Official Publication of the State Bar of New Mexico

Bar Bulletin

January 27, 2016 • Volume 55, No. 4

High Desert, by Angelique Chacón Weems Art Gallery

Inside This Issue

A Message From **State Bar President J. Brent Moore**

—SPECIAL INSERT— **Board of Bar Commissioners Directory**

The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin,* PO Box 92860, Albuquerque, NM 87199-2860.

505-797-6000 • 800-876-6227 • Fax: 505-828-3765
Email: address@nmbar.org. • www.nmbar.org

January 27, 2016, Vol. 55, No. 4

Table of Contents

Meetings

January

28
Natural Resources, Energy and Environmental Law Section BOD,
Noon, teleconference

28
Alternative Dispute Resolution Committee,
Noon, State Bar Center

February

2
Bankruptcy Law Section BOD,
Boon, U.S. Bankruptcy Court

2
Health Law Section BOD,
9 a.m., teleconference

3
Employment and Labor Law Section BOD,
Noon, State Bar Center

5
Criminal Law Section BOD,
Noon, Kelley & Boone, Albuquerque

10
Animal Law Section BOD,
Noon, State Bar Center

State Bar Workshops

January

27
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

February

3
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

3
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

5
Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

9
Legal Clinic for Veterans:
8:30–11 a.m., New Mexico Veterans Memorial, Albuquerque, 505-265-1711, ext. 34354

17
Family Law Clinic:
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

Cover Artist: Angelique Chacón's photography is focused mainly on animals, flowers and landscape scenes. Living in the Southwest provided incredible landscapes to choose from. She is a person who really loves color and at some point began shooting flowers in macro form, trying to get as close to the inside of a flower as possible. Her goal for viewers is for them to perceive the images of the flower as an abstract art form. She finds that getting right into the heart of a flower expresses a beauty not otherwise seen. Because her stepfather was an abstract painter, she grew to really love his abstract art and found her own way of presenting abstract images through macro photography. Chacón's vision as an artist is to bring to viewers the natural occurrences as she saw them. Each of her photographs is a graphic presentation of her vision.

Notices

State Bar News

Attorney Support Groups

- Feb. 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)
- Feb. 8, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (the group meets on the second Monday of the month). To increase access, teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- March 21, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

2016 Licensing Notification

Must be Completed by Feb. 1

2016 State Bar licensing fees and certifications were due Dec. 31, 2015, and must be completed by Feb. 1 to avoid non-compliance and related late fees. Complete annual licensing requirements at www.nmbar.org. Payment by credit and debit card are available (will incur a service charge). For more information, call 505-797-6083 or email license@nmbar.org. For help logging in or other website troubleshooting, call 505-797-6086 or email aarmijo@nmbar.org. Those who have already completed their licensing requirements should disregard this notice.

Animal Law Section

Judges Needed for National Animal Law Appellate Moot Court

UNM School of Law Professor Marsha Baum is coaching two teams participating in the Ntional Animal Law Appellate Moot Court Competition. The Animal Law Section is looking for volunteers to serve as judges for the students' practice sessions, held on Tuesdays (7–9 p.m.)Thursdays (7–9 p.m.) and Sundays (5–7 p.m.) through Feb. 17. To volunteer, contact Gwenellen Janov at gjanov@janovlaw.com or 505-842-8302. Materiels and bench briefs will be provided.

Professionalism Tip

With respect to my clients:

I will advise my client against tactics that will delay resolution or which harass or drain the financial resources of the opposing party.

Alternative Dispute Resolution Committee

State Bar Members Invited to Quarterly Meetings

The Alternative Dispute Resolution Committee is inviting all members of the State Bar and New Mexico legal community to its quarterly meetings. The next meeting is at noon, Jan. 28, at the State Bar Center. Meetings include lunch. Join the committee for a roundtable discussion regarding what mediators and arbitrators can learn from debriefing with peers. R.S.V.P. to Abbey Daniels, adaniels@nmbar.org.

Board of Bar Commissioners

Third Bar Commissioner District Vacancy

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Feb. 26 meeting to fill the vacancy, with a term ending Dec. 31, 2016, until the next regular election of Commissioners. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply. Applicants should plan to attend the 2016 Board meetings scheduled for May 6, July 28 (in conjunction with the State Bar of New Mexico Annual Meeting at Buffalo Thunder Resort), Sept. 30 and Dec. 14 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and résumé to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 7199-2860; fax to 828-3765; or email to jconte@nmbar.org by Feb. 12.

Entrepreneurs in Community Lawyering

Now Accepting Applications from Newly Licensed Attorneys

The New Mexico State Bar Foundation announces its new legal incubator initiative, Entrepreneurs in Community Lawyering. ECL will help new attorneys to start successful and profitable, solo and small firm practices throughout New Mexico. Each year, ECL will accept three licensed attorneys with 0-3 years of practice who are passionate about starting their own solo or small firm practice. ECL is a 24 month program that will provide extensive training in both the practice of law and how to run a law practice as a successful business. ECL will provide subsidized office space, office equipment, State Bar licensing fees, CLE and mentorship fees. ECL will begin operations in October and the Bar Foundation is currently accepting applications from qualified practitioners. To view the program description, visit www.nmbar.org/nmbardocs/formembers/ECLProgramDescription.pdf. For more information, contact Stormy Ralstin at sralstin@nmbar.org.

Public Law Section

Accepting Nominations for Annual Public Lawyer Award

The Public Law Section is accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol on April 29. Visit www.nmbar.org > About Us > Sections > Public Lawyer Award to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on March 10. Send nominations to Sean Cuniff at scunniff@nmag.gov. The selection committee will consider all nominated candidates and may nominate candidates on its own.

UNM

Law Library

Hours Through May 14

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10a.m.–6p.m.
Sunday	Noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed

continued on page 7

A Message from State Bar President J. Brent Moore

Dear Members of the State Bar of New Mexico:

On Dec. 9, 2015, it was my great honor to be sworn-in by the New Mexico Supreme Court as the 120th president of the State Bar of New Mexico. Being President of the State Bar is both an honor and a responsibility, and I commit to you that I will do my best to represent the State Bar in a manner befitting the office during the coming year.

Realizing that I am just one of the many who have served in this important role, I would like to commend our immediate past president, Martha Chicoski, for her tremendous efforts in 2015. Like all good leaders, Martha recognized and appreciated the importance of the position and did an outstanding job representing the State Bar both throughout our state and nationally.

I also would like to recognize the tireless efforts of the Board of Bar Commissioners. These men and women are elected from throughout the state, and they volunteer their time and considerable talent to serve the legal profession. This issue of the *Bar Bulletin* includes the 2016 Board of Bar Commissioners Directory and contact information is listed for each Commissioner. They are your voice in the State Bar and I strongly encourage you to engage them with issues that are of importance to you and the profession.

I now would like to take a few moments to share with you my specific goals and plans for 2016.

2016 State Bar Annual Meeting—Bench & Bar Conference

I'm extremely excited to announce that the featured speaker for this year's annual meeting will be U.S. Supreme Court Justice Ruth Bader Ginsburg. Justice Ginsburg is quite fond of our state, especially the Santa Fe Opera, and she has agreed to attend our Annual Meeting. The dates for our 2016 Annual Meeting are Aug. 18–20 and the event will be held at the beautiful Buffalo Thunder Resort in Santa Fe. The theme for the Annual Meeting will center on issues facing the legal profession and how the State Bar can assist its members and the public. In time, you will receive more information about the event, and I sincerely hope you can attend what promises to be a wonderful meeting.

New Mexico State Bar Foundation

In 2016, the State Bar will be working to revitalize and reinvigorate the New Mexico State Bar Foundation. The Bar Foundation is the 501(c)(3) organization that serves New Mexico citizens and the legal profession by providing public service and public education. Many of the current programs of the Bar Foundation are supported by the State Bar, the Aging and Long Term Services Department and referral fees. Through direct financial support and in-kind administrative support, the State Bar has long supported services to members and the public. The efforts to revitalize and reinvigorate the Bar Foundation will include an organized effort to raise funds to support the Bar Foundation and fund legal services.

Entrepreneurs in Community Lawyering

In collaboration with the University of New Mexico School of Law, New Mexico Legal Aid and other interested parties, the Bar Foundation is creating a *legal incubator program*, called Entrepreneurs in Community Lawyering ("ECL"). ECL will assist new attorneys in starting their own solo and small-firm practices. The program is not intended to compete with established attorneys, but rather to train new attorneys to be excellent lawyers, serve the legal needs of currently under-represented populations, and instill in these participating attorneys a passion for public service and active community participation. It is hoped that ECL will help provide legal services to those who exceed the legal services guidelines, but still cannot afford legal services.

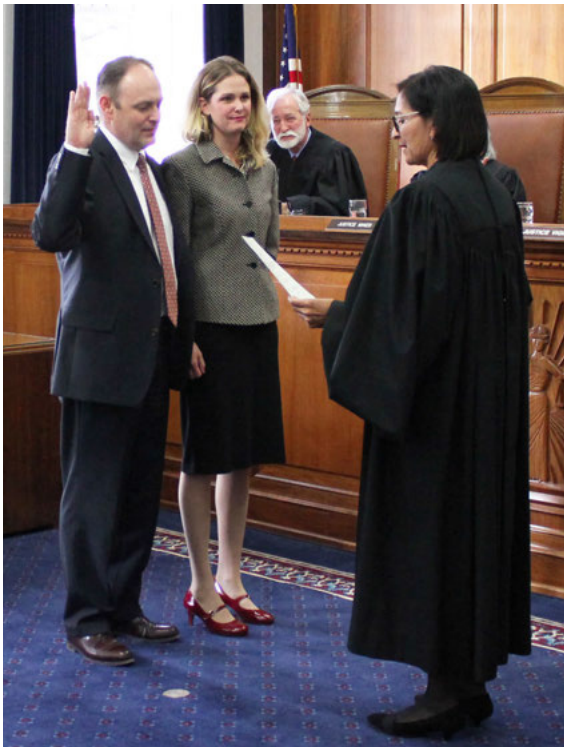
In closing, I believe that the upcoming year will be a great year for the State Bar, and I am honored to lead this organization in 2016. Please do not hesitate to contact the State Bar staff or me if you have any questions or if there is anything we can do to assist you this year.

Sincerely,

J. Brent Moore

J. Brent Moore
President

2016 Board of Bar Commissioners Officers



Chief Justice Barbara J. Vigil delivers the oath of office to Brent Moore who stands with wife Mary Ann

The 2016 officers of the Board of Bar Commissioners were sworn in on December 9 at the Supreme Court in Santa Fe by Chief Justice Barbara J. Vigil. The officers are President J. Brent Moore, President-elect Scotty A. Holloman, Vice President Dustin K. Hunter, Secretary Treasurer Gerald G. Dixon and Immediate Past President Martha Chicoski. After taking the oath, Moore thanked the many people in his life who have helped him achieve this honor including his wife and children, family, in-laws and colleagues. He said that having the ceremony in the Supreme Court chambers makes the honor extra meaningful.

Afterwards the officers, their families, other commissioners and members of the bench and bar headed over to the Inn at Loretto for a reception and the passing of the gavel. The gavel, a gift from former State Bar President Dennis E. Jontz, has become a fun tradition. Said Moore, "2016 is going to be a great year!"

Photos and story by Evann Kleinschmidt

2016 Officers Gerald Dixon, Dustin K. Hunter, Martha Chicoski and Brent Moore. Not pictured: Scotty A. Holloman

From left, Raynard Struck, Joseph F. Sawyer, Brent Moore, Carolyn Wolf, Julie J. Vargas, Dustin K. Hunter, Martha Chicoski, Jared G. Kallunki, Erika E. Anderson and John P. Burton

Brent Moore stands with wife Mary Ann and children Caroline, Virginia and Jonathan after being sworn in

Martha Chicoski passes the gavel to Brent Moore

continued from page 4

Other Bars

New Mexico Defense Lawyers Association

Seeking New Members for Board of Directors

The New Mexico Defense Lawyers Association seeks interested civil defense lawyers to serve on its board of directors. Board terms are five years with quarterly meetings. Board members are expected to take an active role in the organization by chairing a committee, chairing or participating in a CLE program, contributing to *Defense News* or engaging in other duties and responsibilities as designated by the board. Those who want to be considered for a board position should send a letter of interest to NMDLA Board President, Sean Garrett at sg@conklinfirm.com by Feb. 12.

New Mexico Chapter of the Federal Bar Association

CLE and Movie

The New Mexico Chapter of the Federal Bar Association will present its annual CLE and movie at 1 p.m., Feb. 11, at the Regal Theaters in Albuquerque. The movie will be *CitizenFour* followed by a panel discussion including Dana Gold from the Government Accountability Project and local practitioners. *CitizenFour* is the story of filmmaker Laura Poitras and journalist Glenn Greenwald's encounters with Edward Snowden as he hands over classified documents providing evidence of mass indiscriminate and illegal invasions of privacy by the National Security Agency. MCLE approval is pending. For more information, contact Kiernan Holliday at kiernanholliday@mac.com.

Other News

Society for Human Resource Management of New Mexico

2016 Conference in Albuquerque

The Society for Human Resource Management of New Mexico has announced its 2016 conference "Picture the Future... BE the Future" on March 7–9 at the Embasy Suites Hotel and Spa in Albuquerque. The conference includes speakers and topics of interest to HR professionals, legal professionals, and business professionals of all disciplines. Keynote speakers include Louis Efron, former head of global engagement and leadership development at Tesla Motors, Ann Rhoades, president of People Ink, and former vice president of the People Department for Southwest Airlines, Dr. Richard Pimentel, senior partner with Milt Wright & Associates Inc. and Cy Wakeman, author and president and founder of Reality Based. More information and registration is available at www.shrmnm.org. Early bird rates apply through Feb. 7.

Corrections to the *2015–2016 Bench and Bar Directory*

Active Members

Baehr, Raymond A. **505-884-0777**
Butt Thornton & Baehr PC
4101 Indian School Rd NE #300 87110-3989
PO Box 3170
Albuquerque NM 87190-3170
F 505-889-8870
raymondbaehr@aol.com
www.btblaw.com

Brickhouse, Beatrice J., Hon. **505-841-7517**
Second Judicial District Court
PO Box 488
Albuquerque NM 87103-0488
F 505-841-5456

Note: Information for members is current as of April 7, 2015. Visit www.nmbar.org and select "Online Bar Directory" for the most up-to-date information. To submit a correction, contact Pam Zimmer, pzimmer@nmbar.org.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline
Attorneys/Law Students
505-228-1948 • 800-860-4914
Judges
888-502-1289
www.nmbar.org > for Members > Lawyers/Judges Asswistance

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Legal Education

January

27–28 Attacking the Experts' Opinion at Deposition and Trial (two-part course)
6.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 2015 Health Law Symposium
4.5 G, 1.0 EP
Video Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 Ethicspalooza Redux—Winter 2015 Edition: Conflicts of Interest
1.0 EP
Video Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 Ethicspalooza Redux—Winter 2015 Edition
Everything Old is New Again: How the Disciplinary Board Works
1.0 EP
Video Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 Professionalism for the Ethical Lawyer
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

February

9 Better Not Call Saul Reprise
1.0 EP
Live Program
H. Vearle Payne Inn of Court
505-321-1461

10 BYOD (Bring Your Own Device to Work) and Social Media—Employment Law Issues in the Workplace
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 Management and Voting Agreements in Business
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 Special Issues in Small Trusts
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 Civil Rights and Diversity: Ethics Issues
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 Tenth Circuit Winter Meeting & Social Security Disability Practice Update
5.0 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

22 Drafting Promissory Notes to Enhance Enforceability
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 Introduction to the Practice of Law in New Mexico
4.5 G, 2.5 EP
Live Seminar
Center for Legal Education of NMSBF
www.nmbar.org

Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective January 8, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,686	State v. Romero	COA 34,264	01/07/16
No. 35,685	State v. Gipson	COA 34,552	01/07/16
No. 35,680	State v. Reed	COA 33,426	01/06/16
No. 35,682	Peterson v. LeMaster	12-501	01/05/16
No. 35,678	TPC, Inc. v. Hegarty	COA 32,165/32,492	01/05/16
No. 35,677	Sanchez v. Mares	12-501	01/05/16
No. 35,676	State v. Sears	COA 34,522	01/04/16
No. 35,675	National Roofing v. Alstate Steel	COA 34,006	01/04/16
No. 35,672	State v. Berres	COA 34,729	12/31/15
No. 35,669	Martin v. State	12-501	12/30/15
No. 35,668	State v. Marquez	COA 33,527	12/30/15
No. 35,665	Kading v. Lopez	12-501	12/29/15
No. 35,664	Martinez v. Franco	12-501	12/29/15
No. 35,657	Ira Janecka	12-501	12/28/15
No. 35,658	Bustos v. City of Clovis	COA 33,405	12/23/15
No. 35,656	Villalobos v. Villalobos	COA 32,973	12/23/15
No. 35,655	State v. Solis	COA 34,266	12/22/15
No. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,652	Tennyson v. Santa Fe Dealership	COA 33,657	12/18/15
No. 35,650	State v. Abeyta	COA 34,705	12/18/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
No. 35,645	State v. Hart-Omer	COA 33,829	12/17/15
No. 35,644	State v. Burge	COA 34,769	12/16/15
No. 35,642	Rabo Agrifinance Inc. v. Terra XXI	COA 34,757	12/16/15
No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15
No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,654	Dimas v. Wrigley	COA 35,654	12/11/15
No. 35,635	Robles v. State	12-501	12/10/15
No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,617	State v. Alanazi	COA 34,540	11/30/15
No. 35,612	Torrez v. Mulheron	12-501	11/23/15
No. 35,599	Tafoya v. Stewart	12-501	11/19/15
No. 35,593	Quintana v. Hatch	12-501	11/06/15
No. 35,588	Torrez v. State	12-501	11/04/15
No. 35,581	Salgado v. Morris	12-501	11/02/15
No. 35,586	Saldana v. Mercantel	12-501	10/30/15
No. 35,576	Oakleaf v. Frawner	12-501	10/23/15
No. 35,575	Thompson v. Frawner	12-501	10/23/15
No. 35,555	Flores-Soto v. Wrigley	12-501	10/09/15
No. 35,554	Rivers v. Heredia	12-501	10/09/15
No. 35,540	Fausnaught v. State	12-501	10/02/15
No. 35,523	McCoy v. Horton	12-501	09/23/15
No. 35,522	Denham v. State	12-501	09/21/15
No. 35,515	Saenz v. Ranack Constructors	COA 32,373	09/17/15
No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,480	Ramirez v. Hatch	12-501	08/20/15
No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,422	State v. Johnson	12-501	08/10/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,454	Alley v. State	12-501	07/29/15
No. 35,440	Gonzales v. Franco	12-501	07/22/15
No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,416	State v. Heredia	COA 32,937	07/15/15
No. 35,415	State v. McClain	12-501	07/15/15
No. 35,374	Loughborough v. Garcia	12-501	06/23/15
No. 35,372	Martinez v. State	12-501	06/22/15
No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,369	Serna v. State	12-501	06/15/15
No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
No. 35,335	Chavez v. Hatch	12-501	06/03/15
No. 35,371	Pierce v. Nance	12-501	05/22/15
No. 35,266	Guy v. N.M. Dept. of Corrections	12-501	04/30/15
No. 35,261	Trujillo v. Hickson	12-501	04/23/15
No. 35,159	Jacobs v. Nance	12-501	03/12/15
No. 35,106	Salomon v. Franco	12-501	02/04/15
No. 35,097	Marrah v. Swisstack	12-501	01/26/15
No. 35,099	Keller v. Horton	12-501	12/11/14
No. 35,068	Jessen v. Franco	12-501	11/25/14
No. 34,937	Pittman v. N.M. Corrections Dept.	12-501	10/20/14
No. 34,932	Gonzales v. Sanchez	12-501	10/16/14
No. 34,907	Cantone v. Franco	12-501	09/11/14
No. 34,680	Wing v. Janecka	12-501	07/14/14
No. 34,777	State v. Dorais	COA 32,235	07/02/14
No. 34,790	Venie v. Velasquz	COA 33,427	06/27/14
No. 34,775	State v. Merhege	COA 32,461	06/19/14
No. 34,706	Camacho v. Sanchez	12-501	05/13/14
No. 34,563	Benavidez v. State	12-501	02/25/14
No. 34,303	Gutierrez v. State	12-501	07/30/13
No. 34,067	Gutierrez v. Williams	12-501	03/14/13
No. 33,868	Burdex v. Bravo	12-501	11/28/12
No. 33,819	Chavez v. State	12-501	10/29/12
No. 33,867	Roche v. Janecka	12-501	09/28/12
No. 33,539	Contreras v. State	12-501	07/12/12
No. 33,630	Utley v. State	12-501	06/07/12

Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)			Date Writ Issued
No. 33,725	State v. Pasillas	COA 31,513	09/14/12
No. 33,877	State v. Alvarez	COA 31,987	12/06/12
No. 33,930	State v. Rodriguez	COA 30,938	01/18/13
No. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
No. 34,274	State v. Nolen	12-501	11/20/13
No. 34,443	Aragon v. State	12-501	02/14/14
No. 34,522	Hobson v. Hatch	12-501	03/28/14
No. 34,582	State v. Sanchez	COA 32,862	04/11/14
No. 34,694	State v. Salazar	COA 33,232	06/06/14
No. 34,669	Hart v. Otero County Prison	12-501	06/06/14
No. 34,650	Scott v. Morales	COA 32,475	06/06/14
No. 34,784	Silva v. Lovelace Health Systems, Inc.	COA 31,723	08/01/14
No. 34,812	Ruiz v. Stewart	12-501	10/10/14
No. 34,830	State v. Mier	COA 33,493	10/24/14
No. 34,929	Freeman v. Love	COA 32,542	12/19/14
No. 35,063	State v. Carroll	COA 32,909	01/26/15
No. 35,016	State v. Baca	COA 33,626	01/26/15
No. 35,130	Progressive Ins. v. Vigil	COA 32,171	03/23/15
No. 35,101	Dalton v. Santander	COA 33,136	03/23/15
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	04/03/15
No. 35,198	Noice v. BNSF	COA 31,935	05/11/15
No. 35,183	State v. Tapia	COA 32,934	05/11/15
No. 35,145	State v. Benally	COA 31,972	05/11/15
No. 35,121	State v. Chakerian	COA 32,872	05/11/15
No. 35,116	State v. Martinez	COA 32,516	05/11/15
No. 34,949	State v. Chacon	COA 33,748	05/11/15
No. 35,298	State v. Holt	COA 33,090	06/19/15
No. 35,297	Montano v. Frezza	COA 32,403	06/19/15
No. 35,296	State v. Tsosie	COA 34,351	06/19/15
No. 35,286	Flores v. Herrera	COA 32,693/33,413	06/19/15
No. 35,255	State v. Tufts	COA 33,419	06/19/15
No. 35,249	Kipnis v. Jusbasche	COA 33,821	06/19/15
No. 35,214	Montano v. Frezza	COA 32,403	06/19/15
No. 35,213	Hilgendorf v. Chen	COA 33056	06/19/15
No. 35,279	Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,289	NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,290	Olson v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,349	Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586	07/17/15
No. 35,302	Cahn v. Berryman	COA 33,087	07/17/15
No. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,386	State v. Cordova	COA 32,820	08/07/15
No. 35,278	Smith v. Frawner	12-501	08/26/15
No. 35,398	Armenta v. A.S. Homer, Inc.	COA 33,813	08/26/15
No. 35,427	State v. Mercer-Smith	COA 31,941/28,294	08/26/15
No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
No. 35,451	State v. Garcia	COA 33,249	08/26/15
No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	08/31/15
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	08/31/15
No. 35,499	Romero v. Ladlow Transit Services	COA 33,032	09/25/15
No. 35,456	Haynes v. Presbyterian Healthcare Services	COA 34,489	09/25/15
No. 35,437	State v. Tafoya	COA 34,218	09/25/15
No. 35,395	State v. Bailey	COA 32,521	09/25/15

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
No. 33,969	Safeway, Inc. v. Rooter 2000 Plumbing	COA 30,196	08/28/13
No. 33,884	Acosta v. Shell Western Exploration and Production, Inc.	COA 29,502	10/28/13
No. 34,093	Cordova v. Cline	COA 30,546	01/15/14
No. 34,287	Hamaatsa v. Pueblo of San Felipe	COA 31,297	03/26/14
No. 34,613	Ramirez v. State	COA 31,820	12/17/14
No. 34,798	State v. Maestas	COA 31,666	03/25/15
No. 34,630	State v. Ochoa	COA 31,243	04/13/15
No. 34,789	Tran v. Bennett	COA 32,677	04/13/15
No. 34,997	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,993	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,726	Deutsche Bank v. Johnston	COA 31,503	08/24/15
No. 34,826	State v. Trammel	COA 31,097	08/26/15
No. 34,866	State v. Yazzie	COA 32,476	08/26/15
No. 35,035	State v. Stephenson	COA 31,273	10/15/15
No. 35,478	Morris v. Brandenburg	COA 33,630	10/26/15
No. 34,728	Martinez v. Bravo	12-501	12/14/15
No. 35,248	AFSCME Council 18 v. Bernalillo County Comm.	COA 33,706	01/11/16

Opinion on Writ of Certiorari:

			Date Opinion Filed
No. 34,146	Madrid v. Brinker Restaurant	COA 31,244	12/10/15
No. 35,049	State v. Surratt	COA 32,881	12/10/15

Writ of Certiorari Quashed:

			Date Order Filed
No. 34,946	State v. Kuykendall	COA 32,612	12/04/15
No. 34,945	State v. Kuykendall	COA 32,612	12/04/15

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,432	Castillo v. Macias	12-501	01/07/16
No. 35,399	Lopez v. State	12-501	01/07/16
No. 35,651	Bustos v. City of Clovis	COA 33,405	01/05/16
No. 35,643	State v. Orozco	COA 34,665	01/05/16
No. 35,639	State v. Kenneth	COA 33,281	01/05/16
No. 35,636	AFSCME Council 18 v. State	COA 34,144	01/05/16
No. 35,632	State v. Terrazas	COA 33,241	01/05/16
No. 35,627	State v. James	COA 34,413	01/05/16
No. 35,626	State v. Garduno	COA 34,355	01/05/16
No. 35,624	State v. Depperman	COA 33,871	01/05/16
No. 35,623	State v. James	COA 34,549	01/05/16
No. 35,622	State v. Costelon	COA 34,265	01/05/16
No. 35,621	State v. Bejarano	COA 34,439	01/05/16
No. 35,620	State v. Sandoval	COA 33,108	01/05/16
No. 35,561	State v. Scott C.	COA 33,891/34,220/34,221	01/05/16
No. 35,602	State v. Astorga	COA 32,374	12/30/15
No. 35,615	State v. Mary S.	COA 33,905	12/22/15
No. 35,613	State v. Archuleta	COA 34,699	12/22/15
No. 35,606	State v. Romero	COA 33,376	12/22/15
No. 35,605	State v. Sertuche	COA 34,579	12/22/15
No. 35,598	Fenner v. N.M. Taxation and Revenue Dept.	COA 34,365	12/22/15
No. 35,549	Centex v. Worthgroup Architects	COA 32,331	12/22/15
No. 35,375	Martinez v. State	12-501	12/22/15
No. 35,271	Cunningham v. State	12-501	12/22/15
No. 35,604	State v. Wilson	COA 34,649	12/17/15
No. 35,603	State v. County of Valencia	COA 33,903	12/17/15
No. 35,596	State v. Lucero	COA 34,360	12/07/15
No. 35,595	State v. Axtolis	COA 33,664	12/07/15
No. 35,594	State v. Hernandez	COA 33,156	12/07/15
No. 35,591	State v. Anderson	COA 32,663	12/07/15
No. 35,587	State v. Vannatter	COA 34,813	12/07/15
No. 35,585	State v. Parra	COA 34,577	12/07/15
No. 35,584	State v. Hobbs	COA 32,838	12/07/15
No. 35,582	State v. Abeyta	COA 33,485	12/07/15
No. 35,580	State v. Cuevas	COA 32,757	12/07/15
No. 35,579	State v. Harper	COA 34,697	12/07/15
No. 35,578	State v. McDaniel	COA 31,501	12/02/15
No. 35,573	Greentree Solid Waste v. County of Lincoln	COA 33,628	12/02/15
No. 35,509	Bank of New York v. Romero	COA 33,988	12/02/15

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

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Effective January 15, 2016

Published Opinions

No. 33247	9th Jud Dist Curry CR-11-549, STATE v M VARGAS (reverse and remand)	1/12/2016
No. 33588	11th Jud Dist San Juan LR-13-40, STATE v T BEGAY (reverse and remand)	1/13/2016
No. 33524	WCA-12-1268, M VALENZUELA v A S HORNER (reverse)	1/13/2016

Unublished Opinions

No. 32962	2nd Jud Dist Bernalillo LR-09-121, STATE v J KINGSTON (affirm)	1/11/2016
No. 34625	6th Jud Dist Grant CR-13-149, STATE v C CALLOWAY (affirm)	1/11/2016
No. 33951	5th Jud Dist Lea CR-13-21, STATE v D TAYLOR (affirm)	1/11/2016
No. 34669	13th Jud Dist Valencia DM-1966-45, N LUCHETTI v HSD (affirm)	1/11/2016
No. 33292	2nd Jud Dist Bernalillo CV-09-11772, HSBC BANK v LLAVE ENTERPRISES (affirm)	1/12/2016
No. 34645	2nd Jud Dist Bernalillo DM-13-2064, M RIVAS v D ROMERO (dismiss)	1/12/2016
No. 34840	12th Jud Dist Lincoln DV-14-49, L OSBORN v H THOMPSON (affirm)	1/12/2016
No. 33518	2nd Jud Dist Bernalillo CV-12-10147, HSBC BANK v LLAVE ENTERPRISES (affirm)	1/12/2016
No. 34768	2nd Jud Dist Bernalillo JQ-11-89, CYFD v NORMA M (affirm)	1/13/2016
No. 34683	2nd Jud Dist Bernalillo JQ-12-21, CYFD v. MARCELINA R (affirm)	1/13/2016
No. 33461	2nd Jud Dist Bernalillo CR-10-2747, STATE v G ABEYTA (reverse and remand)	1/14/2016
No. 34671	2nd Jud Dist Bernalillo DM-13-843, L BARTH v D SCENTER (dismiss)	1/14/2016

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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Effective January 20, 2016

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

None to report at this time.

Recently Approved Rule Changes Since Release of 2015 NMRA:

For 2014 year-end rule amendments that became effective December 31, 2014, and which now appear in the 2015 NMRA, please see the November 5, 2014, issue of the Bar Bulletin *or visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us/nmrules/NMRuleSets.aspx.*

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

Certiorari Denied, September 16, 2015, No. 35,489

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-104

No. 33,187, (filed July 21, 2015)

CYNTHIA R. HERALD, M.D.,
Plaintiff-Appellant/Cross-Appellee,
v.
BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO,
a body corporate of the STATE OF NEW MEXICO, for itself and
its public operations including BOARD OF DIRECTORS OF THE UNIVERSITY
OF NEW MEXICO HEALTH SCIENCES CENTER, UNIVERSITY OF NEW MEXICO
HEALTH SCIENCES CENTER and its components the UNIVERSITY OF NEW
MEXICO HOSPITAL and UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE,
Defendant-Appellee/Cross-Appellant

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
C. SHANNON BACON, District Judge

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Albuquerque, New Mexico
for Appellee

Opinion

Jonathan B. Sutin, Judge

{1} Plaintiff Cynthia Herald, M.D., sued the Board of Regents of the University of New Mexico (Defendant) after she was discharged from the residency program at the University of New Mexico School of Medicine. She claimed that her termination was driven by discrimination and retaliation in violation of the New Mexico Human Rights Act (the HRA), NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007), and the Whistleblower Protection Act (the WPA), NMSA 1978, §§ 10-16C-1 to -6 (2010). She also stated claims under the New Mexico Tort Claims Act (the TCA), NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2015), and for breach of contract. Underlying these claims was Plaintiff's theory that Defendant's alleged discriminatory and retaliatory actions toward her, including her termination, stemmed from and were related to Plaintiff's allegation that she had been raped by a fellow participant in the residency program.

{2} The district court dismissed Plaintiff's TCA and WPA claims, and the court granted summary judgment in favor of Defendant as to Plaintiff's breach of contract claim. The district court construed Plaintiff's complaint as stating three claims under the HRA, namely, disparate treatment, sex discrimination, and retaliation. As to disparate treatment, the district court granted summary judgment in favor of Defendant. Plaintiff's claims of sex discrimination and retaliation pursuant to the HRA were tried before a jury; the jury found in favor of Defendant on both claims.

{3} On appeal, Plaintiff challenges the district court's WPA and TCA dismissal orders and its order granting summary judgment as to her breach of contract claim. She also argues that the court erred in its instructions to the jury on her HRA claim. We reverse the district court's dismissal of Plaintiff's WPA claims on statutory construction grounds. As to Plaintiff's remaining arguments, we affirm the district court.

{4} Defendant cross appeals, claiming that the district court erred in denying its requested costs and attorney fees. We reverse the district court's denial of costs associated with Defendant's electronic filing fees because we hold that it was premised on a misapplication of the relevant law. We affirm on the remaining issues.

BACKGROUND

{5} After graduating from medical school, Plaintiff enrolled in the University of New Mexico School of Medicine (the School) as a post-doctoral fellow and resident physician in anesthesiology (the residency program) in June 2008. As a participant in the residency program, Plaintiff was both an employee and a student at the University of New Mexico (UNM), with responsibilities as a "house staff physician for patients" at UNM Hospital, as well as having a responsibility to participate in educational activities. Plaintiff's involvement with the residency program was formalized in a "Graduate Medical Education Agreement" between Defendant and Plaintiff; this agreement served as Plaintiff's employment contract.

{6} In June 2009, Plaintiff visited the home of a man who was "senior to Plaintiff" in the residency program (the senior resident), and who, by virtue of his greater experience, education, and training, supervised Plaintiff's work. Plaintiff claimed that while she was in his home, the senior resident raped her. In September 2009, Plaintiff reported the alleged rape to the Associate Dean for Graduate Medical Education, Dr. David Sklar; Residency Program Director, Dr. James Harding; and Chairman of the Department of Anesthesiology, Dr. John Wills (collectively, the residency administrators). Plaintiff never reported the alleged rape to a law enforcement agency, and the senior resident was never charged with or convicted of any crime as a result of Plaintiff's allegation that he raped her.

{7} In June 2010, Plaintiff was terminated from the residency program. A "notice of final action" letter to Plaintiff, signed by Doctors Wills and Sklar, detailed the School's decision to terminate Plaintiff from the residency program on "administrative misconduct" grounds. The letter enumerated several findings that led to the School's conclusion that Plaintiff had committed various forms of administrative

misconduct. Those findings included that Plaintiff was impaired and incompetent while on duty at UNM Hospital as a result of ingesting Schedule IV narcotics; that an investigation revealed that Plaintiff's hospital-issued narcotic pack was missing Schedule II and IV controlled substances and that Plaintiff had altered a document pertaining to the content of the narcotic pack so as to hide the discrepancy; and that, in contravention of the School's policy, Plaintiff had repeatedly filled prescriptions issued to her by other participants in the residency program, many of which may have been falsified by Plaintiff in an unlawful use of the other residents' institutional DEA numbers. As well, the letter stated that Plaintiff had refused to attend meetings, refused to discuss her impairment and related issues, deliberately lied to the School so as to obstruct the investigation, and had attempted to convince an attending physician to take the blame for the discrepancy in her narcotic pack.

{8} Following her termination from the residency program, Plaintiff filed a complaint with the New Mexico Department of Workforce Solutions, Human Rights Bureau alleging that she had suffered sex discrimination and retaliation culminating in her termination from the residency program. She received an order of non-determination from the Labor Relations Division of the Human Rights Bureau allowing her to pursue her HRA claim in district court. *See* § 28-1-10(D) (stating that "[a] person who has filed a complaint with the human rights division may request and shall receive an order of non[-]determination from the director"); § 28-1-13(A) (stating that the order of non-determination may be appealed to the district court where the complainant may obtain a trial de novo).

{9} Plaintiff filed a "notice of appeal [from the order of non-determination] and complaint for negligent supervision [under the TCA], wrongful discharge[,] and violation of civil rights" against Defendant in district court. In her complaint, Plaintiff alleged the following. After she reported to the residency administrators that the senior resident had raped her, they discouraged her from reporting the alleged rape to law enforcement so as to avoid damaging the reputation of the School and UNM Hospital. Defendant failed to investigate the rape allegation and failed to "provide appropriate assistance" to her. And, although her "documented performance continued to be satisfactory through December 2009," after she reported the alleged rape, she was subjected to "heightened scrutiny and increased criticisms" by Defendant's agents.

{10} Plaintiff further alleged that, on an unspecified date, she requested but was denied a medical leave of absence so that she could seek and participate in medical treatment for the alleged rape. She also alleged that her physical, psychological, and emotional condition deteriorated after she reported the alleged rape to the residency administrators and that on January 14, 2010, Dr. Harding requested that she resign from the residency program based on "performance deficiencies and unspecified 'global problems.' " She then repeated her request for a medical leave of absence, and the request was granted. When she returned to work, she was advised that, owing to deficient clinical performance, she would be subject to a three-month period of formal remediation during which her clinical performance would be assessed regularly.

{11} Plaintiff alleged that, after she returned to work, she was not periodically assessed, but to the extent that she was assessed, her performance was deemed satisfactory, and without a final assessment, the remediation period concluded in April 2010. Finally, Plaintiff's complaint stated facts that have already been addressed in this Opinion, pertaining to her alleged impairment on duty on May 4, 2010, and her termination from the residency program.

{12} Based on the foregoing factual allegations, Plaintiff stated four overarching claims: negligent supervision under the TCA, wrongful discharge for a breach of an employment contract, wrongful discharge by retaliation contrary to the WPA, and retaliation and sex discrimination contrary to the HRA.

{13} Before answering Plaintiff's complaint, Defendant filed two motions to dismiss, one seeking dismissal of Plaintiff's WPA claims and another seeking dismissal of Plaintiff's negligent supervision and breach of contract claims. For reasons that are discussed later in this Opinion, the district court granted Defendant's motion to dismiss Plaintiff's WPA claims and TCA claims, and the court denied Defendant's motion to dismiss Plaintiff's breach of contract claim.

{14} Notwithstanding the court's orders of dismissal, Plaintiff filed a first amended notice of appeal and first amended complaint for failure to properly operate a hospital, wrongful discharge, and violation of civil rights (the amended complaint) that re-stated all of the claims in the original complaint. According to Plaintiff, the substantive differences between the original complaint and the amended complaint were that the amended complaint made it clear that the WPA claims were "in the alternative and/or in addition to the relief and remedies of the other causes of action"; and that, unlike the original complaint, the amended complaint specified that Plaintiff's tort claim was based on an alleged "failure to properly operate a hospital[.]" With the exception of the previously dismissed WPA and TCA claims, which the court ruled remained dismissed, the district court permitted Plaintiff to proceed on the amended complaint.

{15} After Defendant answered Plaintiff's amended complaint, Defendant filed two motions for summary judgment, one pertaining to Plaintiff's breach of contract claim and another pertaining to her HRA claims. Plaintiff filed responses in opposition to both motions for summary judgment. The details of the parties' arguments will be discussed as necessary in the body of this Opinion.

{16} Based on the parties' written arguments and the arguments made at a hearing on the motions for summary judgment, the district court granted summary judgment in favor of Defendant as to Plaintiff's breach of contract claim. As to Plaintiff's HRA claims, the district court ruled that, to the extent that Plaintiff raised a claim of sex discrimination on the theory of disparate treatment, summary judgment should be granted in Defendant's favor. To the extent that Plaintiff's HRA claims for sex discrimination were based on a theory of hostile work environment and of retaliation based on the theory of opposition to unlawful discrimination, the court denied summary judgment and allowed the claims to be tried before a jury.

{17} A jury determined that Plaintiff failed to prove that Defendant unlawfully retaliated or unlawfully discriminated against her. The district court entered a judgment on the verdict ordering that "Plaintiff take nothing[.]" Thereafter, Defendant sought costs pursuant to Rule 1-054(D) NMRA and, on the ground that it had made two offers of settlement, both of which had been rejected by Plaintiff, it sought costs pursuant to Rule 1-068 NMRA. Defendant also sought attorney fees. The district court awarded Defendant its partial costs but denied its request for attorney fees.

{18} On appeal, Plaintiff argues that the district court dismissed her WPA claims based on its erroneous determination that the WPA and the HRA are irreconcilable and on its related conclusion that Plaintiff could therefore only proceed under the HRA. Plaintiff also argues that erroneous legal determinations led the district court to grant summary judgment in favor of Defendant on Plaintiff's breach of contract claim. Additionally, Plaintiff argues that the district court's decision to dismiss her tort claims was based on its misconstruction of the TCA. And finally, Plaintiff argues that because the jury instructions did not accurately reflect the relevant law, the instructions confused and misled the jury. On these bases, Plaintiff seeks reversal. In a cross-appeal, Defendant argues that the district court erred in not awarding attorney fees and in not awarding its full costs or, alternatively, double costs.

{19} We conclude that the district court erred in dismissing Plaintiff's WPA claims on the ground that the WPA and the HRA are irreconcilably conflicting. Accordingly, we reverse the court's dismissal of Plaintiff's WPA claims and remand for further proceedings as to that claim. Plaintiff's remaining arguments provide no grounds for reversal.

{20} We conclude that the district court's denial of Defendant's electronic filing fees on the ground that they are not recoverable under the applicable rule was based on a misinterpretation of the law and remand for further consideration of that issue. Defendant's remaining arguments pertaining to costs and attorney fees do not demonstrate grounds for reversal.

DISCUSSION

A. Plaintiff's Arguments

{21} Plaintiff's arguments present issues of law that are reviewed de novo. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 10, 309 P.3d 1047 (stating that statutory construction is a question of law that an appellate court reviews de novo); *Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 19, 141 N.M. 808, 161 P.3d 853 (stating that the appellate court reviews "jury instructions de novo to determine whether they correctly state the law" (internal quotation marks and citation omitted)); *Lopez v. Las Cruces Police Dep't*, 2006-NMCA-074, ¶ 10, 139 N.M. 730, 137 P.3d 670 (stating that orders pertaining to summary judgment and motions to dismiss are reviewed de novo).

1. Plaintiff's Argument That the District Court Erred in Dismissing Her WPA Claims

{22} Plaintiff's respective HRA and WPA claims arose out of her claim that because she reported the alleged rape to the residency administrators, Defendant took various retaliatory actions against her that ultimately culminated in terminating her from the residency program. In its motion to dismiss Plaintiff's WPA claims, Defendant argued that the HRA provides the exclusive remedy for Plaintiff's retaliation claim. The district court agreed and dismissed Plaintiff's WPA claims. We begin by reviewing the relevant provisions of the HRA and the WPA.

i. The HRA

{23} The HRA provides that it is an unlawful discriminatory practice for an employer to discharge or discriminate based on an employee's sex when that employee is otherwise qualified, in matters of terms, conditions, or privileges of employment. Section 28-1-7(A). It is also an unlawful discriminatory practice for any employer to "aid, abet, incite, compel[,] or coerce the doing of any unlawful discriminatory practice or to attempt to do so" or to "engage in any form of . . . reprisal or discrimination against any person who has opposed any unlawful discriminatory practice[.]" Section 28-1-7(I)(1), (2). A person claiming to be aggrieved by an unlawful discriminatory practice may file a written complaint with the Human Rights Division, thus prompting a series of administrative processes, or she may request an order of non-determination. *See generally* § 28-1-10. An aggrieved employee may obtain a trial de novo in the district court either from an order of the commission following the administrative process or from an order of non-determination. Section 28-1-10(D); § 28-1-13(A).

ii. The WPA

{24} The WPA applies exclusively to public employers and public employees. Section 10-16C-3. Among other things, the WPA prohibits a public employer from taking any retaliatory action against a public employee because the public employee: "communicates to the public employer . . . information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act" or "objects to or refuses to participate in an activity, policy[,] or practice that constitutes an unlawful or improper act." Section 10-16C-3(A), (C). A "retaliatory action" is defined in the WPA as "any discriminatory or adverse employment action against a public employee in the terms and conditions of public employment[.]" Section 10-16C-2(D). The WPA enumerates the remedies that are available to a public employee who prevails in a lawsuit and provides that those remedies "are not exclusive and shall be in addition to any other remedies provided for in any other law[.]" Section 10-16C-4(A), (C).

iii. Plaintiff Was Entitled to State Claims Under the HRA and the WPA

{25} Statutory interpretation is driven primarily by the language in a statute, and the language of remedial statutes, including the HRA and the WPA, must be liberally construed. *See Whitely v. State Pers. Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308, 850 P.2d 1011 (stating that the language used by Legislature in a statute is the primary indicator of legislative intent); *Las Campanas Ltd. P'ship v. Pribble*, 1997-NMCA-055, ¶ 15, 123 N.M. 520, 943 P.2d 554 (stating that remedial statutes must be liberally construed). With these principles in mind, we observe that the WPA expressly provides that its remedies "shall be in addition to any other remedies provided for in any other law[.]" Section 10-16C-4(C). Further, we observe that, although the HRA is silent on the issue of exclusivity, our Supreme Court has interpreted this silence to mean that the Legislature did not intend the HRA's remedies to be exclusive. *See Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, ¶ 8, 117 N.M. 441, 872 P.2d 859 (stating that the language of the HRA "is permissive [insofar as it] contains no declaration that the remedies [that] it provides are exclusive" and holding, therefore, that the Legislature "did not intend the [HRA's] remedies to be exclusive").

{26} In light of our Supreme Court's discussion of the HRA in *Gandy*, and based upon the language in Section 10-16C-4(C) of the WPA, we conclude that the Legislature did not intend the HRA to provide Plaintiff's exclusive remedy in this case. Our conclusion, supported by the Legislature's language, also comports with a liberal construction of the two statutes. The district court's reasons for reaching the opposite conclusion are not persuasive.

{27} "Statutes are not to be read in a manner that would make portions of them superfluous." *State Dep't of Labor v. Echostar Commc'ns Corp.*, 2006-NMCA-047, ¶ 6, 139 N.M. 493, 134 P.3d 780. In construing legislative intent to reach its conclusion

that the HRA provided Plaintiff's exclusive remedy, the district court omitted any discussion of the express provision in Section 10-16C-4(C) that the remedies in the WPA "shall be in addition to any other remedies provided for in any other law[.]" Having omitted consideration of that language, which ostensibly allows a plaintiff to state a WPA claim alongside a claim under any other law, including the HRA, the district court concluded that there was a conflict between the WPA and the HRA that rendered them irreconcilable.

{28} In the context of statutory construction, a determination that two legislatively enacted provisions irreconcilably conflict is not favored. *See Luboyeski v. Hill*, 1994-NMSC-032, ¶ 10, 117 N.M. 380, 872 P.2d 353 ("Whenever possible, [the appellate courts] must read different legislative enactments as harmonious instead of as contradicting one another."); *see also* NMSA 1978, § 12-2A-10(A) (1997) (stating that "[i]f statutes appear to conflict, they must be construed, if possible, to give effect to each"). This is because there is a presumption that the Legislature is aware of existing laws and would not intend to enact new legislation that irreconcilably conflicts with existing laws. *See Luboyeski*, 1994-NMSC-032, ¶ 10 (stating that the Legislature is presumed not to have intended to enact a law that is inconsistent with existing laws). Thus, the district court's conclusion that the HRA and the WPA are irreconcilably conflicting is out of step with general principles of statutory construction, particularly in light of the language in Section 10-16C-4(C).

{29} In support of its conclusion that there was an irreconcilable conflict between the HRA and the WPA, the district court stated that: (1) unlike the WPA, the HRA "provides a comprehensive administrative process . . . which must be exhausted as a prerequisite to suit"; (2) the two acts have different statutes of limitations; and (3) the two acts differ in terms of the recovery available to a successful claimant. Defendant urges this Court to rely on these distinctions to affirm the district court's decision. We decline to do so.

{30} We begin with the different statutes of limitations and the different recoveries available to a successful claimant. Here, the district court did not explain why these differences necessarily placed the HRA and the WPA in irreconcilable conflict. And, on appeal, Defendant has failed to as well. We see no reason to conclude that these distinctions create an irreconcilable conflict between the two acts.

{31} The HRA and the WPA may be read harmoniously, giving effect to each, notwithstanding the different statutes of limitations and the different remedies available to a successful claimant. We assume that any plaintiff who wished to file claims pursuant to the HRA and the WPA would understand the need to do so within the earlier statute of limitations of the HRA to avoid dismissal of the HRA claim on timeliness grounds. *See* § 28-1-10(A) (providing a three-hundred-day statute of limitations for filing claims under the HRA); § 10-16C-6 (providing a two-year statute of limitations for filing claims under the WPA). In the present case, Plaintiff's HRA and WPA claims were timely brought within the same complaint.

{32} Additionally, that the HRA and the WPA provide different remedies for a successful claimant does not create an irreconcilable conflict. *See* § 28-1-13(D) (providing that, pursuant to the district court's discretion, a successful claimant under the HRA may receive "actual damages and reasonable attorney fees"); § 10-16C-4(A) (stating that a public employer that violates the WPA "shall be liable to the public employee for actual damages, reinstatement with the same seniority status that the employee would have had but for the violation, two times the amount of back pay with interest on the back pay and compensation for any special damage sustained as a result of the violation . . . . [and the] employer shall be required to pay the litigation costs and reasonable attorney fees of the employee"). To the extent that a plaintiff is successful under both theories and to the extent that the remedies overlap, it is incumbent on the district court to prevent impermissible double recovery. *Hood v. Fulkerson*, 1985-NMSC-048, ¶ 12, 102 N.M. 677, 699 P.2d 608 (stating that "[d]uplication of damages or double recovery for injuries received is not permissible" and "[w]here there are different theories of recovery and liability is found on each, but the relief requested was the same . . ., the injured party is entitled to [recover a particular type of damages] award [only once]"); *see Gandy*, 1994-NMSC-040, ¶ 12 ("We are confident that an appropriate exercise of discretion by the district courts . . . will prevent double recovery[.]").

{33} In regard to its conclusion that the HRA "provides a comprehensive administrative process . . . which must be exhausted as a prerequisite to suit," the district court reasoned that allowing a public employee to frame retaliation-based disputes as WPA claims instead of HRA claims would frustrate the Legislature's intent, reflected in the HRA, to require aggrieved employees to pursue administrative remedies. But here, Plaintiff satisfied the grievance procedure of the HRA by requesting and receiving an order of non-determination and then appealing that order in the district court. *See Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 16, 127 N.M. 282, 980 P.2d 65 (explaining that the process of requesting and receiving an order of non-determination signals that the claimant has complied with the HRA grievance procedures and may proceed to court). The order of non-determination allowed Plaintiff to bring her HRA and non-HRA claims, including her WPA claim, before the district court in a single lawsuit.

{34} That the Legislature provided a procedure in the HRA by which a claimant may proceed to court on her claim after requesting and receiving an order of non-determination precludes the conclusion that the Legislature intended to require a claimant, in every instance, to proceed through a comprehensive administrative process before the Human Rights Commission before bringing her claim to court. *See, e.g.*, § 28-1-10(B), (C), (F) (describing an administrative process that includes, in part, an investigation by the director of the Human Rights Division, potentially followed by an attempt of persuasion or conciliation, possibly followed by a hearing before the Human Rights Commission). Rather, as demonstrated in this case, a claimant may essentially circumvent the more extensive administrative processes contemplated by the HRA by requesting and receiving, without delay, an order of non-determination that may then be appealed in a trial de novo in the district court. *See* § 28-1-10(D) ("A person who has filed a complaint with the [H]uman [R]ights [D]ivision may request and shall receive an order of non[-]determination from the director without delay[.]"); § 28-1-13(A) (stating that the order of non-determination may then be appealed to the district court where the complainant may obtain a trial de novo).

{35} In sum, we reverse the district court's order dismissing Plaintiff's WPA claims on the ground that the HRA and WPA are in irreconcilable conflict and that, therefore, the HRA is the exclusive remedy for Plaintiff's retaliation claim.

iv. Defendant's Arguments in Opposition to Remanding Plaintiff's WPA Claims for Trial

{36} Defendant argues that even if this Court reverses the dismissal of Plaintiff's WPA claims, Plaintiff is not entitled to a trial on that issue. According to Defendant, when the jury found that Plaintiff did not prove Defendant unlawfully retaliated against her under the HRA, it necessarily resolved her claim for retaliation under the WPA as well. We disagree.

{37} Plaintiff's claims under the HRA and under the WPA were premised on distinct theories of what caused Defendant's alleged retaliation against her. In regard to the HRA claims, the jury was instructed, in relevant part, that to prove retaliation, Plaintiff was required to show that she suffered an adverse employment action because she opposed an "unlawful discriminatory practice." The phrase "unlawful discriminatory practice" was defined for the jury as follows: (1) "to create a hostile work environment, discharge an employee[,] or to otherwise discriminate on the basis of sex"; or (2) "to discriminate against any person who reports an unlawful discriminatory practice."

{38} Thus, as to Plaintiff's HRA claims, the jury was instructed that an employer engages in an unlawful retaliation if the employee claiming retaliation (1) opposed the creation of a hostile work environment or the discharge of an employee or other discrimination on the basis of sex; or (2) reported the creation of a hostile work environment, the discharge of an employee, or other discrimination on the basis of sex. Plaintiff argues that the jury's determination that Plaintiff did not suffer retaliation on any of the foregoing bases did not answer the question that was raised by her WPA claims, that is, whether Defendant retaliated against her based on her report of the alleged rape to the residency administrators.

{39} The issue whether Defendant's alleged retaliatory behavior was triggered by Plaintiff's report of the alleged rape alone is distinct from the issue whether Defendant's alleged retaliatory behavior was triggered by Plaintiff's opposition to or report of an "unlawful discriminatory practice" as that phrase was defined for the jury. Accordingly, we hold that the jury's determination of no retaliation under the HRA did not preclude a determination that Defendant retaliated against Plaintiff in violation of the WPA, and we remand this matter to the district court for further proceedings related to Plaintiff's WPA claims.

{40} Recognizing that we might hold that the WPA claims were viable, Defendant argues that we should affirm the district court's dismissal of Plaintiff's WPA claims on the basis that the WPA is unconstitutional. Defendant argues that the WPA is void for vagueness because it "sets no discernable standard for compliance" and fails to define crucial terms such as "information" and "about." The district court, having dismissed Plaintiff's WPA claims on another ground, expressly declined to consider the issue whether the WPA is unconstitutional. Accordingly, this issue is not properly before this Court and will not be considered. *See Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 19, 137 N.M. 152, 108 P.3d 558 (declining to consider an issue upon which the district court had not passed).

2. Plaintiff's Breach of Contract Arguments

{41} In the amended complaint, Plaintiff stated a claim for wrongful discharge premised on the theory that, by terminating her from the residency program without just cause, Defendant had breached the Graduate Medical Education Agreement (the employment contract). Defendant filed a motion for summary judgment on the ground that Plaintiff's contract claim was precluded as a matter of law, which the district court granted. On appeal, Plaintiff argues that disputed issues of fact existed that rendered summary judgment on this issue improper.

{42} In summary judgment proceedings, the moving party has the initial burden of making a prima facie showing that it is entitled to summary judgment. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. The moving party may meet this burden by showing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question[.]" *Id.* (internal quotation marks and citation omitted). "Once this prima facie showing has been made, the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts [that] would require trial on the merits." *Id.* (internal quotation marks and citation omitted). In order to meet its burden, the non-movant must provide the court with evidence that justifies a trial on the issues; merely arguing that such evidence exists is insufficient. *Id.*

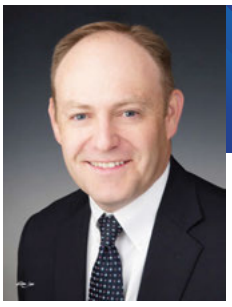
{43} Defendant set forth the following undisputed facts in support of its motion: (1) "[t]he terms of Plaintiff's employment contract, including applicable policies and procedures, required her to adjudicate her contract dispute through a formal three-step grievance [procedure]"; (2) "[w]hile Plaintiff initiated that process, she did not complete the third step—final and binding arbitration"; and (3) "Plaintiff, having failed to comply with the exclusive dispute resolution provisions of her own contract, including applicable policies and procedures, is precluded as a matter of law from asserting claims against [Defendant] for breach of contract[.]" Attached to Defendant's motion were several exhibits that supported the foregoing statements, including the employment contract and copies of "grievance forms" indicating that Plaintiff had completed only two steps of the three-step grievance procedure.

{44} The district court relied on Defendant's undisputed material facts as the basis for its summary judgment order. Implicit in the court's summary judgment was a determination that Plaintiff failed to meet her burden, under *Romero*, of demonstrating the existence of evidence that would require a trial on the merits. *See id.* On appeal, Plaintiff argues that two issues of fact precluded the court's summary judgment.

{45} First, Plaintiff argues that there exists a factual issue regarding the basis for her termination from the residency program. In support of her argument, Plaintiff points out that, although the notice of final action by which Defendant terminated Plaintiff from the residency program states that the various forms of conduct for which Plaintiff was terminated constituted "administrative misconduct," the notice of final action "clearly articulate[d] academic and professional objections[.]" Therefore, Plaintiff argues, she was actually terminated for "alleged non-administrative misconduct[.]" Plaintiff argues that since she was not terminated for administrative misconduct, she was not required to follow the three-step grievance procedure upon which the district court's summary judgment order was based. Rather, Plaintiff argues, she was required to and did follow a "bifurcated two-step grievance process" that is applicable to termination based on academic or professional misconduct. Based on the foregoing, Plaintiff argues that the district court erred in concluding as a matter of law that she failed to comply with the three-step grievance procedure required in the employment contract.

STATE BAR of NEW MEXICO

Board of Bar Commissioners 2016



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J. Brent Moore is a shareholder with the law firm of Montgomery & Andrews and works in the firm's Santa Fe office. He graduated from the University of New Mexico School of Law. His current practice focuses primarily on the fields of governmental relations, insurance regulation, and environmental law, and he assist clients with their lobbying efforts before the New Mexico Legislature and with their regulatory needs before New Mexico government agencies. Prior to going into private practice, he was the general counsel for the Insurance Division of the New Mexico Public Regulation Commission, where he worked on numerous issues for the Superintendent and the Division. In addition, he has served previously as agency counsel for the Navajo Nation Environmental Protection Agency and as an assistant general counsel for the New Mexico Environment Department. Moore also represents the Third Bar Commissioner District.

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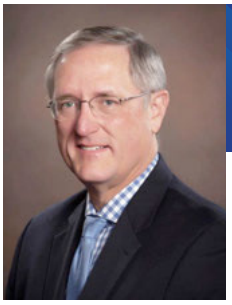

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Gerald Dixon is a shareholder at Dixon, Scholl & Bailey PA. He practices in the areas of professional malpractice defense, commercial and construction litigation. He is a frequent speaker on liability and risk management issues. Jerry was admitted to the Colorado Bar Association in 1981 and State Bar of New Mexico in 1986. He is a member of the Albuquerque Bar Association (President, 1994). Jerry attended Texas Tech University (BBA 1977, J.D. 1981). He has participated in the New Mexico high school mock trial program as a coach or judge since 1988 and has served as a trustee for the Texas Tech School of Law Foundation since 2005. He provides pro bono services through Christian Legal Aid. Dixon was recognized by Best Lawyers each year since 2009 and as 2014 Lawyer of the Year in the area of professional malpractice. Jerry was named Outstanding Attorney by the Albuquerque Bar Association in 2014. Dixon also represents the First Bar Commissioner District.

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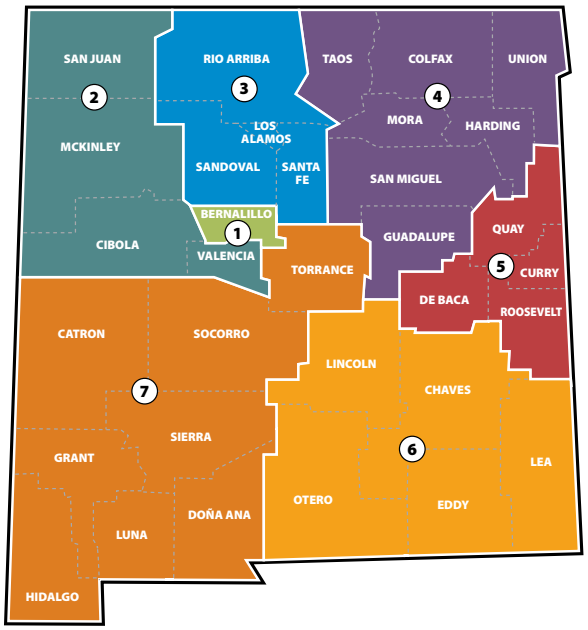
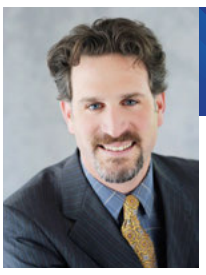
Martha Chicoski has a wide range of litigation experience in both civil and criminal law. She currently manages the Albuquerque office of Glasheen, Valles & Inderman, LLP, focusing on personal injury law. Prior experience includes Chicoski Law Firm, Farmers Insurance Exchange, Albuquerque City Attorney's Office, and the New Mexico Public Defender Department. Other bar service includes the New Mexico Women's Bar Association (president 2012, treasurer 2011) and Young Lawyers Division (chair 2010 and 2009). She is a 2012 recipient of the *New Mexico Business Weekly* 40 Under Forty. Chicoski attended The George Washington University and Suffolk University Law School. She is licensed to practice law in New Mexico, Massachusetts, and U.S. District Court for the District of New Mexico. Chicoski and her husband, Jason Brock, reside in Albuquerque with their rescue dogs, Doug Flutie, Ty Webb, and Morley Bean. Chicoski also represents the First Bar Commissioner District.

BOARD OF BAR COMMISSIONERS DISTRICT MAP



FIRST BAR COMMISSIONER DISTRICT



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Joshua A. Allison has been a shareholder and director at Sheehan & Sheehan, P.A. since 2013, where his practice is focused in legal malpractice defense, complex business disputes, and construction litigation. Mr. Allison graduated from the University of New Mexico School of Law in 2008 and clerked for then-Chief Justice Edward L. Chávez for one year. After practicing in Southern California, he returned to New Mexico in 2010 with his wife and children to build his practice at Sheehan. Mr. Allison is also a member of the State Bar's Lawyers Professional Liability and Insurance Committee and is a member of the steering committee of the developing legal incubator, Entrepreneurs in Community Lawyering. When he is not practicing law, he is spending time with his wife of 13 years, Michelle, and their four kids.

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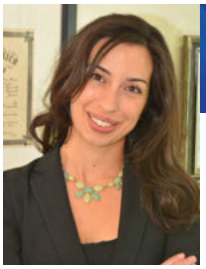
Hon. Kevin L. Fitzwater (ret.) is a retired Metropolitan Court judge. On the bench for 18 years hearing criminal and civil cases, he also served a term as Chief Judge. He founded the first Mental Health Court in the state of New Mexico. Previous to that, he served as a Deputy District Attorney in charge of the Metropolitan Court division, having handled a broad range of cases from misdemeanors to violent crimes. Fitzwater came to the DA's office after leaving active military service. He served in the United States Marine Corps as a combat arms officer, having graduated from UNM in 1981, and was one of four selected to attend law school, coming home to attend UNM law school. He returned to active duty as a criminal defense attorney, and worked in appellate law. He retired after a 30-year career as a colonel in the reserves.



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Clara Moran is a 2005 graduate of the University of New Mexico School of Law. She is currently the division director of special prosecutions with the Office of the Attorney General. Moran has been a prosecutor her whole career, prosecuting homicides, violent crimes, sex crimes, crimes against children and child exploitation cases, as well as DWI and domestic violence cases. She was named the 2014 Jurisprudence Prosecutor of the Year by the New Mexico District Attorneys Association, received the 2009 Outstanding Young Lawyer of the Year Award from the State Bar of New Mexico and the 2007

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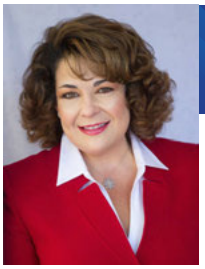

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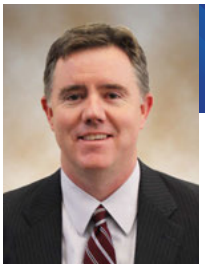
SECOND BAR COMMISSIONER DISTRICT



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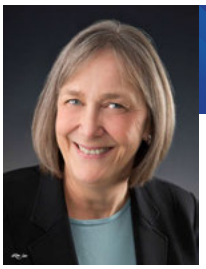
THIRD BAR COMMISSIONER DISTRICT



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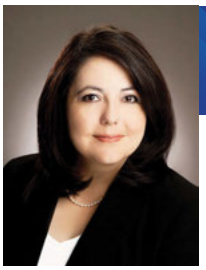
FOURTH BAR COMMISSIONER DISTRICT



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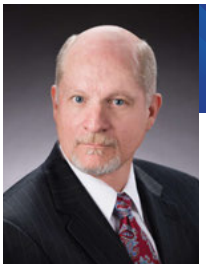
Ernestina R. Cruz is a sole practitioner and owner of Cruz Law Office in Taos. Her practice primarily focuses on matters involving civil rights, employment law, family law, and personal injury. She is a graduate of the University of New Mexico (B.A. 1996 and J.D. 2001) and the University of Notre Dame (M.A. 1998). This summer she will begin coursework in connection with obtaining a LL.M. in Dispute Resolution with a concentration in Mediation from the Straus Institute for Dispute Resolution at Pepperdine University School of Law. In 2008, she was named the Young Lawyer of the Year by the New Mexico Hispanic Bar Association. She was also recognized by the Hispanic National Bar Association as a Top Lawyer under 40 in 2010. Cruz is a past chair of the State Bar of New Mexico Young Lawyers Division and Employment and Labor Law Section.

FIFTH BAR COMMISSIONER DISTRICT



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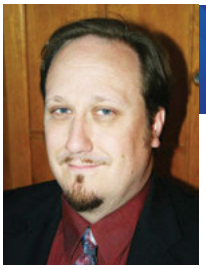
Wesley O. Pool is the principal and owner of Pool Law Firm PC in Clovis. He is licensed to practice in New Mexico and Texas. The firm focuses on commercial litigation in addition to real estate, bankruptcy, probate, wills and estate planning, and domestic relations. Pool is a member of the Curry/Roosevelt Bar Association, the American Bar Association, and the American Trial Lawyers Association. He has served on the board of directors of the Business Law Section and is the BBC liaison to the Minimum Continuing Legal Education Board.

SIXTH BAR COMMISSIONER DISTRICT



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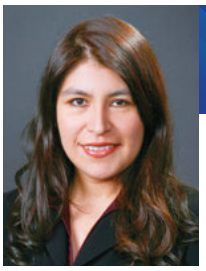
SEVENTH BAR COMMISSIONER DISTRICT



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Roxanna M. Chacon is a Las Cruces attorney. Chacon received her bachelor's degree from New Mexico State University and her law degree from the UNM School of Law. She serves on the UNM School of Law Alumni Board and is a former board member for New Mexico Legal Aid and the New Mexico Hispanic Bar Association. Chacon is currently pursuing an LL.M. in Public International Law at the University of Helsinki, Finland. Ms. Chacon and her husband, Juha Koponen, have two children, Lucianna and Paul Edvard.

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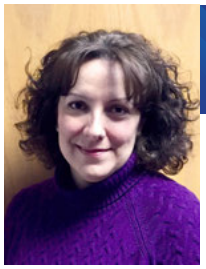
PARALEGAL DIVISION



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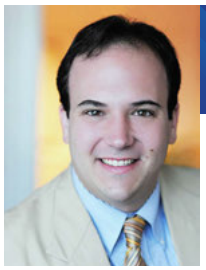
YOUNG LAWYERS DIVISION



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{46} Plaintiff does not supply any evidentiary or legal support for her assertion that, contrary to what was stated in the notice of final action, the actions that led to her termination constituted non-administrative misconduct. We note as well that in Plaintiff's grievance forms, attached to Defendant's motion for summary judgment, Plaintiff referred to the grievance procedure applicable to disciplinary action for administrative misconduct. Accordingly, we are not persuaded that the district court erred in granting Defendant's summary judgment motion. *See id*. (stating that in response to the movant's showing of entitlement to summary judgment, the non-movant must show, rather than merely argue, the existence of evidence that warrants a trial on the merits); *V.P. Clarence Co. v. Colgate*, 1993-NMSC-022, ¶ 2, 115 N.M. 471, 853 P.2d 722 ("[A]rguments of counsel are not evidence upon which a trial court can rely in a summary judgment proceeding.").

{47} Plaintiff nevertheless argues that even if the grievance procedure applicable to termination on administrative misconduct grounds applied to her, she could not have submitted her dispute to binding arbitration because only the union that negotiated the terms of the employment contract on behalf of all medical residents was permitted to do so. And, according to Plaintiff, the union "did not elect to proceed to the third step—binding arbitration[.]" In Plaintiff's view, she "exhausted her remedies within the UNM system" by completing the only two steps of the grievance procedure that she, personally, could do. From our review of the record, we conclude that Plaintiff failed in the district court to provide any evidence in support of this argument. Specifically, Plaintiff does not point to any evidence demonstrating that she attempted but the union refused to submit her grievance to arbitration, thus leaving her unable to complete the grievance procedure. Plaintiff's arguments on appeal are unsupported by citations to the record on appeal and fail to demonstrate grounds for reversing the district court's summary judgment order. *See id.*; *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 (stating that, on appeal, this Court will not rely on the arguments and assertions of counsel that are unsupported by citations to the record).

3. Plaintiff's TCA Arguments

{48} The district court granted Defendant's motion to dismiss Plaintiff's tort claims because Plaintiff failed to comply with the TCA's notice requirement. Plaintiff argues that the court erred in concluding that she failed to meet the TCA's notice requirements. She also argues that the merits of her tort claims precluded dismissal. Because we affirm the district court's dismissal on the notice issue, we do not consider Plaintiff's remaining TCA arguments.

{49} Under the TCA, a person who claims damages against a public entity is required to provide the administrative head of the public entity with written notice stating the "time, place[,] and circumstances of the loss or injury" that gave rise to the claim. Section 41-4-16(A). Unless the public entity has been given notice as required in Section 41-4-16(A) or unless the public entity had "actual notice of the occurrence[,]" a court is jurisdictionally barred from considering the matter. Section 41-4-16(B). Plaintiff claims that dismissal of her tort claims was improper because, by reporting the alleged rape, Plaintiff provided Defendant with "actual notice" of the occurrence; thus, Plaintiff contends, she satisfied the notice requirement of Section 41-4-16(B). Under the clear constraint of precedent, we disagree.

{50} The purpose of the notice requirement in Section 41-4-16(B) is "to ensure that the agency allegedly at fault is notified that *it may be subject to a lawsuit*." *City of Las Cruces v. Garcia*, 1984-NMSC-106, ¶ 5, 102 N.M. 25, 690 P.2d 1019 (internal quotation marks and citation omitted); *Dutton v. McKinley Cnty. Bd. of Comm'rs*, 1991-NMCA-130, ¶ 9, 113 N.M. 51, 822 P.2d 1134 (stating that it is "firmly established that the notice required is not simply actual notice of the occurrence of the accident or injury but rather, actual notice that there exists a likelihood that litigation may ensue" (internal quotation marks and citation omitted)). Requiring a potential claimant to provide notice that litigation is likely to ensue is intended to "reasonably alert [the agency] to the necessity of investigating the merits of a potential claim against it." *Smith v. State ex rel. State Dep't of Parks & Recreation*, 1987-NMCA-111, ¶ 12, 106 N.M. 368, 743 P.2d 124; *see also Ferguson v. State Highway Comm'n*, 1982-NMCA-180, ¶ 12, 99 N.M. 194, 656 P.2d 244 (stating that the purpose of the notice requirement under the TCA is to enable an investigation "while the facts are accessible[,]" "to question witnesses[,]" "to protect against simulated or aggravated claims[,]" and "to consider whether to pay the claim or to refuse it").

{51} Plaintiff does not argue on appeal, nor did she allege in the district court, that her report of the alleged rape created or was sufficient to notify Defendant of a likelihood that litigation may ensue. Without such notice, the fact that Plaintiff notified Defendant of the alleged rape does not satisfy Section 41-4-16(B). *Dutton*, 1991-NMCA-130, ¶ 9 (stating that actual knowledge of a plaintiff's alleged injury is insufficient to comply with Section 41-4-16). The district court properly dismissed Plaintiff's TCA claims.

4. Plaintiff's Jury Instructions Arguments

{52} In regard to the instructions given to the jury, Plaintiff argues that the district court erred in two ways. Plaintiff's first argument pertains to the instruction that stated the elements of a "hostile work environment" claim. In relevant part, the jury was instructed that to prove her hostile work environment theory, Plaintiff was required to establish that Defendant's "alleged conduct, after it learned of Plaintiff['s] allegations of rape, was based on her sex and was severe and pervasive." Plaintiff argues that because the given instruction included the phrase "severe and pervasive" instead of the phrase "severe or pervasive[,]" as stated in Plaintiff's proffered instruction on this issue, the jury was provided with a misstatement of the law.

{53} Plaintiff's argument regarding the hostile work environment instruction is premised on our Supreme Court's recognition, in *Nava v. City of Santa Fe*, that "generally" a hostile work environment claim requires showing that "the harassment was sufficiently severe or pervasive to create an abusive work environment[.]" 2004-NMSC-039, ¶ 6, 136 N.M. 647, 103 P.3d 571 (quoting Lawrence Solotoff & Henry S. Kramer, *Sex Discrimination and Sexual Harassment in the Work Place* § 3.04[2], at 3-31 (2004)) (internal quotation marks omitted). The *Nava* Court also observed, however, that in New Mexico the HRA has been interpreted to require conduct that is "so severe and pervasive that . . . the workplace is transformed into a hostile and abusive environment for the employee." *Nava*, 2004-NMSC-039, ¶ 5 (quoting *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 24, 135 N.M. 539, 91 P.3d 58) (internal quotation marks omitted). The phrase "severe and pervasive" used in *Ocana* and recognized in *Nava* continued, after *Nava*, to be employed by our Supreme Court in the context of hostile work environment claims. *See, eg.*,

Ulibarri v. State, 2006-NMSC-009, ¶ 13, 139 N.M. 193, 131 P.3d 43 ("The alleged harassment . . . was not sufficiently severe and pervasive to support [the p]laintiff's claim.").

{54} The issue in the present case, whether harassment must be "severe and pervasive" or "severe or pervasive" was not considered by the *Nava* Court, and therefore, *Nava* is not authority for Plaintiff's argument. *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 10, 128 N.M. 601, 995 P.2d 1043 ("[C]ases are not authority for propositions they do not consider."). Further, we are not persuaded that, by its mere recognition of a general rule cited in a treatise, the *Nava* Court intended to announce a new standard applicable to hostile work environment claims in New Mexico. Accordingly, we conclude that the district court's instructions to the jury on this issue accurately stated the law.

{55} Plaintiff's second argument in regard to the jury instructions is a generalized complaint that the district court failed to give the jury Plaintiff's proffered instructions pertaining to three issues: Defendant's failure to conduct an adequate and fair investigation into the alleged rape, its failure to prepare a written report on the alleged rape, and its failure "to respond" to Plaintiff's reports that she felt "traumatized, terrified, intimidated[,] and unable to work or learn" when she was required to interact with the senior resident. Insofar as we can tell from Plaintiff's briefing, Plaintiff's argument regarding Defendant's failure to prepare a written report is raised for the first time on appeal. Therefore, this issue will not be considered. *See Wolfley v. Real Estate Comm'n*, 1983-NMSC-064, ¶ 5, 100 N.M. 187, 668 P.2d 303 (stating that the appellate courts will not consider theories that are raised for the first time on appeal).

{56} As to Plaintiff's contention that the district court erred in failing to instruct the jury in regard to Defendant's failure to conduct an investigation into the alleged rape and its failure "to respond" to Plaintiff in a particular manner, Plaintiff fails to demonstrate where, in the record, facts to support these instructions were argued before the district court, argued at trial, or supported by evidence that was presented to the jury. *See* Rule 12-213(A)(4) NMRA (requiring the appellant to include in the brief in chief citations to the record proper, transcript of proceedings, or exhibits relied upon in support of each argument). We will not search the record on Plaintiff's behalf; accordingly, Plaintiff's argument provides no grounds for reversal. *See Muse*, 2009-NMCA-003, ¶ 72 (stating that this Court "will not search the record for facts, arguments, and rulings in order to support generalized arguments").

5. Conclusion of Issues in Plaintiff's Appeal

{57} In summary, we reverse the district court's order dismissing Plaintiff's WPA claim. As to all other issues raised by Plaintiff, we affirm. We turn now to Defendant's cross-appeal.

B. Defendant's Cross-Appeal

{58} Defendant's cross-appeal pertains to the district court's decisions regarding its requested costs and attorney fees. As to the costs issue, Defendant relies upon both Rule 1-068 and Rule 1-054. Since the jury did not enter a judgment in favor of Plaintiff, Rule 1-068 does not apply under the circumstances of this case. *See* Rule 1-068(A) ("If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant must pay the costs . . . incurred by the defending party after the making of the offer[.]"); *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 100, 134 N.M. 77, 73 P.3d 215 ("Rule 1-068 . . . does not apply where the judgment is entered against [a] plaintiff-offeree and in favor of a defendant-offeror."). Accordingly, we limit our review of the costs issue to Defendant's arguments under Rule 1-054.

{59} Pursuant to Rule 1-054(D)(1), "costs . . . shall be allowed to the prevailing party unless the court otherwise directs[.]" Attorney fees awards are governed by the American rule, which provides that "absent statutory or other authority, . . . each party should bear its own attorney fees"; an exception to the American rule is the court's power "to sanction the bad faith conduct of litigants and attorneys[.]" *Clark v. Sims*, 2009-NMCA-118, ¶ 21, 147 N.M. 252, 219 P.3d 20 (internal quotation marks and citation omitted). The district court's decisions regarding costs and attorney fees are reviewed for an abuse of discretion. *Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶¶ 47, 53, 135 N.M. 641, 92 P.3d 653.

{60} Defendant filed motions seeking to recover attorney fees in an amount not specified in the record, and costs, totaling $39,442.05. The district court found that, at trial, Plaintiff testified that she had "earned almost no money. However, Plaintiff has a medical degree and it was established at trial that Plaintiff had done little, to nothing, to seek employment from the time of her termination to the time of trial." The court determined that, although the foregoing facts did not support an "outright denial of Defendant's cost bill[,]" they did warrant reducing certain costs that Defendant sought to recover. The district court ultimately awarded Defendant costs totaling $16,661.16. The district court denied Defendant's request for attorney fees, reasoning that the HRA does not allow attorney fees for a prevailing Defendant and that Plaintiff's case was not brought in bad faith, nor was it unreasonable, frivolous, or lacking a foundation.

{61} Defendant argues that it was error for the district court to deny its costs for certain depositions on the ground that they were not used at trial or in support of summary judgment, as well as its electronic filing fees, its charges for obtaining Plaintiff's medical records, witness fees that it paid to Plaintiff's psychiatrist who was not qualified as an expert, and transcript fees that were not requested or approved by the court. Additionally, Defendant argues that the court erred in reducing its jury consultant fees from the total sum of $18,298.31 to the awarded sum of $2000. With the exception of the court's denial of Defendant's electronic filing fees, which was based on a misconstruction of Rule 1-054(D)(2)(a), we conclude that the district court properly exercised its discretion in its decision regarding costs.

{62} Pursuant to the Rules of the District Court of the Second Judicial District, Defendant was required to file all of its court documents electronically. *See* LR2-303 NMRA (stating that in the Second Judicial District Court, in civil, domestic relations, and probate actions, "[t]he electronic filing of documents . . . is mandatory for parties represented by attorneys"). Having prevailed against Plaintiff in this lawsuit, Defendant sought to recover its electronic filing fee costs of $330. The district court refused to award Defendant's filing fees on the ground that "Rule 1-054 does not allow for the recovery of e-filing charges."

{63} Rule 1-054(D)(2)(a) provides that "filing fees" are generally recoverable. Rule 1-005(F) NMRA, governing the service and filing of pleadings and other papers with the court, provides that " '[f]iling' shall include . . . filing an electronic copy[.]" Nothing in these rules suggests that the cost of electronically filing court documents is excluded from Rule

1-054(D)(2)(a)'s provision that filing fees are generally recoverable. Further, to conclude that electronic filing fees comprise an exception to Rule 1-054(D)(2)(a) would absurdly render that rule inapplicable to attorney-represented litigants in a civil, domestic relations, or probate action in the Second Judicial District Court who are required to file documents electronically. LR2-303. To avoid this absurd result, and in accord with the language of the rule, we conclude that "filing fees" as that term is used in Rule 1-054(D)(2) includes electronic filing fees.

{64} Because the district court's denial of Defendant's costs was expressly based upon its misconstruction of Rule 1-054(D)(2)(a), we conclude that the court abused its discretion in that regard. *See Bhandari v. Artesia Gen. Hosp.*, 2014-NMCA-018, ¶ 9, 317 P.3d 856 (stating that the district court abuses its discretion when its discretionary decision rests upon a misapprehension of the law), *cert. denied*, 2014-NMCERT-001, 321 P.3d 935. On remand, the district court shall reconsider whether to award Defendant its electronic filing fee costs of $330.

{65} Having reviewed Defendant's arguments and the district court's order, we conclude that the court's remaining costs decisions were supported by various provisions of Rule 1-054, and we will not second guess the equitable consideration by the district court of Plaintiff's inability to pay the costs. *See Martinez v. Martinez*, 1997-NMCA-096, ¶ 20, 123 N.M. 816, 945 P.2d 1034 (stating that equitable considerations are appropriate in determining whether to award costs); *Gallegos ex rel. Gallegos v. Sw. Cmty. Health Servs.*, 1994-NMCA-037, ¶ 30, 117 N.M. 481, 872 P.2d 899 ("[T]he losing party's ability to pay is a proper factor to consider in determining whether to award costs."); *see also* Rule 1-054(D)(1) (granting the court discretion to determine whether to award costs); Rule 1-054(D)(2)(d) (stating that transcript fees are generally recoverable "when requested or approved by the court"); Rule 1-054(D)(2)(e)(i), (ii) (stating, in relevant part, that the cost of a deposition is generally recoverable only when it is used at trial or used in support of a motion for summary judgment); Rule 1-054(D)(2)(g) (providing only that "expert" witness fees are generally recoverable). Accordingly, we are not persuaded that the district court's denial or reduction of Defendant's remaining costs constituted an abuse of discretion.

{66} In regard to attorney fees, Defendant, citing *Sorbo v. United Parcel Service*, 432 F.3d 1169, 1181 (10th Cir. 2005), argues that "[i]n federal employment discrimination actions, the court has discretion to award fees to a prevailing defendant when the plaintiff's claim 'was brought in bad faith, or was frivolous, unreasonable, or without foundation.' " Defendant urges this Court to interpret the HRA to comport with the principle that it has derived from *Sorbo*. Building on the foregoing, Defendant argues further that because "Plaintiff's claims in this litigation were, in fact, unreasonable and without foundation[,]" the district court erred in denying its request for attorney fees under the HRA.

{67} It is unnecessary in this case to determine whether the HRA should be read to comport with the principle that Defendant has derived from *Sorbo*. Had the district court determined that Plaintiff's lawsuit was unreasonable or without foundation, it was free to exercise its discretion to award attorney fees to Defendant. *See Clark*, 2009-NMCA-118, ¶ 21 (stating that, pursuant to the American Rule, a district court may award a prevailing party its attorney fees on the ground that the losing party acted in bad faith). The district court expressly found that Plaintiff's lawsuit was not unreasonable and was not brought "without foundation[.]" Defendant does not attack the district court's determination in that regard, and it is conclusive. *See* Rule 12-213(A)(4) (stating that where a party does not specifically attack a finding, the finding shall be deemed conclusive). Accordingly, Defendant's assertion that Plaintiff's lawsuit was "in fact, unreasonable and without foundation" is contradicted by the district court's conclusive finding to the contrary. Defendant's attorney fees argument provides no grounds for reversal.

{68} In sum, as to Defendant's cross-appeal, we reverse the district court's decision to deny the cost of Defendant's electronic filing fees. On remand, the district court shall consider whether those costs should be awarded to Defendant. As to the court's remaining decisions regarding costs and attorney fees, we affirm.

CONCLUSION

{69} We reverse the district court's dismissal of Plaintiff's WPA claim. We also reverse the district court's denial of Defendant's request to recover the cost of its electronic filing fees. We remand for further proceedings as to these issues. As to all remaining issues raised in Plaintiff's appeal and Defendant's cross-appeal, we affirm.

{70} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
LINDA M. VANZI, Judge

Certiorari Denied, September 16, 2015, No. 35,486

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-105

No. 33,465, (filed July 21, 2015)

JOHN WILLS, M.D.,
Plaintiff-Appellant,
v.
BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO
and UNIVERSITY OF NEW MEXICO HEALTH SCIENCES CENTER,
Defendants-Appellees

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
CLAY CAMPBELL, District Judge

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for Appellant

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for Appellees

Opinion

Roderick T. Kennedy, Judge

{1} Plaintiff John Wills, M.D. sued the Board of Regents of the University of New Mexico and the University of New Mexico Health Sciences Center (Defendants) for breach of contract and, relatedly, breach of the covenant of good faith and fair dealing. He later amended his complaint to include claims of a violation of due process and a violation of the New Mexico Whistleblower Protection Act (the WPA), NMSA 1978, §§ 10-16C-1 to -6 (2010), on the ground that Defendants terminated his employment in retaliation for his initiation of this lawsuit. On Defendants' motion, the district court dismissed Plaintiff's contract-related claims and his WPA claim. The court later granted Defendants' motion for a judgment on the pleadings as to Plaintiff's due process claim.

{2} On appeal, Plaintiff argues that the district court erred in dismissing his breach of contract[1] and WPA claims and in entering judgment on the pleadings as to his due process claim. We conclude that the district court did not err, and we affirm.

BACKGROUND

{3} Plaintiff was hired to the position of Chair of the Department of Anesthesiology and Critical Care Medicine at the University of New Mexico Health Sciences Center in September 2002. Pursuant to a two-year employment contract, Defendants agreed to pay Plaintiff a base salary plus a supplemental salary. After the two-year term of the contract expired, Defendants continued to pay Plaintiff's salary in an amount consistent with the payment-related terms of the original contract until 2009. After 2009 Defendants stopped paying Plaintiff pursuant to those original contract payment-related terms.

{4} In June 2011, Plaintiff filed a complaint for breach of contract and breach of the covenant of good faith and fair dealing (the initial complaint) by which he sought to recover "past due salaries" that were unpaid since 2009. Plaintiff alleged that the terms of the expired contract had been "continued by the acts of the parties and the subsequent payment of salary to [P]laintiff per the terms of the [original] contract" and, by failing to pay him in accord with those terms, Defendants were in breach of their contractual obligation. Approximately four days after Defendants were served with Plaintiff's initial complaint, Defendants terminated his employment.

{5} After Defendants terminated his employment, Plaintiff amended his complaint, adding a claim for retaliatory violation of due process. In support of his due process claim, Plaintiff alleged that by terminating his employment in retaliation for filing the initial complaint, Defendants violated Plaintiff's constitutional right of access to the courts. Later, in a third amended complaint, Plaintiff added a new claim in which he alleged that, by retaliating against him for filing the initial complaint, Defendants abused their authority in violation of the WPA.

{6} Defendants moved to dismiss Plaintiff's third amended complaint pursuant to Rule 1-012(B)(6) NMRA on the ground that it failed to state any claim upon which relief could be granted. For reasons that are discussed later in this Opinion, the district court granted Defendants' motion to dismiss Plaintiff's claims related to breach of contract and breach of the covenant of good faith and fair dealing, as well as his WPA claim. As to Plaintiff's due process claim, the district court denied Defendants' motion to dismiss on the ground that "a public employer may not take adverse employment action against a public employee for that employee filing a lawsuit[.]"

{7} Defendants again sought dismissal of Plaintiff's due process claim in a motion for a judgment on the pleadings pursuant to Rule 1-012(C). *See Glaser v. LeBus*, 2012-NMSC-012, ¶ 8, 276 P.3d 959 ("A judgment on the pleadings is treated as a motion to dismiss when the district court considers matters contained solely within the pleadings."). In the motion for a judgment on the pleadings, Defendants argued that, insofar as Plaintiff sought to recover damages from Defendants for an alleged violation of his constitutional right of access to the courts, his claim was barred by the New Mexico Tort Claims Act (the TCA), NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2015). In support of their argument, Defendants cited New Mexico case law for the proposition that "absent a waiver of immunity under the [TCA], a person may not sue the state for damages for violation of a state constitutional right." *Valdez v. State*, 2002-NMSC-028, ¶ 12, 132 N.M. 667, 54 P.3d 71 (internal quotation marks and citation omitted). Plaintiff conceded that this was

[1]Plaintiff does not raise any issue on appeal regarding his claim of a breach of the covenant of good faith and fair dealing.

a correct statement of the law; he argued in response, however, that Defendants' motion for a judgment on the pleadings should be denied because the TCA's "failure to permit a remedy for a violation of a public employee's fundamental and constitutional right of access to the courts makes the [TCA] unconstitutional as applied" in this case.

{8} In support of his argument that the TCA was unconstitutional as applied in this case, Plaintiff argued that access to the courts is a fundamental right and that by depriving him of access to the courts and, concomitantly, a remedy in this case, the TCA violated his right to equal protection. Plaintiff also argued that he had a fundamental right to "a means to a remedy," and to the extent that the TCA barred his ability to exercise the right to seek a remedy in this instance, its application violated his substantive and procedural due process rights.

{9} The district court was not persuaded by Plaintiff's constitutional arguments. Having considered Defendants' motion for a judgment on the pleadings and Plaintiff's response, the district court granted the motion for a judgment on the pleadings, thereby dismissing Plaintiff's due process claim.

{10} On appeal, Plaintiff argues that the factual allegations in his complaint satisfied the plain language of the WPA and that the district court's dismissal of his WPA claim was founded on an erroneous interpretation of the law. He also argues that because he had an implied employment contract, he was legally entitled to sue Defendants for breach of contract and that the district court erred in concluding otherwise. And, finally, reiterating the argument that he made in response to Defendants' motion for a judgment on the pleadings, he argues that the district court erred in dismissing his due process claim.

{11} We conclude that because Defendants' breach of contract claim was not founded upon a valid written contract, the district court properly dismissed his claim. We further conclude that the allegations in Plaintiff's complaint did not state a claim under the WPA. And, finally, we conclude that Plaintiff's constitutional attack on the TCA is not supported by the relevant law, and we affirm the district court's judgment on the pleadings as to Plaintiff's due process claim.

Standard of Review

{12} We review de novo a district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6). *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917. "Dismissals under Rule 1-012(B)(6) are proper when the claim asserted is legally deficient." *Id.* "In reviewing a district court's decision to dismiss for failure to state a claim, we accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint." *Id.* (internal quotation marks and citation omitted). The foregoing standard of review also applies to a district court's entry of judgment on the pleadings pursuant to Rule 1-012(C). *Vill. of Angel Fire v. Bd. of Cnty. Comm'rs of Colfax Cnty.,* 2010-NMCA-038, ¶ 5, 148 N.M. 804, 242 P.3d 371.

Plaintiff's WPA Claim

{13} Plaintiff's WPA claim was based on the allegation that Defendants retaliated against him for filing the initial complaint by terminating his employment and that this retaliatory act constituted "an abuse of authority" as that term is used in the WPA. *See* § 10-16C-2(E)(3). The district court dismissed Plaintiff's WPA claim on the ground that Plaintiff's allegations did not show that Plaintiff engaged in any activity that is protected by the WPA. On appeal, Plaintiff argues that the district court erred in dismissing his claim because the allegations in his third amended complaint satisfied the "plain language" of the WPA.

{14} The WPA provides that it is unlawful for a public employer to "take any retaliatory action against a public employee because the public employee . . . communicates to the public employer or a third party information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act[.]" Section 10-16C-3(A). In relevant part, the WPA defines an "unlawful or improper act" as an "action or failure to act on the part of a public employer that . . . constitutes . . . an abuse of authority[.]" Section 10-16C-2(E)(3). Thus, in order to state a legally viable claim under the WPA, Plaintiff was required to allege that because Plaintiff communicated with Defendants or a third party about Defendants' abuse of authority, Defendants retaliated against him.

{15} In his complaint, Plaintiff failed to allege that Defendants retaliated against him because he communicated with a third party or with Defendants about Defendants' abuse of authority. Rather, Plaintiff alleged only that the act of retaliation, that is, the termination of his employment, constituted an abuse of authority. Because the WPA exclusively protects an employee's communications, by failing to allege that Defendants retaliated against him because he communicated about "an unlawful or improper act" as that term is defined in the WPA, Plaintiff omitted the element of communication that was essential to his WPA claim. *Am. Fed'n of State Cnty. And Mun. Emps. Council 18 v. State*, 2013-NMCA-106, ¶ 6, 314 P.3d 674 (recognizing that to withstand dismissal for failure to state a claim, the facts pleaded must meet the essential elements of the claim). Plaintiff's argument on appeal that Defendants violated the WPA when they abused their authority by retaliating against him is not supported by any facts or by any language of the WPA and is, therefore, unpersuasive.

{16} On appeal, Plaintiff expands his WPA theory. He now argues that by filing the initial complaint, "he was communicating to both his public employer and to a third party via the public record" that Defendants were abusing their authority by withholding his "contractually agreed-upon pay." Although Plaintiff did not clearly articulate this theory below, it may reasonably have been inferred from his complaint and, therefore, we will consider it on appeal. *Id.* (stating dismissal is improper where the essential elements of the claim may reasonably be inferred from the alleged facts); *Delfino*, 2011-NMSC-015, ¶ 9 (stating that the appellate courts must resolve all doubts in favor of the sufficiency of the complaint).

{17} Defendants argue that whistleblower protection laws, including the WPA, do not protect an employee's "communications" about a personal employment grievance. Rather, Defendants argue, the purpose of whistleblower protection laws generally and the WPA specifically is to protect employees who risk their own job security for the good of the public by disclosing the unlawful and improper activities of public officials. Because Plaintiff's at-issue lawsuit "communication" pertained only to whether Defendants were required to pay Plaintiff according to the terms of the original contract, Defendants contend that the communication was not one that was protected by the WPA.

{18} Plaintiff has conceded that the breach of contract allegations that he communicated in his initial complaint did not pertain to "a matter of public concern." He argues, however, that this Court should not read into the statute something that is

not there, namely, a requirement that to qualify for the protections of the WPA, the employee's at-issue communication must pertain to a matter of public concern. In Plaintiff's view, the "plain meaning" of the text of the WPA reveals the Legislature's intent to permit a WPA claim under the circumstances of this case.

{19} The issue whether Plaintiff was entitled to whistleblower protection arising out of his lawsuit communication regarding Defendants' failure to pay him according to the terms of the original employment contract is a matter of first impression in New Mexico. "When New Mexico cases do not directly answer the question presented, we look for guidance in analogous law in other states or the federal system." *CIT Grp./Equip. Fin., Inc. v. Horizon Potash Corp.*, 1994-NMCA-116, ¶ 6, 118 N.M. 665, 884 P.2d 821. The WPA was modeled after its federal counterpart. *See* 5 U.S.C. § 2302(b)(8) (2013) (prohibited personnel practices). Accordingly, cases interpreting the federal whistleblower law have persuasive value in considering the legislative intent behind the WPA. *See Trujillo v. N. Rio Arriba Elec. Coop, Inc.*, 2002-NMSC-004, ¶ 8, 131 N.M. 607, 41 P.3d 333 (recognizing that, when New Mexico statutes are similar to their federal counterparts, appellate courts may rely on federal jurisprudence in construing legislative intent).

{20} Like the WPA, the federal whistleblower protection law does not explicitly limit whistleblower protection to communications that benefit the public or pertain to matters of public concern. Nevertheless, as Defendants demonstrate in their answer brief, federal courts interpreting the federal whisteblower protection law have distinguished "whistleblowing" that benefits the public by exposing unlawful and improper actions by government employees from communications regarding personal personnel grievances that primarily benefit the individual employee. *See Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012) (stating that the federal whistleblower protection law "makes clear that whistleblowing provides an important public benefit"); *Winfield v. Dep't of Veterans Affairs*, 348 F. App'x. 577, 580 (Fed. Cir. 2009) (per curiam) ("Whistleblower protection does not extend to an employee's personal grievances about his job."); *Riley v. Dep't of Homeland Sec.*, 315 F. App'x. 267, 270 (Fed. Cir. 2009) (stating that "personal disagreements with legitimate managerial decisions" do not demonstrate abuse of authority or "any other kind of activity that could be considered a whistleblowing disclosure"); *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998) (stating that the federal whistleblower protection laws are "designed to protect employees who risk their own personal job security for the benefit of the public"). Only the former is protected by whistleblower protection laws. *See Montgomery v. E. Corr. Inst.*, 835 A.2d 169, 180 (Md. 2003) (discussing the legislative intent of the federal whistleblower protection laws and stating that the term "whistleblowing," which generally evokes the type of public disclosure that "serve[s] the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary government expenditures[,]" does not include an individual's communications regarding a supervisor's maltreatment of him personally (emphasis, internal quotation marks, and citation omitted)).

{21} Plaintiff argues that the foregoing authorities are not binding on this Court and should not bear on our analysis of the WPA. However, aside from citing the bare text of the WPA, he provides no authority to support the proposition that, by communicating about his dispute with Defendants over whether Defendants were required to pay him according to the terms of his expired employment contract, he engaged in an activity that was protected by the WPA. We will therefore assume that no such authority exists. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that, if no authority is cited in support of a proposition the appellate courts will assume that no such authority exists). Further, the object of statutory interpretation is to construe its terms according to their "obvious spirit or reason," not to interpret its terms in a way that would lead to an absurd or unintended result. *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 3, 117 N.M. 346, 871 P.2d 1352 (internal quotation marks and citation omitted). Nothing in the language of the WPA, when read in its entirety and against the backdrop of the earlier discussed federal authorities, leads us to believe that Plaintiff's initial complaint constituted a protected whistleblowing activity. Since the district court reached the same conclusion, we affirm its order dismissing Plaintiff's WPA claim.

Plaintiff's Contract Claim

{22} The district court dismissed Plaintiff's breach of contract claim on the ground that Plaintiff's employment contract expired by its own terms after two years and, in the absence of a valid written employment contract, Plaintiff's claim was barred by NMSA 1978, Section 37-1-23(A) (1976). Plaintiff argues that he had an implied contract that satisfied Section 37-1-23(A). Therefore, Plaintiff argues, the district court erred in dismissing his claim.

{23} Section 37-1-23(A) provides that "[g]overnmental entities are granted immunity from actions based on contract, except actions based on a valid written contract." Accordingly, "a government[] entity's contractual liability can only be based on a valid written contract." *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 8, 121 N.M. 728, 918 P.2d 7.

{24} In the present case, the two-year employment contract between Plaintiff and Defendants expired in September 2004. Plaintiff alleged, however, that, "[t]he terms of the original contract . . . [were] continued by the acts of the parties" and by Defendants' subsequent payment of Plaintiff's salary in an amount consistent with the terms of the original contract. Relying on the principle that "an implied employment contract . . . may be found . . . in the conduct of the parties," Plaintiff argues that the continued acts of the parties under the circumstances of this case gave rise to an implied contract. *Id.* ¶ 10 (internal quotation marks and citation omitted).

{25} Even assuming that the parties' conduct gave rise to an implied employment contract, without a showing that the terms of the implied contract were written, Section 37-1-23(A) bars Plaintiff's claim. Plaintiff's reliance on *Garcia* is misplaced. In *Garcia*, the implied employment contract that included *written* terms in a personnel policy constituted a "valid written" employment contract as contemplated in Section 37-1-23(A). *Garcia*, 1996-NMSC-029, ¶¶ 14-15, 19. *Garcia* does not support Plaintiff's argument that an employment contract that is implied only from the actions of the parties satisfies Section 37-1-23(A). Rather, *Garcia* stands for the proposition that where an employment contract may be implied from "written terms" it may be considered a "valid written contract" for the purpose of satisfying Section 37-1-23(A). *See Garcia*, 1996-NMSC-029, ¶¶ 10, 18 (recognizing that although an implied employment contract may be found from written representations, oral representations, from the parties' conduct,

or in a combination of conduct and representations, an oral promise is not a "valid written contract" such that it could satisfy Section 37-1-23(A)). Because Plaintiff failed to demonstrate the existence of a valid written employment contract, we affirm the district court's dismissal of his claim.

Plaintiff's Due Process Claim

{26} In his third amended complaint, Plaintiff alleged that Defendants violated his due process right of access to the courts by terminating his employment in retaliation for filing his initial complaint. Plaintiff conceded that insofar as his claim for damages did not fit within one of the enumerated exceptions to governmental immunity under the TCA, his claim was barred. *See Valdez*, 2002-NMSC-028, ¶ 12 (recognizing that "absent a waiver of immunity under the [TCA], a person may not sue the state for damages for violation of a state constitutional right" (internal quotation marks and citation omitted)). Plaintiff argued, however, that as applied to his claim, the TCA was unconstitutional in that it violated his "fundamental right" of access to the courts. The district court rejected Plaintiff's constitutional attack on the TCA and granted Defendants' motion for a judgment on the pleadings. On appeal, Plaintiff re-asserts his as-applied challenge to the constitutionality of the TCA on equal protection and due process grounds.

{27} We do not discern any substantive distinction between Plaintiff's equal protection and due process arguments. In his equal protection argument, Plaintiff argues that the TCA violates his fundamental right of access to the courts by barring his claim for monetary damages against Defendants. And in his due process argument, Plaintiff argues that the TCA is unconstitutional because it acts as a "complete ban" upon his fundamental right of access to the courts to seek a monetary remedy in this case. Thus, Plaintiff's sole argument is that the TCA is unconstitutional because it does not permit him to exercise what he asserts is a fundamental right, that is, the right to sue Defendants for monetary damages.

{28} Plaintiff's constitutional attack on the TCA is unavailing because it improperly conflates the constitutionally guaranteed right of access to the courts with the notion of entitlement to recover monetary damages. The right of access to the courts is an implicit guarantee derived from Article II, Section 18 of the New Mexico Constitution. *See Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 20, 125 N.M. 721, 965 P.2d 305 (recognizing that the constitutional provision that "[n]o person shall be deprived of life, liberty[,] or property without due process of law; nor shall any person be denied equal protection of the laws" contains an implicit right of access to the courts (internal quotation marks and citation omitted)). However, the right of "access to the courts does not create a right to unlimited governmental tort liability[,]" and it does not guarantee the existence of a remedy. *Id.* ¶¶ 20-21. Thus, "the fact that a plaintiff is denied an adequate remedy when suing the state does not constitute a violation of one's right to court access." *Id.* ¶ 21.

{29} Plaintiff's constitutional argument is also unpersuasive because it is based on the erroneous assumption that he had a fundamental right to sue Defendants for damages. The right to sue the government for tort damages is not a fundamental right; it is a statutory right. *See Marrujo v. State Highway Transp. Dep't*, 1994-NMSC-116, ¶¶ 18, 24, 118 N.M. 753, 887 P.2d 747 (stating that there is no fundamental right to sue the government for tort damages; rather, "[t]he right to sue the government is a statutory right"). As such, the Legislature may reasonably restrict that right, as it has done in the TCA. *See id.* ¶ 24 (stating that the Legislature may reasonably restrict the right to sue the government for tort damages); *Garcia v. Albuquerque Pub. Sch. Bd. of Educ.*, 1980-NMCA-081, ¶ 9, 95 N.M. 391, 622 P.2d 699 (recognizing that creating exceptions to sovereign immunity via the TCA is a function of the Legislature, not of the courts).

{30} In sum, Plaintiff has failed to demonstrate that the absence of a TCA exception that would permit him to seek monetary damages from Defendants under the circumstances of this case renders the TCA unconstitutional. Nor has Plaintiff demonstrated any legal basis upon which he was entitled to seek damages for Defendants' alleged violation of his constitutional right of access to the courts. Accordingly, we affirm the district court's order granting Defendants' motion for a judgment on the pleadings.

CONCLUSION

{31} We affirm.

{32} **IT IS SO ORDERED.**

RODERICK T. KENNEDY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, September 15, 2015, No. 35,496

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-106

No. 33,041, (filed July 28, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LUIS MADRIGAL,
Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
FERNANDO R. MACIAS, District Judge

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Opinion[1]

Michael D. Bustamante, Judge

{1} Defendant Luis Madrigal (Defendant) appeals his conviction for trafficking, conspiracy to commit trafficking, and possession of drug paraphernalia. Because we conclude that Defendant was twice put in jeopardy for the same crime when the State both forfeited his property and subjected him to a criminal trial, we further conclude that Defendant's convictions must be vacated. *See* N.M. Const. art. II, § 15; NMSA 1978, § 30-1-10 (1963).

BACKGROUND

{2} Defendant was stopped while driving away from an apartment that was under surveillance by officers investigating drug trafficking. Cocaine was found in his pocket. He was indicted on July 16, 2009, for trafficking (possession with intent to distribute), conspiracy to commit trafficking, and possession of drug paraphernalia. A forfeiture complaint for the cash found in Defendant's pocket during the stop was filed fourteen days later on July 30, 2009, pursuant to the Forfeiture Act and the Controlled Substances Act, NMSA 1978, §§ 30-31-1 to -41 (1972, as amended through 2015). The forfeiture complaint had the same case number as the criminal case and was assigned to the same judge. A summons for the forfeiture complaint was issued the same day. The parties differ as to whether the summons was properly served. Defendant argues that the summons was served at Defendant's address in El Paso, Texas, although he was still in custody in New Mexico at the time and "could not possibly have been personally served at that address." The State maintains that the "return on th[e] summons indicated that Defendant was personally served with it on August 4, 2009." In any case, the parties agree that Defendant was not present for the forfeiture hearing on November 9, 2009. Because he failed to appear or answer the forfeiture complaint, the district court, Judge Bridgforth, entered a default judgment against him. Although the criminal case was initially assigned to Judge Bridgforth, it was reassigned several times and ultimately was tried in October 2012—roughly three years after entry of the default judgment—before Judge Macias. Defendant was convicted by a jury of all charges and sentenced to eighteen years imprisonment.

DISCUSSION

{3} Defendant argues that (1) his right to be free of double jeopardy was violated, (2) his counsel at trial was ineffective, and (3) there was insufficient evidence to support his convictions. Because we agree with Defendant's first argument, we need not reach the other two.

{4} We begin with the State's concession that the forfeiture of Defendant's money was fatally flawed under the Forfeiture Act. Section 31-27-6(E)(2) of the Forfeiture Act provides that "[t]he court shall enter a judgment of forfeiture and the property shall be forfeited to the state if the state proves by clear and convincing evidence that . . . the criminal prosecution of the owner has resulted in a conviction[.]" In addition, the State must prove by clear and convincing evidence that the property is subject to forfeiture and certain facts about the value of the property. Section 31-27-6(E)(1), (3). The State concedes that default judgment in the forfeiture matter was improper because Defendant had not yet been convicted, and the State did not demonstrate that the other elements were met. Because "compliance with the Forfeiture Act is mandatory[,]" we agree that the forfeiture judgment is invalid. *Albin v. Bakas*, 2007-NMCA-076, ¶ 1, 141 N.M. 742, 160 P.3d 923. We therefore vacate that judgment.

{5} The State argues that "[i]f the forfeiture is vacated, then the double jeopardy issue is mooted" and that once the forfeiture is vacated, "there [i]s only one proceeding"

[1]The present matter is decided under the Forfeiture Act enacted in 2002. *See* NMSA 1978, §§ 31-27-1 to -8 (2002, as amended through 2015). All references to the Forfeiture Act herein are to the statute as it existed before the 2015 amendments. In the 2015 session, the New Mexico Legislature substantially amended the Forfeiture Act. *See* 2015 N.M. Laws, ch. 152, §§ 1 to 10. Among other changes, the 2015 amendments provide that the Forfeiture Act "ensure[s] that only criminal forfeiture is allowed in this state[,]" and that "[t]he forfeiture proceeding shall begin after the conclusion of the trial for the related criminal matter in an ancillary proceeding . . . before the same judge and jury, if applicable[.]" Section 31-27-2(A)(6); § 31-27-6(C). They also state that "[d]iscovery conducted in an ancillary forfeiture proceeding is subject to the rules of criminal procedure." Section 31-27-6(D). These amendments took effect on July 1, 2015. 2015 N.M. Laws, ch. 152, § 21. Thus the precise scenario presented in this case is unlikely to be repeated.

and, thus, no double jeopardy violation. We disagree. Jeopardy attached on entry of the default judgment. *State v. Esparza*, 2003-NMCA-075, ¶ 17, 133 N.M. 772, 70 P.3d 762 ("[I]t is now settled that jeopardy attaches upon a court's entry of default judgment."). The State's concession that the default judgment was obtained in error does not negate the fact that the default proceedings occurred or that jeopardy attached. *See State v. Nunez*, 2000-NMSC-013, ¶ 167, 129 N.M. 63, 2 P.3d 264 (Serna, J., dissenting) ("[U]nder a true successive prosecution inquiry, . . . it would be a violation of double jeopardy to subject a defendant to multiple prosecutions regardless of whether an earlier prosecution resulted in acquittal, and therefore no punishment, or conviction, and therefore punishment. The harm the defendant suffers is the proceeding itself, regardless of the outcome."). *Cf. Blake v. State*, 65 A.3d 557, 564 (Del. 2013) ("Because the second prosecution for the greater offense subjected [the defendant] to double jeopardy, the [s]tate cannot avoid the protection the Double Jeopardy Clause provides by offering to vacate the lesser-included offense as consolation.").

{6} We therefore go on to examine whether Defendant's right to be free from double jeopardy under the New Mexico Constitution, Article II, Section 15, was violated when he was subjected to trial on the criminal charges. In *Nunez*, the Supreme Court of New Mexico held that forfeitures under the Controlled Substances Act "are decidedly punitive for double[] jeopardy purposes." 2000-NMSC-013, ¶ 94. The *Nunez* Court then made clear that, to avoid double jeopardy concerns, "all forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding." *Id.* ¶ 104. The crux of the matter now before us is whether the State pursued the forfeiture and criminal actions in a single proceeding or whether the proceedings were sufficiently distinct as to constitute separate proceedings.

{7} This Court addressed single versus separate proceedings in *Esparza*. There, the Court considered three consolidated cases (*Esparza*, *Booth*, and *Reed*) involving both criminal charges and forfeitures and focused specifically on whether the proceedings were separate such that double jeopardy principles precluded successive trials on both. *Esparza*, 2003-NMCA-075, ¶¶ 1, 19. The *Booth* case involved facts similar to those here, i.e., a default forfeiture judgment and subsequent criminal prosecution. *Id.* ¶¶ 6-8. In considering whether the forfeiture and criminal proceedings were separate, the Court noted that the forfeiture motion was filed three days after the indictment, had the same cause number as the indictment, and was directed to the same judge as the indictment. *Id.* ¶ 27. The Court also concluded that "[d]efendant Booth was on notice of the dual penalties facing him before either of the proceedings was resolved and . . . had no expectation of finality upon the resolution of the forfeiture motion." *Id.* ¶ 28. It also observed that "the State was not afforded multiple opportunities to rehearse its trial strategy, and [d]efendant Booth was not repeatedly subjected to the expense, embarrassment[,] and ordeal of repeated trials." *Id.* (internal quotation marks and citation omitted). Finally, the Court stated that "the State . . . endeavored, in good faith, to comply with the requirement of a single proceeding." *Id.* ¶ 33. It concluded that, "given the circumstances" of that case, "the unity of the two proceedings is apparent[.]" *Id.* It further concluded that Booth's right to be free of double jeopardy was not violated. *Id.* ¶ 46.

{8} Such unity is not apparent here. First, while it is true that the indictment and forfeiture complaint referenced the same case number, "the mere act of assignment of a docket number is insufficient, of itself, to demonstrate that the penalties were sought in a single, bifurcated proceeding." *Id.* ¶ 27. Second, although the two matters were initially assigned to the same judge, ultimately the two matters were decided before different judges. *See id.* ¶¶ 27, 32 (relying in part on the fact that the proceedings were overseen by the same judge to hold that forfeiture and criminal proceedings were not separate). Third, the parties dispute whether Defendant had notice of the forfeiture action at all. Fourth, the criminal trial occurred nearly three years after the conclusion of the forfeiture action. Neither *Nunez* nor *Esparza* require that forfeiture and criminal proceedings result in a single judgment or that they proceed in lock step. *See Nunez*, 2000-NMSC-013, ¶ 31; *Esparza*, 2003-NMCA-075, ¶¶ 20-22. In *Booth*, the criminal proceeding concluded with a plea nine months after the default judgment was entered. *Esparza*, 2003-NMCA-075, ¶ 8. *Contra Oakes v. United States*, 872 F. Supp. 817, 824-25 (E.D. Wash. 1994) (noting that "the civil decree of forfeiture was not entered until nearly ten months after the [p]etitioner's criminal conviction" in its holding that the forfeiture and criminal proceedings were separate), *rev'd on other grounds*, *United States v. Oakes*, 92 F.3d 1195 (9th Cir. 1996) (non-precedential). Nevertheless, the length of time between the default judgment and criminal convictions here stretches the bounds of what can be reasonably considered a single proceeding. Finally, we cannot ascribe good faith to the State when it sought a default forfeiture judgment in disregard of statutory requirements that had been in effect for seven years. *See* § 31-27-6. Considering these circumstances as a whole, we conclude that the forfeiture and criminal actions were pursued in separate proceedings.

{9} Because subjecting Defendant to two separate proceedings resulting in two penalties based on the same conduct is contrary to double jeopardy principles as stated in *Nunez*, we further conclude that Defendant's double jeopardy rights were violated. 2000-NMSC-013, ¶ 104 ("The only feasible way to avoid double jeopardy is to bring both civil and criminal suits in one combined proceeding." (alteration, internal quotation marks, and citation omitted)). Hence, Defendant's criminal convictions must be vacated. *Id.* ¶ 30 ("The New Mexico Constitution bars whichever action placed the defendant in jeopardy a second time for the same offense.").

CONCLUSION

{10} For the foregoing reasons, we remand to the district court with instructions to vacate the forfeiture judgment and Defendant's convictions.

{11} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
TIMOTHY L. GARCIA, Judge

Certiorari Granted, September 25, 2015, No. 35,499

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-107

No. 33,032, (filed July 31, 2015)

HENRY ROMERO,
Worker-Appellant,
v.
LAIDLAW TRANSIT SERVICES, INC. d/b/a SAFERIDE SERVICES, INC.
and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Employer/Insurer-Appellees

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
DAVID L. SKINNER, Workers' Compensation Judge

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TIMOTHY S. HALE
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for Appellees

Opinion

M. Monica Zamora, Judge

{1} In this workers' compensation case, Henry Romero (Worker) appeals from an order awarding him permanent partial disability (PPD) benefits, partial attorney fees, and imposing bad faith sanctions against Laidlaw Transit Services, Inc. d/b/a Saferide Services, Inc. (Employer), and the Insurance Company of the State of Pennsylvania (Insurer). Worker maintains that the bad faith sanctions imposed against Employer/Insurer were inadequate and that he should not have been required to pay half of his attorney fees. We affirm.

BACKGROUND

{2} Worker was employed as a patient transporter and driver for Employer. Worker was injured in two separate accidents, which both occurred within the scope of his employment. On April 13, 2006, a compensation order was entered finding that Worker had sustained compensable injuries as a result of the accidents. Worker was awarded temporary total disability (TTD) benefits. An interim order was entered March 9, 2012, reflecting a stipulation by the parties to reduce Worker's TTD benefits to PPD benefits at 80 percent.

{3} In August 2012, the parties reached a settlement agreement. Worker agreed to accept a lump sum payment in lieu of additional workers' compensation benefits, and Insurer agreed to continue paying Worker PPD benefits until the order approving settlement was filed. The agreement was presented to and approved by the Workers' Compensation Judge (WCJ) on August 10, 2012, and the order approving settlement was filed on August 30, 2012. However, Insurer had discontinued payment of PPD benefits on August 10, 2012, the day the WCJ approved the settlement rather than August 30, 2012, the day the order was filed.

{4} Worker sent letters requesting payment of PPD benefits for the period from August 10, 2012, to August 30, 2012, and received no response from Insurer. Worker requested that the WCJ enter an order directing payment of the PPD benefits along with post-judgment interest, a benefit penalty, and attorney fees. On March 7, 2013, the WCJ entered an order directing payment of the PPD benefits. The WCJ found that, contrary to the order approving settlement and despite Worker's requests for payment, Insurer failed or refused to issue the missed PPD payments. The WCJ ordered Insurer to issue payment of the PPD benefits and post-judgment interest, which together totaled $864.76. The WCJ set a hearing to address Worker's request for a benefit penalty and attorney fees.

{5} The hearing was held on March 20, 2013. The WCJ found that Insurer: failed to timely issue payment of the lump sum settlement funds pursuant to the order approving settlement; failed to pay PPD benefits in compliance with the order approving settlement; took no action in response to Worker's requests for payment; failed to respond to Worker's application to the WCJ requesting the order directing payment; failed to timely comply with the WCJ's order requiring payment of the PPD benefits; and offered no excuse or justification for its failure to comply with the WCJ's orders.

{6} The WCJ found that Insurer had willfully disregarded Worker's rights and violated the WCJ's orders and that Insurer knew that there was no reasonable basis for its conduct. The WCJ determined that Insurer's conduct constituted bad faith and/or unfair claim processing. The WCJ ordered Insurer to pay Worker $864.76 in PPD benefits, plus a benefit penalty of $216.19, for a total award of $1,080.95. The WCJ also awarded $2,500 in attorney fees to be shared equally between Insurer and Worker. Worker was responsible for $1,250 in attorney fees, resulting in a $169.05 net loss to Worker. Worker appealed.

DISCUSSION

{7} On appeal, Worker argues that the Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2015), provides an inadequate remedy for unfair claim-processing practices and bad faith claims. Worker also challenges the WCJ's decision concerning attorney fees.

Standard of Review

{8} We review the WCJ's factual findings under a whole record standard of review. *Moya v. City of Albuquerque*, 2008-NMSC-004, ¶ 6, 143 N.M. 258, 175 P.3d 926. We give deference to the WCJ as fact finder where findings are supported by substantial evidence. *See DeWitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453, 212 P.3d 341. The WCJ's application of the law to the facts is reviewed de novo. *Ruiz v. Los Lunas Pub. Sch.*, 2013-NMCA-085, ¶ 5, 308 P.3d 983. We also apply a de novo standard of review to the extent that our analysis involves the interpretation of workers' compensation statutes. *See Ramirez v. IBP Prepared Foods*, 2001-NMCA-036, ¶ 10, 130 N.M. 559, 28 P.3d 1100 (stating that interpretation of a workers' compensation statute is a question of law to be reviewed de novo), *superseded by statute on other grounds as stated in Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, 149 N.M. 198, 246 P.3d 1070. The WCJ's award of attorney fees is reviewed for abuse of

discretion. *Cordova v. Taos Ski Valley, Inc.*, 1996-NMCA-009, ¶ 15, 121 N.M. 258, 910 P.2d 334.

Unfair Claim-Processing Practices and Bad Faith

{9} Section 52-1-28.1(B) provides that when an employer/insurer engages in unfair claim processing or bad faith, the worker shall be awarded "any benefits due and owing" and "a benefit penalty not to exceed twenty-five percent of the benefit amount ordered to be paid." In this case, the WCJ awarded a benefit penalty of $216.19, an amount equal to twenty-five percent of the benefit amount ordered to be paid. This is the maximum benefit penalty allowable under the statute.

{10} Worker argues that the benefit penalty allowed by Section 52-1-28.1 is insufficient to deter bad faith and unfair claim processing by employers/insurers and that workers are deterred from pursuing bad faith and unfair claim-processing claims because the cost of successfully pursuing such claims exceeds the available benefit penalty. Worker also argues against Section 52-1-28.1 as an exclusive remedy for workers' bad faith claims.

{11} Section 52-1-28.1 was enacted in response to *Russell v. Protective Insurance Co.*, 1988-NMSC-025, ¶¶ 8-9, 107 N.M. 9, 751 P.2d 693, *abrogated by Cruz v. Liberty Mutual Insurance Co.*, 1995-NMSC-006, 119 N.M. 301, 889 P.2d 1223. *See Meyers v. W. Auto*, 2002-NMCA-089, ¶ 16, 132 N.M. 675, 54 P.3d 79. In *Russell,* the New Mexico Supreme Court held that, because the Act did not address bad faith claims in a workers' compensation context, such claims could be brought in the district court. 1988-NMSC-025, ¶¶ 8-9. Subsequently, the Legislature enacted Section 52-1-28.1 that provided workers with a remedy for bad faith and unfair claim-processing practices.

{12} In *Cruz*, the New Mexico Supreme Court addressed the question of whether the statute provides an adequate and exclusive remedy for workers' bad faith claims. 1995-NMSC-006, ¶¶ 2, 4. In *Cruz*, an injured worker filed a complaint in district court alleging "fraud, bad faith, breach of contract, breach of the insurance code, civil conspiracy, invasion of privacy, negligent misrepresentation, and racketeering" after the employer/insurer refused to pay for the worker's treatment as set forth in the parties' settlement agreement. *Id*. The district court dismissed the worker's complaint, finding it lacked jurisdiction due to the Act's exclusivity provision. *Id.* ¶ 6. The worker appealed, arguing that Section 52-1-28.1 was not an exclusive or adequate remedy for bad faith and unfair claim-processing claims. *Cruz*, 1995-NMSC-006, ¶¶ 7, 13.

{13} Our Supreme Court discussed the effect of Section 52-1-28.1 on workers' bad faith claims. *Cruz*, 1995-NMSC-006, ¶¶ 7-14. As to the statute's exclusivity, the Court explained that prior to the enactment of Section 52-1-28.1, workers were not afforded a remedy for bad faith and unfair claim processing under the Act. *Cruz*, 1995-NMSC-006, ¶ 9. The Court determined that the Legislature, by enacting Section 52-1-28.1 and providing a remedy for bad faith under the Act, brought all workers' bad faith claims under the Act's exclusivity provision and abrogated workers' rights to file bad faith actions in district court. *Cruz*, 1995-NMSC-006, ¶¶ 9, 11.

{14} As to the adequacy of the remedy, the Court stated that "[t]he purpose of the bad[] faith action in the Act is to secure benefits for the employee and penalize the employer or insurer." *Id.* ¶ 14. The Court noted that under Section 52-1-28.1, the worker receives all benefits due and owing as well as the extra benefit penalty of up to twenty-five percent of the claim. *Cruz*, 1995-NMSC-006, ¶ 14. The Court recognized that the benefit penalty would not be large in cases involving small claims. *Id.* Nonetheless, the Court concluded that the penalty amount was adequate and provided "sufficient deterrence to prevent an insurer from denying benefits in bad faith and enforces the public policy against the bad[]faith handling of workers' compensation claims." *Id.*

{15} Worker urges this Court to reexamine and overturn the holding of *Cruz* concerning the adequacy and exclusivity of the remedies provided in Section 52-1-28.1. We decline to do so. Our Supreme Court's decision in *Cruz* is binding, and we do not have the authority to overrule it. *See Alexander v. Delgado*, 1973-NMSC-030, ¶ 9, 84 N.M. 717, 507 P.2d 778 (stating that "the Court of Appeals is to be governed by the precedents of [the Supreme C]ourt"); *Meyers*, 2002-NMCA-089, ¶ 21 ("Worker challenges the holding of *Cruz* with respect to exclusivity and the adequacy of remedies available under Section 52-1-28.1. However, this Court does not have authority to overrule *Cruz*.").

Worker's Other Arguments Related to the Act's Exclusivity

{16} Worker argues that NMSA 1978, Section 59A-16-30 (1990), which provides a private right of action for bad faith under the Insurance Code and which specifically excludes actions by workers subject to the Act's exclusivity, violates the Equal Protection Clause of the New Mexico Constitution. Worker also argues that the district court should be granted concurrent jurisdiction with WCJs to assess penalty benefits for workers' bad faith claims. With regard to both of these arguments, Worker does not cite any supporting authority or develop factual bases on which we can evaluate his claims. As such, we will not review these arguments on appeal. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that this Court will not review unclear or undeveloped arguments or guess at what parties' arguments might be); *ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969 (explaining that appellate courts will not consider propositions that are unsupported by citation to authority).

Attorney Fees

{17} The WCJ determined and allocated Worker's attorney fees pursuant to NMSA 1978, § 52-1-54(I), (J) (2003, amended 2013), which provided in pertinent part:

> I. . . . The workers' compensation judge may . . . award[] a reasonable attorney fee if [he] finds that a claimant, an insurer or an employer acted in bad faith with regard to handling the injured worker's claim and the injured worker or employer has suffered economic loss as a result. However, in no case shall this additional amount exceed two thousand five hundred dollars ($2,500). . . .
>
> J. . . . [T]he payment of a claimant's attorney fees determined under this section shall be shared equally by the worker and the employer.

{18} Worker argues that the WCJ abused his discretion in assessing fifty percent of the awarded attorney fees to him. Worker relies on 11.4.4.13(B), (D)(1) NMAC (6/13/2003, amended 12/31/2012 and 10/1/2014), which provide that a WCJ may assess reasonable attorney fees to a party upon a finding of bad faith or unfair claim processing.[1] Worker contends that, under the circumstances of this case, it was reasonable to assess 100 percent of Worker's attorney fees to Insurer pursuant

[1]This regulation was amended in 2014, and the current version does not contain the provisions Worker relies on.

to the regulations. Worker's reading of the regulation puts it in direct contravention to Section 52-1-54(J). Worker's argument fails for two reasons.

{19} First, "[a]n administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority." *Wilcox v. N.M. Bd. of Acupuncture & Oriental Med.*, 2012-NMCA-106, ¶ 7, 288 P.3d 902 (internal quotation marks and citation omitted). "If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute." *Jones v. Emp't Servs. Div. of Human Servs. Dep't,* 1980-NMSC-120, ¶ 3, 95 N.M. 97, 619 P.2d 542.

{20} Second, we will not adopt a construction of an administrative code provision that is inconsistent with a related statute if consistent construction is possible. In interpreting sections of the administrative code, we employ the same rules as used in statutory construction. *AMREP Sw. Inc. v. Sandoval Cnty. Assessor*, 2012-NMCA-082, ¶ 9, 284 P.3d 1118. The primary goal "is to give effect to the intent of the [L]egislature." *Archer v. Roadrunner Trucking, Inc.*, 1997-NMSC-003, ¶ 7, 122 N.M. 703, 930 P.2d 1155. Administrative regulations should be construed in harmony with related statutory provisions if possible. *See Fowler v. Vista Care*, 2014-NMSC-019, ¶ 7, 329 P.3d 630 ("[The appellate courts] will not read the plain language of the statute in a way that is absurd, unreasonable, or contrary to the spirit of the statute, and will not read any provision of the statute in a way that would render another provision of the statute null or superfluous[.]" (internal quotation marks and citations omitted)); *DeWitt*, 2009-NMSC-032, ¶ 14 (stating that related provisions should be read together "to produce a harmonious whole"); *AMREP*, 2012-NMCA-082, ¶ 14 (reading pertinent statutory and administrative code provisions "together so as to give effect to their meaning"); *Howell v. Marto Elec.*, 2006-NMCA-154, ¶ 16, 140 N.M. 737, 148 P.3d 823 ("[I]t is the function of [the] courts to interpret [statutes and regulations] in a manner consistent with the legislative intent."). We conclude that 11.4.4.13(B), (D) NMAC (6/13/2003) cannot be read in a manner consistent with Section 52-1-54. Accordingly, we reject Worker's argument that the WCJ abused his discretion by failing to assess attorney fees entirely to Insurer under the regulation.

{21} We note that Section 52-1-54(I) and (J) were amended effective June 14, 2013. The current version of the statute provides that a "party found to have acted in bad faith *shall pay [100] percent* of the additional fees awarded for representation of the prevailing party in a bad faith action." Section 52-1-54(I) (emphasis added). However, because Worker's claim with regard to the benefit penalty and attorney fees was pending at the time the statute was amended, Article IV, Section 34 of the New Mexico Constitution precludes the application of the current version of the statute to this case. *See* N.M. Const. art. IV, § 34 ("No act of the [L]egislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.").

CONCLUSION

{22} For the foregoing reasons, we affirm the WCJ's order.

{23} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
CYNTHIA A. FRY, Judge

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