IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

UTTI ATHERTON, LAURA JARAMILLO,
JOHN DOE 1-99, and JANE DOE 1-99,

Plaintiffs-Appellees,

and

STATE OF NEW MEXICO, ex rel.
GARY K. KING, Attorney General,

Plaintiff-Appellee,

v.

MICHAEL J. GOPIN,
an unlicensed New Mexico attorney,
d/b/a the Law Offices of Michael J. Gopin,

Defendant-Appellant.

No. 32,028

Appeal from the Third Judicial District Court
Doña Ana County
The Honorable James T. Martin

REPLY BRIEF

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Statement Regarding Transcript Citations

Citations to all hearings are to the stenographic transcripts and substantially follow the form in Rule 23-112, NMRA, Appendix Part I.D, while including the date of the hearing cited.

Statement of Compliance

Pursuant to Rule 12-213(G), NMRA, this brief complies with the type-volume limitations set forth in Rule 12-213(F)(3), NMRA, because it is prepared in 14-point Times New Roman, and the body of the brief contains 4,191 words, according to WordPerfect X4.

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ARGUMENT

I. The District Court Erred in Granting Partial Summary Judgment on the Merits and in Applying That Ruling to the Joined Plaintiffs and to Hundreds of Unnamed Individuals.

Plaintiffs argue repeatedly that Defendant's liability under the UPA was decided on the merits. [AB 8; 27; 30-33]. Under the circumstances of this case – where Plaintiffs' allegations were accepted as true for Defendant's failure to file a timely response – the judgment was based on his procedural default.

Plaintiffs argue that the district court adopted as "undisputed" the facts in their partial summary judgment motion. [AB 8-9]. One example of an "undisputed" fact is that people were led to believe that Defendant was an attorney licensed to practice law in New Mexico. [AB 8]. That "undisputed" fact was supported by nothing more than photocopies of some of Defendant's advertising. [RP 77; 117-124]. At trial, Aurora Nichols testified that when she saw Defendant's advertising, she did not even believe that he was an attorney, much less one licensed to practice in New Mexico. *Id.* at 232

Plaintiffs argue that the order granting the original partial summary judgment motion was final. [AB 18-19]. As Plaintiffs acknowledge, an order is not final until all issues of law and fact have been determined and the case has been disposed of to the fullest extent possible. [AB 19]; *see also Kelly Inn v. Kapnison*, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992). Generally, a grant of

partial summary judgment is not a final order where other claims are left unresolved. *See Gates v. NM Tax. & Rev. Dept.*, 2008-NMCA-023, ¶ 8, 143 N.M. 446, 176 P.3d 1178. Here, the grant of partial summary judgment did not dispose of the case to the fullest extent possible; the case was litigated for another four years.

Plaintiffs acknowledge that even after the grant of partial summary judgment, there were claims remaining. [AB 20-21]. Under Rule 1-054(B)(1), "the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay." The district court made no such determination. [RP 315]. In the absence of such a determination, any order that adjudicates fewer than all claims does not terminate the action. *See* Rule 1-054(B)(1), NMRA.

When there are multiple parties, "judgment may be entered adjudicating all issues as to one or more, but fewer than all parties" and that judgment "shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment." Rule 1-054(B)(2), NMRA. The order granting partial summary judgment did not adjudicate all issues as to any parties. Additional Plaintiffs, including the Attorney General, were joined after the grant of partial summary judgment, and the litigation continued. [RP

282; 291; RP 1124].

The fact that the order granting partial summary judgment was not a final appealable order is highlighted by Plaintiffs' suggestion that Defendant should have filed an application for an interlocutory appeal. [AB 21]. Their argument is a concession that the partial summary judgment was not final. There would be no reason to seek an interlocutory appeal from a final order.

Plaintiffs also argue that in the first appeal, this Court "relied on the summary judgment Order as final." [AB 19]. This Court has never ruled on the finality of the partial summary judgment. The Court noted that the appeal was filed after "the parties agreed to settle the lawsuit." *Atherton v. Gopin*, 2012-NMCA-023, ¶ 2, 272 P.3d 700; *see also id.* at ¶ 12. That appeal was about a collateral issue, i.e. the use of a multiplier in awarding attorney fees. *Id.* at ¶ 1.

A. The District Court Erred in Granting Partial Summary Judgment to Plaintiffs.

Plaintiffs argue that there are not 314 unnamed individuals, but, rather, there are 314 voided settlement contracts between Defendant and his former clients. [AB 3-4]. Practically speaking, these amount to the same thing. Defendant did not have clients with more than one contract. The Attorney General was awarded $5,000 for each of these 314 individuals.

Plaintiffs believe that it is "immaterial" that there was no evidence of a contract signed by a non-lawyer from Defendant's office. [AB 25]. They argue that they presented evidence at summary judgment that non-attorney staff interviewed potential clients and "contracted with clients for legal services." [AB 25]. There is no evidence that non-lawyers ever contracted with clients, but Defendant was never given an opportunity to controvert this "fact." Nor was he given an opportunity to controvert any other disputed facts. Defendant has argued that it is not improper for non-attorneys to complete legal forms at the direction of a consumer as long as they are not giving legal advice. [BIC 15 (citing CARTER & SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 10.4.2.4 (7th ed. 2008)]. Plaintiffs offer no response.

Plaintiffs next argue that Defendant's then-trial counsel stated at a hearing that this is not a fact-intensive case. [AB 26]. Even if there is only one disputed issue of material fact, it is error to grant summary judgment. In the instant case, Defendant has identified numerous disputed issues of fact. [BIC 14-16].

B. The District Court Abused Its Discretion in Failing to Allow Defendant to Respond to the Facts in the Partial Summary Judgment Motion Because Defendant Demonstrated Excusable Neglect.

In *Lujan v. City of Albuquerque*, 2003-NMCA-104, ¶ 4, 134 N.M. 207, 75

P.3d 423, it was the defendants who moved for summary judgment, and the district court dismissed the plaintiffs' case as a sanction for their failure to respond. This Court reversed, deciding that dismissal was too severe a sanction for a failure to respond to a summary judgment motion. *Id.* at ¶ 20. In the instant case, the parties are switched; Plaintiffs were the moving parties, and the district court essentially "dismissed" Defendant's case, so that for the remaining four years of litigation, the facts and the case as a whole were set against him due to nothing more than excusable neglect in failing to respond to the summary judgment motion in a timely manner. The district court's treatment of Defendant in the instant case is analogous to the district court's unacceptable dismissal of the plaintiffs' case in *Lujan*. It was far too harsh a sanction for the district court to have essentially disregarded the defense and accepted Plaintiffs' version of the case prior to discovery simply because Defendant did not file a timely response.

This Court has expressed the policy that dismissal is so severe that it must be reserved for the most extreme cases and must be "used only where a lesser sanction would not serve the ends of justice." *Lujan*, at ¶ 11, 134 N.M. 207, 75 P.3d 423. The district court violated that policy here. Other than *Lujan*, the district court offered no rationale for why Defendant would be given an additional 15 days to file a response but would not be permitted to controvert the facts in

Plaintiffs' motion. [RP 223].

As discussed in Defendant's opening brief, *Lujan* was never intended to be used to grant additional time to respond to a summary judgment motion while tying the non-movant's hands with respect to facts. Nothing in *Lujan* would prevent the district court from hearing Defendant on both the facts and the law once it decided that Defendant would be given additional time to respond. Having decided that Defendant would be given additional time, the ends of justice could not be served by allowing him to advance only a legal argument while accepting Plaintiffs' version of the facts.

Plaintiffs' response is that under *Lujan*, Defendant waived his right to challenge the facts. [AB 23; 34]. They argue that Defendant failed to establish the existence of disputed material facts and that Defendant has not presented evidence to support the adoption of additional facts. [AB 23-25]. They also argue that Defendant failed to meet his burden in challenging the sufficiency of the evidence. [AB 25-26]. They even argue that Defendant "did not present the district court with contradictory facts." [AB 35]. These arguments evince a profound misunderstanding of what is at stake in this appeal. This is not a trial court proceeding where Defendant's job is to oppose a summary judgment motion, nor is it a substantial evidence appeal.

Plaintiffs next argue that Defendant was represented by counsel before they filed their first partial summary judgment motion. [AB 5; 29-30]. Defendant filed an answer to the original complaint, containing a blanket denial and nothing more. [RP 72-73]. That answer was signed by an employee of Defendant's firm. *Id.* Defendant did not retain legal counsel until he was denied insurance coverage, and he found out that the lawsuit would not be dismissed as he was led to believe. [RP 210; Tr. 4/23/08, at 4-5].

Plaintiffs argue that Defendant failed to preserve the issue of excusable neglect. [AB 27-28]. Defendant demonstrated excusable neglect in his motion for additional time in which to respond and at the hearing on his motion. [RP 209]. By allowing Defendant 15 additional days in which to respond, the district court implicitly agreed that he had demonstrated excusable neglect. [RP 223; *see also* Tr. 4/23/08, at 18].

C. The District Court Erred in Applying the Partial Summary Judgment to the Joined Plaintiffs and the Unnamed Individuals.

Plaintiffs cite *Cordova v. State Tax & Rev. Dept.*, 2005-NMCA-009, ¶ 38, 136 N.M. 713, 104 P.3d 1104, for the proposition that summary judgment may be granted "on the basis of a former adjudication when an earlier summary judgment has disposed of the same issues between sufficiently related parties." [AB 34; 38].

Cordova does not assist Plaintiffs for at least two reasons. First, the "former adjudication" was procedurally infirm. Second, the earlier summary judgment necessarily did not dispose of the same issues between sufficiently related parties. The named Plaintiffs achieved summary judgment by having the district court accept all of their facts as true. If the later-joined Plaintiffs were required to move for summary judgment, Defendant would have had an opportunity to controvert their statement of facts.

D. The District Court Violated Defendant's Right to Due Process of Law By Refusing to Permit Him to Respond to the Facts in Plaintiffs' Summary Judgment Motion and By Applying the Judgment Obtained Through Procedural Default to Hundreds of Joined Plaintiffs and Unnamed Individuals.

After closing arguments at trial, the court announced rulings from the bench. The first thing that the district court did was adopt all of the "undisputed facts" from the summary judgment entered four years earlier. [Tr. 1/5/12, at 22]. Plaintiffs concede that the district court's findings replicate the facts in the original summary judgment motion. [AB 41].

Plaintiffs argue that Defendant waived his due process claim because he did not plead it as an affirmative defense. [AB 39]. Defendant's claim that his constitutional rights have been violated is not an affirmative defense. The question before the Court involves Defendant's fundamental right not to be

deprived of liberty or property without due process of law. The judgment also implicates the public interest in ensuring that the procedure of summary judgment is not misused. The Court may, therefore, address the issue of due process. Rule 12-216 (B), NMRA.

Plaintiffs argue that Defendant had notice and an opportunity to respond. [AB 36; 40]. The opportunity to respond was not meaningful based on the district court's misapplication of *Lujan*.

II. The District Court Misinterpreted the Unfair Practices Act in Concluding that Defendant Violated the Act and that He Did So "Willfully."

A. Defendant Did Not Engage in Unfair or Deceptive Trade Practices Within the Meaning of the Act.

Plaintiffs argue that this Court has already determined that they are the prevailing parties under the UPA. [AB 10; 40 (citing *Atherton*, 2012-NMCA-023, at ¶ 1)]. The first appeal was taken by the original named plaintiffs after they settled with Defendant. *Atherton*, at ¶¶ 2, 12. That appeal was from a Stipulated Order of Partial Dismissal. [RP 797]. That appeal was not about whether Plaintiffs had met the requisite standards under the Act.

In his opening brief, Defendant argued that Plaintiffs cannot prevail under the teachings of *Encinias v. Whitener Law Firm*, 2013-NMCA-003, 294 P.3d

1245. [BIC 32]. Plaintiffs try to distinguish *Encinias* by arguing that Defendant is not licensed in New Mexico and that his clients were not represented by a New Mexico attorney. Clients of the Las Cruces office of Defendant's firm were, in fact, represented by either David Zenner, Ricardo Rios, or Jonathan Huerta, all of whom were New Mexico licensed attorneys. [RP 396; 390; 385; 251].

Plaintiffs argue that the district court found that the only contact the clients had with a New Mexico licensed attorney was after settlement. [AB 42]. The evidence at trial directly contradicts this finding. Christina Martinez testified that she met with a man, but she did not know his name, and she did not know whether he was an attorney. [Tr. 1/4/12, at 52-53]. The attorneys in the Las Cruces office were all male. Defendant testified that the New Mexico licensed attorneys had ultimate decision-making authority over cases from the Las Cruces office. [Tr. 1/4/12, at 83-84]. Ms. Martinez's attorney, Mr. Rios, obtained a $2,100 reduction in the chiropractor's bill on her behalf. [Tr. 1/4/12, at 58]. Mr. Rios also obtained a reduction in the chiropractor's bill on behalf of Juan Martinez. [Tr. 1/4/12, at 99]. Becky Duran testified that she met with Mr. Rios. [Tr. 1/4/12, at 66]. Debbie Escobar's testimony also indicates that she was represented by Mr. Rios. [Tr. 1/4/12, at 218]. Lucy Lucero testified that she met with Mr. Zenner before signing a contract. [Tr. 1/4/12, at 259-60]. All settlement agreements were signed

by a New Mexico licensed attorney. [RP 2034]. Defendant did not practice law in New Mexico. [Tr. 1/4/12, at 197; RP 385].

In *Encinias*, the plaintiff argued that the misleading aspect of the attorney's advertisements rested entirely on the lawyer's failure to act in accordance with the advertising. *See Encinias*, 2013-NMCA-003, at ¶ 27, 294 P.3d 1245. The district court found that the advertisements were neither misleading nor false, and this Court agreed. *Id.* at ¶¶ 27-28.

In the instant case, Defendant testified that he relied on the expertise of New Mexico attorneys to ensure that his advertising complied with New Mexico law. [Tr. 1/4/12, at 143]. Defendant has never used any advertising that indicates that he is licensed to practice law in New Mexico. [RP 385]. There is a dearth of evidence that Plaintiffs and other consumers were misled by Defendant's advertising.

Plaintiffs next argue that the proceeding before the New Mexico Disciplinary Board did not deal with media advertising. [AB 43]. Plaintiffs are incorrect. Those proceedings dealt directly with Defendant's website and the issue of advertising jurisdictional limitations. [RP 396].

Plaintiffs next argue that Defendant could not have relied on the outcome of the disciplinary proceeding prior to August 2006, and many clients retained

Defendant prior to that. [AB 43-44]. Plaintiffs' argument is nonsensical. The Board found that no disciplinary action was warranted and dismissed the complaint against Defendant. [RP 396; 400]. Other than an update to his website at the suggestion of disciplinary counsel, Defendant conducted his practice and advertising the same before and after the complaint. Furthermore, in expanding his firm into another jurisdiction, Defendant relied on a 1983 Attorney General advisory opinion, well before any Plaintiffs retained him. [RP 401].

In his opening brief, Defendant argued that the exemption to the UPA applies to him. [BIC 33-34]. Plaintiffs respond that a letter from the Disciplinary Board is not a public document. [AB 44]. In *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 62, 147 N.M. 583, 227 P.3d 73, the Supreme Court stated that the permission must be "articulated in some form of public document." The Disciplinary Board is an agency of the New Mexico Supreme Court. Even confidential correspondence from this public body could be said to qualify as "some form of public document." Surely an advisory opinion from the Attorney General is a public document.

B. The District Court Erred in Awarding Treble Damages and Civil Penalties Because Defendant Did Not Act "Willfully" Within the Meaning of the Unfair Practices Act.

Plaintiffs claim that Defendant's "symbiotic relationship" with a

chiropractor is relevant to the issue of willfulness under the UPA. [AB 12-13]. Assuming arguendo that the relationship is problematic under the Rules of Professional Conduct, a violation of those rules does not give rise to a cause of action. *See* Rules of Professional Conduct, Preamble (violation of rule should not itself give rise to cause of action against lawyer); *see also Noble v. Marshall*, 579 A.2d 594 (Conn. App. 1990) (attorney's violation of Rules of Professional Conduct does not give rise to private UPA cause of action).

Plaintiffs' motion for partial summary judgment cited numerous cases that relied on those rules. [RP 80-98]. Yet at the hearing on their motion, they shifted gears and argued that the UPA provided the basis for liability. [Tr. 6/9/08, at 6-7]. The UPA is not intended to cover claims relating to professional judgment by an attorney. *See Beyers v. Richmond*, 937 A.2d 1082 (Pa. 2007) (holding that exclusive constitutional authority to regulate practice of law displaces UPA where misconduct governed by Rules of Professional Conduct is concerned).

Plaintiffs concede that willfulness involves more than knowledge. [AB 48]. Plaintiffs argue that the willfulness standard under the UPA does not include an actual or deliberate intent to injure or harm. [AB 47; 50]. This contravenes the law in New Mexico. *See Matthews v. State*, 113 N.M. 291, 297, 825 P.2d 224, 230 (Ct. App. 1991) (willfulness involves an "actual or deliberate intention to

injure or harm another"); N.M. UJI § 13-1827 ("Willful conduct is the intentional doing of an act with knowledge that harm may result."). Plaintiffs cite no source of law indicating that the standard of willfulness under the UPA should be different than in any other context.

C. The District Court Erred in Granting Partial Summary Judgment to the Attorney General on the Issue of Willfulness.

Plaintiffs concede that the standard of willfulness is the same for the private plaintiffs and for the Attorney General. [AB 46; 52-53]. This amounts to a concession that the district court erred in concluding that the standard of willfulness for treble damages is different than the standard of willfulness for the imposition of civil penalties. [Tr. 9/13/11 at 39-41]. There is no justification for the district court to have granted partial summary judgment to the Attorney General on the issue of willfulness while holding a trial on the issue of willfulness as to the private plaintiffs. This highlights the district court's profound misunderstanding of the willfulness standard necessary for imposing treble damages and civil penalties.

Plaintiffs argue that Defendant should have appealed the grant of partial summary judgment to the Attorney General. [AB 53]. The grant of partial summary judgment to the Attorney General was not a final order. *See Gates*, at

¶ 8, 143 N.M. 446 (grant of partial summary judgment generally not final order). The Attorney General still had to go to trial on the issue of restitution.

D. The Amount of Civil Penalties and Restitution Awarded to the Attorney General is Excessive and Arbitrary, Violating Defendant's Right to Due Process of Law.

1. The Award of Civil Penalties is Excessive and Arbitrary

Plaintiffs argue that each voided contract is a violation of the UPA. [AB 15 (citing RP 2026; 2041); AB 62]. The UPA speaks to false or misleading statements. *See* NMSA 1978, § 57-12-2 (D); *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091. The violations, if any, are the number of false or misleading statements. [BIC 44].

Plaintiffs cite *People v. Superior Court (Olson),* 157 Cal. Rptr. 628, 639 (Cal. App. 1979), for the proposition that a single publication constitutes a minimum of one violation, with the number of consumers responding to the advertisement comprising additional violations. [AB 62-63]. *Olson* does not assist Plaintiffs because there is no evidence that any of the 314 consumers saw or responded to one of Defendant's advertisements. In fact, there was evidence that some of Defendant's clients did not hire him based on advertising.

For example, on direct examination, James Nichols testified that he had seen Defendant's billboards, his TV advertisement, and a picture in the Yellow Pages

telephone directory. [Tr. 1/4/12, at 250]. When asked whether those advertisements played a part in why he chose Defendant's law office, he responded, "Well, no, not really." *Id.* He explained that the reason that he went to see Defendant was because his wife had gotten a recommendation from somebody. *Id.* Not satisfied with that response, Plaintiffs' counsel again asked whether the advertisements played a part in why he chose Defendant's law office. *Id.* at 251. Defense counsel objected on the basis that the question had been asked and answered. *Id.* The district court overruled the objection. This time, Mr. Nichols answered, "Very much so." *Id.*

In addition to Mr. Nichols' dubious testimony, Christina Martinez testified that she had never heard of Michael Gopin. [Tr. 1/4/12, at 47]. Becky Duran testified that she chose Defendant's law office because a friend had recommended him, and then she started seeing his billboards. [Tr. 1/4/12, at 62; 74].

Olson actually supports Defendant's position. In *Olson*, a California appellate court was unwilling to multiply the statutory penalty by the number of persons who read a false advertisement. *Olson*, 157 Cal. Rptr. at 639. The court believed that the legislature did not intend such excessive penalties to arise out of one advertisement. *Id.* The court was concerned about violating due process rights through oppressive and unreasonable penalties. *Id.*

Plaintiffs argue that the district court did not enter judgment on behalf of 314 individuals because the Attorney General counts as only one plaintiff. [AB 34]. The critical point is that, applying the earlier grant of partial summary judgment, the district court multiplied by 314 the maximum statutory penalty per violation. [RP 1778-79; *and see* Tr. 9/13/11 at 43]. Using that calculation, the district court awarded civil penalties in the amount of $1,570,000, which is excessive and unreasonable. [RP 2026].

Plaintiffs claim that Defendant has "mischaracterized" civil penalties as punitive damages. [AB 56]. Plaintiffs argue that because the UPA is remedial legislation, punitive damages standards do not apply. [AB 56-57]. The term "penalty" needs no elaboration; a penalty is a punishment.

Even if the Court were to determine that the civil penalties awarded here are more remedial than punitive, that does not end the inquiry. Where there is a massive aggregation of statutory damages awards, principles of due process are implicated. *See* CARTER & SHELDON § 13.5.7 (7th ed. 2008); *see also Parker v. Time Warner*, 331 F.3d 13, 22, 26 (2d Cir. 2003) (where statute allows for damages on a per consumer basis, there is "the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered"). Civil penalties should be required to meet the due process standards applicable to

punitive damages, as set forth in *BMW v. Gore*, 517 U.S. 559 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *See* CARTER & SHELDON at § 15.5.3. For this reason, Plaintiffs are incorrect that civil penalties should be removed from the equation to determine the ratio of punitive to actual damages. [AB 61]. Because the award in the instant case far exceeds a single digit ratio, it does not satisfy due process. *See Campbell*, 538 U.S. at 425; *see also* BIC 43-45.

To counter the argument that an incorrect definition of "per violation" resulted in an arbitrary and excessive imposition of civil penalties, Plaintiffs argue that the State will deposit the money into the consumer protection fund. [AB 59]. The question is not whether the State will use the money well, but how the penalty will affect Defendant. The award of civil penalties is an extreme and unwarranted punishment.

2. *The Award of Restitution is Excessive and Arbitrary*

As Defendant has argued, the award of restitution is arbitrary because there is no evidence to support the proposition that he realized a benefit of $757,358.56. [BIC 46]. An award of restitution to individual consumers must be supported by evidence that those consumers relied on a misrepresentation. *See Consumer Protection Div. v. Morgan*, 874 A.2d 919, 941 (Md. App. 2005). There is no such

evidence. In fact, as discussed above, there is evidence that numerous clients did not rely on Defendant's advertisements at all.

III. The District Court Erred in Allowing a Double Recovery in the Form of Gross Receipts Tax.

Plaintiffs argue that there is no double recovery because different parties will ultimately receive the amounts that Defendant paid for gross receipts tax. [AB 66]. Regardless where the money goes, Defendant should not be required to pay the same amount twice.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief in chief, the Court should reverse the judgment.

Respectfully submitted,

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I hereby certify that on this 22nd day of July 2013, I caused to be delivered a true and correct copy of the foregoing on the following by first class U.S. mail, postage prepaid:

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