply because their complaint was filed solely against Dr. Zimmerman, not a governmental entity, and the plain language of Wyo. Stat. § 1-39-113(a) shows that its requirements only apply to suits brought against governmental entities.

The district court denied the Morenos' motion. *See Moreno v. Zimmerman*, No. 20-CV-086-F, 2021 WL 4130532, at *1 (D. Wyo. Aug. 11, 2021). As the district court explained, "[t]he Wyoming Supreme Court has clearly said, '[b]efore a suit can be brought against a governmental entity **or public employee** . . . certain procedures must be adhered to,'" including the notice-of-claim requirement of Wyo. Stat. § 1-39-113(a). *Id.* at *2 (second alteration in original) (quoting *Romero v. Schulze*, 974 P.2d

Court." Aplts.' App. at 809–10 (Dist. Ct. Order Den. Req. for Certification, filed June 14, 2021).

959, 962 (Wyo. 1999)). Therefore, the district court determined that the notice-of-claim requirement applied to the Morenos' action and thus denied their motion to alter or amend the judgment or for a new trial.[2] *See id.* at *3.

The Morenos timely appealed from the district court's entry of judgment dismissing their action against Dr. Zimmerman as barred by the WGCA, as well as the district court's order denying their motion to alter or amend that judgment or for a new trial. In addition, the Morenos filed in this court a motion to certify to the Wyoming Supreme Court the same key question of state law that the district court considered—that is, whether WGCA's notice-of-claim requirement applies to claims brought solely against a public employee.

II

The main issue on appeal is whether Wyo. Stat. § 1-39-113(a) of the WGCA applies and requires a plaintiff to file a notice of claim within the prescribed two-year limitations period when bringing an action solely against a public employee and not the governmental entity employer. The Morenos argue that the clear and unambiguous language of Wyo. Stat. § 1-39-113(a) shows that the notice-of-claim requirement applies only when an action is brought "against a governmental entity."

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[2] In the context of their post-judgment briefing, the Morenos also renewed their earlier motion for certification to the Wyoming Supreme Court of the question of whether Wyo. Stat. § 1-39-113(a) applies to claims brought solely against a public employee. The district court again found "this issue is not complex or unique [enough] to require certification"; consequently, it rejected the Morenos' renewed request for certification to the Wyoming Supreme Court. *Moreno*, 2021 WL 4130532, at *3.

Under the Morenos' reasoning, because they sued only Dr. Zimmerman, who is a "public employee" and not a "governmental entity," the WGCA's notice-of-claim requirement does not apply; consequently, the district court erred in concluding to the contrary and entering judgment against them.

A

We review for an abuse of discretion a district court's denial of a motion to alter or amend the judgment under Rule 59(e) and its denial of a motion for a new trial under Rule 59(a). *See Burke v. Regalado*, 935 F.3d 960, 1044 (10th Cir. 2019) (reviewing denial of Rule 59(e) motion to alter or amend the judgment for abuse of discretion); *Elm Ridge Expl. Co., LLC v. Engle*, 721 F.3d 1199, 1216 (10th Cir. 2013) (reviewing denial of Rule 59(a) motion for new trial for abuse of discretion). "We typically review purely legal issues, like the proper interpretation of these statutes and rules, de novo." *United States v. Doby*, 928 F.3d 1199, 1202 (10th Cir. 2019); *see also Burke*, 935 F.3d at 1044 ("'The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.' We therefore review for errors of law de novo." (citation omitted) (quoting *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1228 (10th Cir. 2016))); *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 768 (10th Cir. 2009) (noting that insofar as "the district court's ruling relied upon the construction of a statute, we apply a de novo standard of review").

At issue in this appeal is whether the WGCA's notice-of-claim requirement applies to suits brought solely against public employees, and thus bars the Morenos' action because they brought it solely against a public employee, Dr. Zimmerman, and did not satisfy the notice-of-claim requirement. Where the lawsuit is predicated on diversity jurisdiction, as here, "the federal courts are required to apply the law of the forum state." *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988).

If the state's highest court has addressed the issue before us, we are bound by their conclusion. *See, e.g.*, *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 665–66 (10th Cir. 2007) ("In cases arising under diversity jurisdiction, the federal court's task is not to reach its own judgment regarding the substance of the common law, but simply to '"ascertain and apply the state law."' The federal court must follow the most recent decisions of the state's highest court." (citations omitted) (quoting *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir.2003))). However, "[i]f the state's highest court has not addressed the issue presented, the federal court must determine what decision the state court would make if faced with the same facts and issue." *Armijo*, 843 F.2d at 407; *see Wankier*, 353 F.3d at 866 ("Where no controlling state decision exists, the federal court must attempt to predict what the state's highest court would do.").

Accordingly, Wyoming law—in particular, the law defined by the Wyoming Supreme Court—controls our interpretation of the WGCA's notice-of-claim requirement. And we do not defer to the district court's interpretation of the relevant state law, but rather consider it de novo. *See, e.g.*, *Salve Regina Coll. v. Russell*, 499

U.S. 225, 231 (1991) ("[A] court of appeals should review *de novo* a district court's determination of state law."); *Blanke v. Alexander*, 152 F.3d 1224, 1228 (10th Cir. 1998) ("[A] federal district court's state-law determinations are entitled to no deference and are reviewed *de novo*.").

B

The Wyoming Supreme Court has previously addressed the WGCA's notice-of-claim requirement. We conclude that it has spoken with sufficient clarity regarding the coverage of the WGCA's notice-of-claim requirement and demonstrated that it applies even when a claim is brought solely against a public employee. As the district court succinctly and correctly stated the matter, even though "Wyo. Stat. § 1-39-113(a) only mention[ed] actions brought against a governmental entity . . . the Wyoming Supreme Court cases clearly discuss the notice-of-claims requirement by referencing its applicability to suits brought against public employees." *Moreno*, 2021 WL 4130532, at *3. Indeed, as we will see, the Wyoming Supreme Court—time and again—has expressly mentioned public employees or officers, along with governmental entities, in discussing the applicability of the notice-of-claim requirement, even though the statute only explicitly mentions governmental entities.

In *Allen v. Lucero*, 925 P.2d 228 (Wyo. 1996), *overruled on other grounds by Brown v. City of Casper*, 248 P.3d 1136 (Wyo. 2011), the plaintiff, a former deputy sheriff, filed suit against both the county and his former supervising sheriff after his employment was terminated. The plaintiff argued that because his claims for tort and

contract damages arose out of a separate Wyoming statute, his action was not subject to the WGCA or its notice-of-claim requirement. *See id.* at 230. The Wyoming Supreme Court disagreed and held that "a claim for damages based either in contract or tort against the state must proceed, if at all, in accordance with [the WGCA]." *Id.*

The *Allen* court further explained that "[a] prerequisite in pursuing a claim against the state *or its officers* is compliance with the notice requirement of the claims act." *Id.* (emphasis added). And, because "the action required compliance with the notice provision of the claims act," the court affirmed the trial court's grant of summary judgment in favor of the county and sheriff, because the plaintiff had not complied with the notice-of-claim requirement, and the two-year statute of limitations had since run. *Id.*

Notably, in *Allen*, even though the statutory language of the notice-of-claim provision (i.e., Wyo. Stat. § 1-39-113(a)) only expressly mentioned governmental entities, the court noted that satisfaction of the notice-of-claim requirement was a necessary precondition for a suit—not only "against the state"—but also "its officers." *Id.* Significantly, the Wyoming Supreme Court's use of the disjunctive term "or" strongly suggests that the court understood that the notice-of-claim requirement could apply alternatively to "officers," as well as to "the state." *See In re Voss' Adoption*, 550 P.2d 481, 485 (Wyo. 1976) ("The word 'or' is ordinarily used as a disjunctive generally corresponding to 'either' as 'either this or that.' Where two clauses or phrases are expressed in the disjunctive, they are coordinate and *either is applicable to any situation to which its terms relate*." (emphasis added) (citation

omitted) (quoting *People v. Smith*, 279 P.2d 33, 34 (Cal. 1955))); *see also Amoco Prod. Co. v. Bd. of Comm'rs of Carbon Cnty.*, 876 P.2d 989, 993 (Wyo. 1994) ("The contention that the word 'or' should be read as conjunctive rather than alternative in the context of this statute is contrary to the rule of statutory construction generally espoused by this court. The word 'or' usually is used in a disjunctive sense and can be interchanged with the word 'and' only when necessary to harmonize the provisions of a statute."); *cf. Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1349 (10th Cir. 1987) (noting that the court "cannot ignore the use of the 'or'[;] . . . . unless the context or congressional intent indicates otherwise, the use of a disjunctive in a statute and regulations indicates that alternatives were intended"); *United States v. O'Driscoll*, 761 F.2d 589, 597 (10th Cir. 1985) ("When the term 'or' is used, it is presumed to be used in the *disjunctive* sense unless the legislative intent is clearly contrary."). That is, the Wyoming Supreme Court's use of the disjunctive term "or" reinforces the notion that the court understood that one alternative application of the WGCA's notice-of-claim requirement was to a suit brought solely against a public employee or officer.

To be sure, *Allen* addressed the applicability of the WGCA's notice-of-claim requirement to a suit brought against *both* a governmental entity and a public employee. In other words, it did not directly involve the kind of lawsuit at issue here, involving a suit brought solely against a public employee. Consequently, though telling on the question of whether the notice-of-claim requirement applies to suits brought solely against public employees—it does not expressly resolve that

question. However, since *Allen*, the Wyoming Supreme Court has signaled much more clearly its view of whether the WGCA's notice-of-claim requirement applies in suits brought solely against public employees and demonstrated that it does.

Specifically, three years after *Allen*, in *Romero v. Schulze*—the case the district court relied on here—the Wyoming Supreme Court considered the application of the notice-of-claim requirement of Wyo. Stat. § 1-39-113(a) to a plaintiff's medical malpractice suit brought against her doctor. *See Romero*, 974 P.2d at 962–63. In *Romero*, the trial court dismissed the plaintiff's complaint against her doctor because she did not give notice of her claim within the two-year period required by the WGCA. *See id.* at 962. On appeal before the Wyoming Supreme Court, the plaintiff claimed that she did not serve notice of her claim within the two-year period because she did not know of the doctor's status as a public employee until she received his discovery responses, which was after the two-year notice period had expired. *See id.* at 963. The Wyoming Supreme Court agreed with the plaintiff, holding that she did not have sufficient notice that her doctor was a public employee at the time of her medical treatment until she received his discovery responses. *See id.* at 964. Accordingly, the court held that "[t]he two-year notice-of-claim period under the [WGCA], therefore, commenced on [the date she received his discovery responses]," thus reversing the trial court's grant of summary judgment based on the plaintiff's failure to timely serve the notice of claim. *Id.* at 965.

Importantly, in analyzing the timeliness of the plaintiff's notice of claim, the Wyoming Supreme Court in *Romero* effectively recognized that Wyo. Stat. § 1-39-

113(a)'s two-year notice-of-claim requirement is applicable to actions brought solely against a public employee.[3] *See id.* at 962–63. As in *Allen*, the Wyoming Supreme Court in *Romero* explained that "[b]efore a suit can be brought against a governmental entity *or public employee* . . . certain procedures must be adhered to. Among those procedures is the notice-of-claims requirement." *Id.* at 962 (emphasis added) (citing Wyo. Stat. § 1-39-113(a)). However, whereas *Allen* only indirectly (though tellingly) spoke to the question before us, *Romero* directly addressed it through its analysis, by applying the WGCA's notice-of-claim requirement to a tort suit brought solely against a public employee.

The Wyoming Supreme Court again addressed the applicability of the WGCA's notice-of-claim requirement in a suit brought solely against public employees in *Garnett v. Brock*, 2 P.3d 558 (Wyo. 2000), *overruled on other grounds by Brown v. City of Casper*, 248 P.3d 1136 (Wyo. 2011). In *Garnett*, the plaintiff, an inmate, filed suit solely against "two employees of the State of Wyoming" for removing him from his prison work assignment and re-assigning him to a job with a lower pay scale. *Id.* at 559. The trial court had dismissed the action based, in part, on the conclusion that the plaintiff had failed to comply with the notice-of-claim

[3] We note that the plaintiff in *Romero* later amended her complaint to add the hospital itself as a defendant. *See* 974 P.2d at 962. But because the district court had first granted summary judgment in favor of the doctor after finding the plaintiff's claim against him to be barred by the WGCA's notice-of-claim requirement, and the Wyoming Supreme Court then separately considered the district court's order granting summary judgment, we conclude that the Wyoming Supreme Court in *Romero* effectively considered the applicability of the WGCA's notice-of-claim requirement to an action brought solely against a public employee. *See id.* at 962–64.

requirement of the WGCA. *See id.* at 560. The Wyoming Supreme Court agreed and affirmed the dismissal. *See id.* at 561.

The *Garnett* court explained that "[o]ne seeking relief pursuant to the [WGCA] is required to submit a claim to the governmental entity within two years of the date of the alleged act upon which the asserted liability is premised." *Id.* (citing Wyo. Stat. § 1-39-113). Like *Romero*, the *Garnett* court applied the WGCA's notice-of-claim requirement in a suit involving only public employees, noting that "[t]he submission of a claim is a prerequisite to an action against the state *or its public employees*." *Id.* (emphasis added). More specifically, the court held that because the prison officers named as defendants were "public employees" acting within the scope of their duties, the plaintiff was required to comply with WGCA's notice-of-claim requirement. *Id.* Because the plaintiff had failed to do so, the Wyoming Supreme Court in *Garnett* determined that the trial court had appropriately dismissed the plaintiff's case. *See id.*

Based on the foregoing, we conclude that the Wyoming Supreme Court has spoken with sufficient clarity regarding the coverage of the WGCA's notice-of-claim requirement and demonstrated that it applies even when a claim is brought solely against a public employee. And that court's view on this issue is binding on us. In reaching this conclusion, we acknowledge that the Wyoming Supreme Court's analysis of whether the WGCA's notice-of-claim requirement applies to suits brought solely against public employees is limited. In this regard, neither the trial courts nor the parties in *Romero* and *Garnett* seemed to seriously question that suits brought

solely against public employees were—as a categorical matter—within the coverage of the notice-of-claim requirement. That fact in itself seems to speak to the clarity of the statute's message that the notice-of-claim requirement does apply to such suits brought solely against public employees, in addition to actions naming the governmental employer as a defendant. *See, e.g.*, *In re Voss' Adoption*, 550 P.2d at 485 ("Where two clauses or phrases are expressed in the disjunctive, they are coordinate and *either* is applicable to any situation to which its terms relate." (emphasis added)). However, the lack of serious disagreement in *Romero* and *Garnett* on this matter naturally left little for the Wyoming Supreme Court to say.

But that does not mean that the Wyoming Supreme Court has not revealed through its holdings—notably, in direct fashion, in *Romero* and *Garnett*—its view that the WGCA's notice-of-claim requirement applies to suits brought solely against public employees. Indeed, in *Garnett*, the Wyoming Supreme Court dismissed claims against public employees where the plaintiff failed to satisfy the notice-of-claim requirement. *See* 2 P.3d at 561. Moreover, the Morenos have not identified any Wyoming case—let alone one from the Wyoming Supreme Court—in which a tort suit brought solely against a public employee was permitted to proceed without first satisfying the WGCA's notice-of-claim requirement, and we have not found one either. In other words, there appear to be no Wyoming cases that have endorsed the reading of the WGCA's notice-of-claim requirement that the Morenos advance here—and certainly not one from the Wyoming Supreme Court.

In sum, in our view, the Wyoming Supreme Court has spoken with sufficient clarity regarding the coverage of the WGCA's notice-of-claim requirement and demonstrated that it applies even when a claim is brought solely against a public employee. However, even if there were some ambiguity regarding this matter, we are comfortable predicting—based on the Wyoming Supreme Court's existing notice-of-claim precedent—that it would determine that the notice-of-claim requirement applies to suits brought solely against a public employee.

C

The Morenos argue that the plain language of Wyo. Stat. § 1-39-113(a) of the WGCA shows that the notice-of-claim requirement does not apply to suits such as theirs—that is, suits brought solely against a public employee. Specifically, the Morenos argue that the clear and unambiguous language of Wyo. Stat. § 1-39-113(a) applies only to actions brought "against a governmental entity" and because the statute makes no mention of "public employees," it necessarily follows that it does not apply to suits brought solely against a public employee. The Morenos thus contend that the district court violated fundamental rules of statutory construction and erred in applying the notice-of-claim requirement to their medical negligence action brought solely against Dr. Zimmerman.

The Morenos' argument effectively rests on the premise that the district court was obliged to independently construe Wyo. Stat. § 1-39-113(a)'s notice-of-claim requirement and opine on the statute's applicability to their lawsuit. However, this argument reflects a fundamental misunderstanding of the role of a federal court in a

diversity lawsuit, like this one. The federal court's role is to determine the interpretation of the relevant state law that the state's highest court has adopted, and if that court has not spoken, to predict the interpretation it would adopt. *See, e.g.*, *Armijo*, 843 F.2d at 407 ("In a diversity action, the federal courts are required to apply the law of the forum state. If the state's highest court has not addressed the issue presented, the federal court must determine what decision the state court would make if faced with the same facts and issue." (citation omitted)).

The federal court must make this legal assessment without regard to whether it independently would arrive at the same view of state law as the state's highest court. *See Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1223 (10th Cir. 2016) ("If the state's highest court has interpreted a state statute, we defer to that decision."); *Wade*, 483 F.3d at 665–66 ("In cases arising under diversity jurisdiction, the federal court's task is not to reach its own judgment regarding the substance of the common law . . . . The federal court must follow the most recent decisions of the state's highest court." (citations omitted)); *see also Spence v. ESAB Grp., Inc.*, 623 F.3d 212, 217 (3d Cir. 2010) (noting that federal courts "may not impose our own view of what state law should be").

Here, Wyoming's highest court—the Wyoming Supreme Court— has spoken with sufficient clarity regarding the coverage of the WGCA's notice-of-claim requirement and demonstrated that it applies even when a claim is brought solely against a public employee. *See Romero*, 974 P.2d at 962–63; *Garnett*, 2 P.3d at 559. And, even if there were some ambiguity regarding this matter, we are comfortable

predicting—based on the Wyoming Supreme Court's existing notice-of-claim precedent—that it would determine that the notice-of-claim requirement applies to suits brought solely against a public employee.

Therefore, the district court did not err here in declining to independently construe Wyo. Stat. § 1-39-113(a)'s notice-of-claim requirement and opine on the statute's applicability to the Morenos' lawsuit. Instead, the court properly sought to determine the view of the Wyoming Supreme Court concerning the coverage of the notice-of-claim requirement, and it rendered a judgment that is consistent with that view. In other words, the district court properly determined that the Wyoming Supreme Court would apply the notice-of-claim requirement to the Morenos' medical negligence lawsuit brought solely against Dr. Zimmerman—a public employee acting within the scope of his duties—and entered judgment accordingly. And it ineluctably follows that the district court did not abuse its discretion in denying the Morenos' motion to alter or amend the judgment or for a new trial for the same reason—*viz.*, the WGCA's notice-of-claim requirement applies to the Morenos' suit, and because they failed to satisfy that requirement, their action is fatally infirm.

D

Finally, we consider the Morenos' motion to certify questions of state law to the Wyoming Supreme Court. "A motion for certification may be brought independently and anew to the court of appeals. Such a motion requires us to determine whether certification is appropriate as a *de novo* matter without regard to the district court's assessment." *Pino v. United States*, 507 F.3d 1233, 1235 (10th

Cir. 2007) (citation omitted). Whether to certify is ultimately left to our discretion. *See Armijo*, 843 F.2d at 407 ("Whether to certify a question of state law to the state supreme court is within the discretion of the federal court."). The standards we apply in determining whether to grant a motion for certification stem from both state and federal law. *See Pino*, 507 F.3d at 1236.

Tenth Circuit Rule 27.4, which governs the certification of state-law questions, provides that this court may "certify a question arising under state law to that state's highest court," sua sponte or on a party's motion, "[w]hen state law permits." 10TH CIR. R. 27.4(A)–(B). In turn, under Wyoming law, the Wyoming Supreme Court may take up a question of state law certified to it "which may be determinative of the cause then pending in the federal court, and as to which it appears to the federal court there is no controlling precedent in the existing decisions of the supreme court." Wyo. Stat. § 1-13-106. We have likewise explained that certification may be appropriate if the question presented "is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance." *Pino*, 507 F.3d at 1236.

The Morenos seek to certify the following question to the Wyoming Supreme Court: "Does the plain language of W.S. § 1-39-1-113(a) require a prior notice of claim to a governmental entity when an action is commenced against a public employee and not against the governmental entity by which the employee is employed?" Aplts.' Opening Cert. Br. at 2 (emphasis omitted). For the reasons explained above, we believe that the Wyoming Supreme Court already has provided an answer to that question with sufficient clarity, and that answer sounds the death

knell for the Morenos' action. And even if there were some ambiguity regarding this matter, we are comfortable predicting—based on the Wyoming Supreme Court's existing notice-of-claim precedent—how it would answer that question and, again, that answer would provide the Morenos no relief. Moreover, the question that the Morenos ask us to certify is not so "novel" that we feel "uncomfortable" ruling on it "without further guidance" from the Wyoming Supreme Court. Therefore, we deny the Morenos' motion to certify this issue to the Wyoming Supreme Court.

III

For the foregoing reasons, we **AFFIRM** the district court's entry of judgment and its order denying the motion to alter or amend the judgment or for a new trial. And we also **DENY** the Morenos' motion to certify the question here to the Wyoming Supreme Court.

Entered for the Court

Jerome A. Holmes
Chief Judge