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

No. 32,028

AND

STATE OF NEW MEXICO, EX REL. GARY K. KING, ATTORNEY GENERAL,

Plaintiff-Appellee

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
JUN 06 2013

v.

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

Defendant-Appellant

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

PLAINTIFFS-APPELLEES AND PLAINTIFF ATTORNEY GENERAL'S ANSWER BRIEF

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G), NMRA this Answer Brief complies with type volume limitations set forth in Rule 12-213(F)(3), NMRA because it is prepared in 14-point Times New Roman and **by permission of the Court**, the body of the Brief does not exceed seventy pages and contains 16,441 words using the word count function of Microsoft Word 2010.

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I. NATURE OF THE CASE AND DISPOSITION BELOW

This appeal arises from a Judgment dated February 8, 2012, against Michael J. Gopin, Defendant, ("Defendant") for Defendant's knowing, willful and deliberate violations of the New Mexico Unfair Practices Act ("UPA"). NMSA 1978, Section 57-12-1 et. seq. [RP 2025]. Defendant is a lawyer licensed to practice law in Texas. [RP 2032, FOF 1]. Defendant is not and has never been licensed to practice law in New Mexico. [RP 2033, FOF 7]. Defendant was at all relevant times the sole owner and operator of the Law Offices of Michael J. Gopin, in Las Cruces, New Mexico, which gave rise to all the acts of this cause of action. [RP 2033, FOF 4, 5]. The Law Offices of Michael Gopin is a sole proprietorship of which Defendant has exclusive control. [RP 2033, FOF 10, 11, 12].

The Third Judicial District Court concluded as a matter of law that Defendant was engaged in a trade or commerce through the offering of legal services, pursuant to NMSA 1978, § 57-12-2(C). [RP 2041, COL C]. The district court determined that Defendant's business practice, in omitting his jurisdictional limitation and failing to provide any attorney consultation as advertised, is a willful violation of Section 57-12-11 of the New Mexico UPA. [RP 2041, COL D]. In addition, the district court held Defendant's failure to disclose his jurisdictional limitation is a misleading identification and a false or deceptive advertising

practice as described in *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, 142 NM 437, 166 P.3d 1091(2007). [RP 2041, COL E]. The district court found Defendant is subject to civil penalties under the UPA. [RP 1778, FOF 4]. The district court concluded Defendant's practice of charging a contingent fee for collecting personal injury protection ("PIP") and medical insurance benefits ("medpay") violates the Rules of Professional Conduct and is illegal in New Mexico. [RP 2042, COL I]. The district court also concluded that restitution to former clients, as provided by Section 57-12-8(B), is appropriate when premised upon Defendant Gopin's pattern and practices. [RP 2042, COL K & L]. The Court awarded restitution to the Attorney General on behalf of 110 former clients harmed by Defendant's unfair practices and for whom the Attorney General provided evidence to substantiate the restitution award. [RP 2026, n][Ex. AG-3]. These 110 individuals were not joined to the suit and are referred to herein as "named individuals."

The district court found as a matter of law that the actions of Michael J. Gopin and the Law Offices of Michael J. Gopin was done willfully and deliberately as provided by the UPA. [RP 2043, COL T, U, AA]. The court held Defendant was liable for civil penalties of $5,000 for each of the 314 violations of the UPA. [RP 2041, COL F]. The district court concluded the joined plaintiffs

represented by private attorneys are entitled to receive treble damages and to recoup attorney's fees and costs. [RP 2043, COL X & Y]. Finally, the district court held that because the judgment is based upon willful acts, plaintiffs are entitled to judgment interest at the statutory rate of 15 percent per annum. [RP 2044, COL HH].

There was a prior appeal in this case after the district court awarded attorney's fees to the original three named Plaintiffs, but denied Plaintiff's request for a multiplier. *See*, *Atherton v. Gopin,* 2012-NMCA-023, ¶ 1, 272 P.3d 700.

II. SUMMARY OF THE PROCEEDINGS AND RELEVANT FACTS

This Answer Brief will address the issues concerning three groups[1] who were awarded remedies under the UPA and include, 1) the thirteen joined Plaintiffs, awarded compensatory and treble damages under the UPA; 2) the 110 named consumers for which the Attorney General sought and was granted restitution who are identified in this Answer Brief as "named individuals;" and 3) the Attorney General who was awarded civil penalties calculated by multiplying $5,000 by the 314 voided settlement contracts between Defendant and former clients. (Note, 314 is **not** the number of unnamed individuals; it is the number of

[1] It is unclear which group Defendant is referring to in its BIC by the term "unnamed individuals."

contracts between Defendant and his former clients.)

Defendant's suggestion that the Attorney General should have certified this suit as a class action is incorrect. [BIC 23]. Defendant misunderstands the statutory framework of the UPA, which is not a class action relief statute. The UPA authorizes the Attorney General to bring the case in the public interest. NMSA 1978, § 57-12-8. In any action filed pursuant to the UPA, the Attorney General may petition the district court for injunctive relief and restitution. NMSA 1978, §57-12-8(B). In this case, the Attorney General was awarded restitution on behalf of 110 consumers that were former clients of Defendant. [RP 2026]. In addition, the district court awarded the Attorney General civil penalties pursuant to NMSA 1978, § 57-12-11. [RP 2026]. These are separate and distinct remedies.

In contrast, Section 57-12-10 allows for **private** remedies to persons damaged by an unfair or deceptive trade practice. Under this section, plaintiffs may bring a class action suit. NMSA 1978, § 57-12-10(E). However, that was not necessary because the number of individual plaintiffs seeking damages (13) were not so numerous they could not be joined as a practical matter, and all joined plaintiffs were New Mexico residents, so there were no personal jurisdiction issues. *See Berry v. Fed. Kemper Life Assur. Co.*, 2004-NMCA-116, ¶ 41, 136 N.M. 454, 99 P.3d 1166. These thirteen individuals were composed of two groups

represented by two different attorneys and were the **only** Plaintiffs that were awarded treble damages. [RP 2025-2026].

A. Proceedings And Facts Relevant To Granting Plaintiffs' First Motion For Partial Summary Judgment Filed March 13, 2008.

On December 4, 2007, Plaintiffs Utti Atherton ("Atherton") and Laura Jaramillo ("Jaramillo"), and unknown Plaintiffs John and Jane Does, through their attorney, Kyle Gesswein, filed a complaint seeking private remedies under the New Mexico UPA. [RP 47, 53]. The complaint also alleged unauthorized and unlicensed practice of law and sought injunctive relief. [RP 54-55]. Finally, the complaint named the Attorney General as an involuntary plaintiff to facilitate relief not available to private parties under the UPA. [RP 55-56]. In May 2008, the Attorney General moved to intervene in the interest of the State and the public interest. [RP 282].

On December 12, 2007, Plaintiffs served discovery documents on Defendant including Requests for Admissions, Interrogatories and Requests for Production of Documents. [RP 67]. On January 7, 2008, Defendant submitted his Original Answer to the Complaint, but did not properly respond to each allegation; instead Defendant denied in one sentence, "each and every allegation in the pleadings of Plaintiffs and demands strict proof thereof." [RP 72]. Defendant was represented by a New Mexico licensed attorney. [RP 73].

On March 13, 2008, Plaintiffs and the Attorney General filed a Motion for Partial Summary Judgment ("SJM") and a Memorandum in Support of the SJM. [RP 75-116]. The relevant facts asserted in Plaintiffs' Memorandum were supported with exhibits, affidavits and Defendant's Responses to discovery. [RP 117-185].

Exhibit 1, attached to the Memorandum included phone book advertising from the Las Cruces DEX phone directory and the PLUS directory covering Doña Ana and Luna Counties, advertising the Law Offices of Michael J. Gopin. [RP 117-124]. None of the advertisements informed consumers that Defendant was not licensed to practice law in New Mexico. [RP 117-124]. Exhibit 2 contained Affidavits from Plaintiffs, Atherton and Romero, and copies of three Power of Attorney/Contingent Fee Contracts signed by Defendant's former clients, Atherton, Jaramillo, and Romero with the Law Office of Michael J. Gopin. [RP 125-130]. All of the Contingent Fee Contracts state:

> the undersigned hereby transfers, assigns and conveys to THE LAW OFFICES OF MICHAEL J. GOPIN the following undivided interest in and to the said claim:
>
> **<u>38% Plus NM Gross Receipts of 7%</u>** of all amounts recovered, including but not limited to Personal Injury Protection, Medical Payment, and Uninsured/Underinsured Motorist Coverage compromised covered, including, but not limited to **before** a lawsuit is filed;

> **<u>40% Plus NM Gross Receipts of 7%</u>** of all amounts recovered, including, but not limited to Personal Injury Protection, Medical Payment, and Uninsured/Underinsured Motorist Coverage **after** a lawsuit is filed;

[RP 127, 130 & 131]. Exhibit 5 was Defendant's Response to Requests for Admissions. Michael Gopin admitted he was not licensed to practice law in New Mexico. [RP 138]. Defendant also admitted in Responses 1 and 12 that he did not meet personally with Plaintiffs Atherton and Jaramillo at the time they came to Defendant's law office and signed the contracts presented to them by personnel not licensed to practice law in New Mexico. [RP 137 and RP 140]. Exhibit 6 included Affidavits from eight respected personal injury New Mexico attorneys attesting to their practice of handling personal injury cases, which contradicted Defendant's practice of charging attorney fees on medical benefits received and acquiring an interest in a client's personal injury action. [RP 141-159].

Defendant never filed a response, to Plaintiffs' SJM due March 28, 2008, pursuant to Rule 1-056 NMRA. [RP 217]. On April 4, 2008, Plaintiffs filed a Motion for Entry of Judgment. [RP 189-190]. On April 22, 2008, Defendant filed a Motion for an Extension of Time to Respond. [RP 209]. On April 23, 2008, a hearing was held on Plaintiffs' Motion for Entry of Judgment, and Defendant's Motion for Extension of Time. [Tr. Vol. 1: 4]. In Defendant's Motion for an Extension and at the hearing, Defendant argued that he failed to respond to the

Plaintiffs' SJM because he was "diligently attempting to secure coverage from his various insurance companies." [RP 209-210]. [Tr. Vol. 1: 4-5].

On May 6, 2008, the district court issued an order on Defendant's Motion for an Extension of Time and Defendant's Response to Plaintiffs' Motion for an Entry of Judgment. [RP 222]. The Order allowed Defendant fifteen days in which to file a Response Brief on the legal issues raised in Plaintiffs' SJM. [RP 223].

After a hearing on June 9, 2008, the district court stated it had reviewed each of the issues and found that the SJM should be granted. [Tr. Vol.1-A: 8]. The district court issued its Order granting Plaintiffs' March 2008 SJM [RP 315], and attached as Exhibit A Plaintiffs' Motion. [RP 325]. Contrary to Defendant's assertions, [BIC 5], Defendant's liability under the UPA was decided on the merits and not by procedural default.

Based on this Court's decision in *Lujan v. City of Albuquerque*, 2003-NMCA-104, ¶ 18, 134 N.M. 207, 75 P.3d 423, the district court held that Defendant had waived his right to respond to or controvert the facts asserted in Plaintiffs' SJM. [RP 223]. The court adopted as undisputed, certain material facts supported by Plaintiffs' Memorandum, which include the following:

- Defendant is not licensed to practice law in New Mexico. [RP 79].
- Defendant advertised legal representation in New Mexico media, leading persons to believe he was licensed to practice law in New Mexico. [RP 77]

- Prospective clients met with non-lawyer staff members to sign contingency fee contracts with Defendant's law firm and non-attorney staff discussed legal representation with plaintiffs. [RP 78]

- Defendant's clients are charged higher fees and fees for services not customarily charged in the community. [RP 80]

- Defendant collected contingency fees on non-contingent, assured medical payments. [RP 79]

- The Contingent Contracts grant Defendant a pecuniary interest in clients' causes of action which Defendant relied on to claim entitlement to the contract fee for work worth only a fraction of claimed amounts. [RP 78]

- Defendant claimed the right to collect a full fee from recoveries obtained from clients' successor counsel. [RP 80]

- The contracts contained a power of attorney clause giving Defendant's firm complete authority to make all decisions for the client and providing that the client ratify such decisions in advance. [RP 127, 130 & 131].

These same facts were adopted by the trial court after the January 5, 2012 hearing on the merits. [Tr. Vol. 7: 22-34][BIC 8]. The results of the district court's June 9, 2008, Order granting Plaintiffs' SJM were:

- Defendant's practice of having non-attorney staff interview and contract with clients was held to be the unauthorized practice of law;

- Plaintiffs' contracts and all such similar contracts were declared void;

- Defendant's practice of taking an assignment of an interest in Plaintiffs' causes of actions were held to violate the Rules of Professional Conduct and Plaintiffs' contracts and all such contracts were declared void.

- Defendant's practice of charging a contingent fee for collecting personal injury protection/med pay insurance benefits was held to violate the Rules of Professional Conduct and that Plaintiffs' contracts and all such contracts were declared void; and

- Defendant's advertising and operation of his law practice in New Mexico violated the New Mexico UPA and as a matter of law the foregoing were violations of the New Mexico UPA.

[RP 325-326].

After entry of the summary judgment, the original three Plaintiffs and Defendant Gopin agreed to settle the suit for $5200 plus attorney fees. [RP 797]. *See*, *Atherton v. Gopin,* 2012-NMCA-023, ¶ 2. (The Stipulated Order did not affect the claims or pending motions filed by the Attorney General. [RP 798]). The district court refused to apply a multiplier to the lodestar fee it approved and the original Plaintiffs appealed in August 2009. In *Atherton*, 2012-NMCA-023, ¶ 1, this Court noted that the Plaintiffs had prevailed in their UPA claim against Defendant.[2]

B. Facts Relevant To The Motion For Joinder and Intervention.

In response to Plaintiffs' discovery requests, Defendant was compelled to

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[2] The Court held that Plaintiffs were entitled to a multiplier, as well as appellate attorney fees, and reversed and remanded for consideration of Plaintiffs' request. *Atherton*, 2012-NMCA-023.

produce names and addresses of former clients and copies of clients' contracts. [RP 350]. A number of Defendant's former clients authorized Plaintiffs' attorney and the Attorney General to inspect and copy their files. [RP 607, ¶¶ 3, 4] & [RP 622, ¶ 10]. Some of these clients then hired their own attorney to protect their interests in this case. [Tr. Vol. 2: 25].

In June 2009 [RP 899] and July 2009 [RP 1093] two groups of Plaintiffs moved for joinder and intervention requesting that the court substitute them for some of the Doe plaintiffs. Attached to their Memorandum in Support of Plaintiffs' Motion for Joinder were each movant's Power of Attorney and Contingent Fee Contract with Defendant. [RP 902-910; 1099-1103]. The district court held a hearing on this issue on July 28, 2009. [Tr. Vol. 2: 4]. At the hearing the court noted that "given the nature of the John Does and the procedural history where those Does became known by my order to release those files," that a denial of the joinder may work as a prejudice to the named plaintiffs. [Tr. Vol. 2: 25] The court entered an Order For Joinder on August 5, 2009. [RP 1124]. The Order held that the "movant's claim or defense and the action herein have a common question of law and facts." [RP 1125, ¶ 2]. The court further ruled that the new plaintiffs are entitled to the benefit of the existing judgment and all the factual and legal conclusions associated with the SJM and Order because "based on the facts and even the arguments that have

been made, the history, the facts are undisputed as to how these cases are handled by Mr. Gopin's office." [Tr. Vol. 2: 26].

C. Facts Relevant To The Issue Of Defendant's "Willfulness."

On January 4-5, 2012, the district court held a trial on the merits on the issue of whether Defendant "willfully" engaged in unfair or deceptive trade practices pursuant Section 57-12-10(B) of the UPA. The court concluded that all of Gopon's actions were known by and under the direction of Defendant and were therefore deliberate and willful and in willful violation of the UPA. [RP 2043, COL T & U]. After the trial, the district court issued findings of fact on February 20, 2012 that overwhelmingly support the court's conclusion that Defendant had acted "willfully" in violation of the UPA. These findings include, but are not limited to: 1) Defendant's advertising of legal services in New Mexico was false and misleading; [RP 2035, FOF 27]. 2) Defendant's advertised offer of a "free consultation" to prospective clients, that was not provided, was a false and misleading representation knowingly made that deceived or misled consumers into believing that a free consultation with a licensed New Mexico attorney would be provided; [RP 2035, FOF 28, 29]. 3) Defendant personally selected all of the advertising in New Mexico and Texas; [RP 2035, FOF 30]. 4) Defendant engaged in a pattern and practice of agreeing to settle with insurance companies without

client authority; [RP 2037, FOF 45]. 5) Defendant made the final decision as to the amount of the percentage of attorney fees for each case; [RP 2036, FOF 41]; 6) Plaintiffs who were unhappy with their settlement, were informed that Defendant had an ownership interest in their case and plaintiff had to accept the offer or pay Defendant the amount he would have received if the offer had been accepted. [RP 2037, FOF 47].

In addition, the district court found that Defendant's symbiotic relationship with Dr. Laura Carsner, a Las Cruces chiropractor, was also evidence of Defendant's willful conduct under the UPA. Defendant had a professional relationship with Dr. Carsner prior to 2004, while Dr. Carsner was practicing in El Paso, Texas. [RP 2037, FOF 50]. After Dr. Carsner moved her practice to Las Cruces subsequent to 2005, Defendant re-established his professional relationship with her. [RP 2038, FOF 51, 52]. Dr. Carsner would solicit patients who had been in automobile accidents and inform them they needed an evaluation; she selected only those persons not responsible for the accident and where the cited vehicle had insurance. [RP 2038, FOF 56, 57]. Dr. Carsner would also inform potential clients that they should hire the Michael Gopin law firm, and her office would provide transportation to the Gopin law offices. [RP 2038, FOF 58]. Defendant was aware of Dr. Carsner's practice of contacting potential clients through accident reports

and referring them to his firm for representation. [RP 2039, FOF 55, 62]. Defendant knew that Dr. Carsner's referrals constituted the majority of the law firm's practice in Las Cruces, which was over 70% of Defendant's practice in Las Cruces. [RP 2038, FOF 59; RP 2039, FOF 63]. Defendant also knew Dr. Carsner would not substantially discount her bills to facilitate settlement, a fact he never disclosed to his clients. [RP 2039, FOF 64, 65]. The district court concluded as a matter of law that Defendant colluded with Dr. Carsner and they formed a joint venture. [RP 2043, COL W]. The court held the actions of Defendant were in willful violation of the UPA and that civil penalties and treble damages should be assessed. [RP 2041, FOF F] [RP 2043, COL T, V].

D. Facts Relevant To Granting Private Remedies To Plaintiffs, And Restitution To Attorney General For Named Individuals And Award Of Civil Penalties.

On or about May 18, 2008 the New Mexico Attorney General was dismissed as an involuntary plaintiff and allowed to intervene for the State of New Mexico. [RP 282-283]. The Attorney General filed its Complaint for Injunctive Relief and Civil Penalties on May 27, 2008. [RP 291-300]. On September 16, 2009, the district court granted the Attorney General leave to amend its Complaint to seek restitution for as yet unknown individual plaintiffs. [RP 1166]. The Attorney General filed its First Amended Complaint on September 22, 2009. [RP 1168-

1177]. Defendant admitted in his Answer filed October 22, 2009, that the law offices of Michael J. Gopin offer a "free initial consultation" to individuals who may or may not become clients of the firm. [RP 1210, ¶ 41].

On February 22, 2010, Defendant produced a list of 314 client names with whom he had executed contracts and from which Defendant had received attorney fees. [RP 1449-1466]. On October 25, 2010, the district court granted Plaintiff Attorney General's request to notify potential victims of Defendant. [RP 1493-1494]. The Attorney General received responses from approximately 110 of Defendant's former clients. [RP 2040, FOF 74].

A non-jury hearing on the merits was held on January 4-5, 2012, [Tr.Vol. 6: 1-280 and Tr. Vol. 7: 1-44]. The district court entered Judgment adverse to Defendant on February 8, 2012. [RP 2025-2028]. Findings of Fact and Conclusions of Law were issued by the district court on February 20, 2012. [RP 2032-2044]. The district court held that, "based on Defendant's knowing, willful and deliberate violations of the New Mexico UPA," the Plaintiffs are granted judgment in the following sums, which included treble damages. [RP 2025]. The district court concluded each voided contract was a violation of the UPA and imposed a civil penalty of $5,000 for each of the 314 violations totaling $1,570,000. [RP 2026 & RP 2041, COL F]. This civil penalty award to the New

Mexico Attorney General's Office is to be used by the State as compensation for fees, costs and other expenses of the investigation and litigation and shall be allocated for and placed in the consumer protection fund of the Attorney General for the enforcement, litigation, investigation or education activities with respect to consumer protection. [RP 2026, ¶ m].

The court also concluded that Defendant's attorney fee contracts and contingency fee contracts are void and subject to restitution pursuant to Section 57-12-8(B) of the UPA. [RP 2041-42, COL G, J]. The Attorney General was awarded restitution in the amount of $757,358.56 on behalf of 110 of Defendant's former clients who came forward after notification. [RP 2026, ¶ n]. Restitution for these 110 consumers did **not** include treble damages. [RP 2042, COL K, L]. Only the thirteen individual plaintiffs named in the Judgment dated February 8, 2012, received treble damages. [RP 2025-2026].

III. STANDARDS OF REVIEW

Plaintiffs challenge Defendant's standard of review on the issue of the grant of summary judgment. [BIC 10]. As Defendant states, ordinarily, the Court of Appeals reviews the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute. *Harris v. Vasquez*, 2012-NMCA-110, ¶ 9, 288 P.3d 924.

Plaintiffs' position is that the standard of review is de novo because no material issues of fact are in dispute and this appeal presents only a question of law. *Id.*

The following issues are also questions of law for which the proper standard of review is de novo: 1) whether the summary judgment was a final order; *Santa Fe Pac. Trust, Inc. v. City of Albuquerque*, 2012-NMSC-028, ¶ 10, 285 P.3d 595; 2) the interpretation of a statute; *See Morgan Keegan Mortg. Co. v. Candelaria*, 1998-NMCA-8, ¶ 5, 124 N.M. 405, 951 P.2d 1066; and 3) whether the doctrine of law of the case applies, as well as how it applies; *State ex rel. King v. UU Bar Ranch, Ltd.*, 2009-NMSC-010, ¶ 20, 145 N.M. 769, 205 P.3d 816.

The district court's decision as to whether neglect is excusable, is reviewed by the Court of Appeals for an abuse of discretion. *Kinder Morgan CO2 Co., L.P. v. State Taxation & Revenue Dep't*, 2009-NMCA-019, ¶ 9, 145 N.M. 579, 203 P.3d 110 (filed 2008). The proper standard for whether the civil penalties imposed are excessive or arbitrary is also an abuse of discretion. *Long v. Board of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1151 (10th Cir. 1997).

IV. SUMMARY OF THE ARGUMENTS

Defendant presents three issues for review. [BIC 8-9]. The first issue, as presented by Defendant, is actually two issues: 1) whether the district court erred in granting partial summary judgment to the original named Plaintiffs and 2)

whether the district court erred in applying that judgment to the joined Plaintiffs and other named individuals in the case.

The second issue involves the **amount** of the judgments against Defendant, as opposed to whether a judgment is warranted. This issues focus on whether the Defendant "willfully" engaged in an unfair or deceptive trade practice" under NMSA 1978, Sections 57-12-10(B) and 57-12-11 and as a corollary, whether the district court's application of three times actual damages to the thirteen joined Plaintiffs, and civil penalties awarded to the State of New Mexico in the amount of $5,000 per violation was justified. Included in this argument is Defendant's contention that the district court erred in awarding pre-judgment interest at a rate of 15% per annum. [BIC 41].

Defendant's third issue, that the district court erred in allowing a "double recovery" in the form of gross receipts tax, was not preserved for review on appeal. Moreover, Defendant's argument is without merit as there was no "double recovery" by the Attorney General or the Plaintiffs.

V. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN ACCORDANCE WITH RULE AND PRECEDENT.

A. The District Court's Judgment Granting Plaintiffs' Motion For Partial Summary Judgment Was A Final Order, Not Timely Challenged By Defendant And Thereby Waived.

Defendant assumes that the SJM Order granted by the district court and

holding that Defendant had violated the UPA, was not a final appealable order as of June 9, 2008. Plaintiffs recognize that as the New Mexico Supreme Court in *SacramentoValley Irrigation Co. v. Lee*, 15 NM 567, 571, 113 P. 834, (1910) stated "a determination of what is a final judgment or decree is often a close question." Although the rules for determining whether and when a judgment is final are sometimes unclear, there is sufficient authority to support the conclusion that the Order issued June 9, 2008, was final and that Defendant has waived his right to appeal the Order. *See*, Rule 1-054(B)(1) &(2) NMRA.

Generally, an order is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible. *Kelly Inn No. 102 v. Kapnison*, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992). However, this rule is neither absolute nor inflexible. *Id.*

Understandably, New Mexico courts have a strong policy disfavoring piecemeal appeals. *See*, *Executive Sports Club, Inc. v. First Plaza Trust*, 1998-NMSC-008, ¶ 8, 125 N.M. 78, 957 P.2d 63. However, in some circumstances the policies of facilitating meaningful appellate review and of achieving judicial efficiency, outweigh the policy against piecemeal appeals. In the instant case, the Court of Appeals relied on the summary judgment Order as final in *Atherton v. Gopin*, as did the district court when it applied that summary judgment to

additional joined Plaintiffs. [RP 1125, ¶ 5].

The issues of whether the district court abused its discretion in failing to allow Defendant to respond to the SJM facts and whether it properly granted Plaintiffs' SJM, were appealable at the time the judgment was entered, because the conclusions of law resulting from that Order were determinative of the remaining issues in the case. The Defendant waived his right to appeal the district court's Order granting Plaintiffs' SJM, when he failed to timely appeal or to challenge that decision in *Atherton,* 2012-NMCA-023, ¶ 2. The *Atherton* Court held, "Plaintiffs won partial summary judgment, including that Defendant had violated the UPA." *Id.* at ¶ 2. This Court awarded appellate attorney fees to Plaintiffs in reliance upon the district court's Summary Judgment that Defendant now seeks to appeal. *Id.* at ¶ 16. In *Santa Fe Pac. Trust,* 2012-NMSC-028, ¶ 10, the Supreme Court of New Mexico noted:

> Appellate courts are responsible for determining whether an order is final for purposes of jurisdiction, regardless of the parties' or the trial court's beliefs. Finality for the purpose of an appeal is viewed in a practical rather than a technical context and by looking to the substance of the document rather than its form.

Id. (citations omitted). The district court's judgment issued June 9, 2008, was a final disposition of Defendant's liability under the UPA which entitled joined Plaintiffs to private remedies and authorized the Attorney General to request

injunctive relief and restitution. NMSA 1978, § 57-12-8(B) & § 57-12-10. The same material facts supporting the summary judgment Order were re-established at the January 4-5, 2012 hearing on the corollary issue of whether Defendant had "willfully" violated the UPA.

Defendant failed to file a notice of appeal within thirty days of the final judgment. NMSA 1978, § 39-3-2; Rule 12-201 NMRA. Nor did Defendant take timely action to challenge the final order by filing a motion for reconsideration or an interlocutory appeal pursuant to Rule 12-203 NMRA or a cross appeal in *Atherton v. Gopin, supra.* Timely filing of the notice of appeal is jurisdictional, and Defendant waived his right to appeal on this issue. *See Rivera v. King*, 108 N.M. 5, 7, 765 P.2d 1187, 1189 (1988).

B. The District Court Did Not Err In Granting Plaintiffs' Motion For Partial Summary Judgment.

Should the Court determine that Defendant did not waive his right to appeal the district court's Order granting summary judgment in favor of Plaintiffs, still the court's Order was proper. Summary Judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Rule 1-056(C) NMRA. In *Brewer Oil Co. v. State by & Through Udall*, 121 N.M. 106, 108, 908 P.2d 799, 801 (1995), the New Mexico Supreme Court explained the burden on the moving party and the result if the non-movant fails to

controvert a fact.

> The moving party must submit a memorandum which sets out a concise statement of all of the material facts as to which the moving party contends no genuine issue exists. Each fact must refer with particularity to those portions of the record upon which the moving party relies. **If the opposing party does not specifically controvert a fact set forth in the moving party's memorandum, the fact shall be deemed admitted.**

(Internal quotes and citations omitted; emphasis added).

As movants, the Plaintiffs were obligated to make a prima facie showing of entitlement to summary judgment. *Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 672, 808 P.2d 955, 957 (1991). The movant need not demonstrate beyond all possibility that no genuine issue of fact exists. *Id.* "Upon such a prima facie showing, the burden shifts to the party opposing summary judgment to show specific evidentiary facts in the form of admissible evidence that require a trial on the merits." *Hernandez v. Wells Fargo Bank*, 2006-NMCA-018, ¶ 5, 139 N.M. 68, 128 P.3d 496. (citations omitted). The non-movant cannot defeat the prima facie showing by relying solely upon allegations contained in an unverified complaint or mere argument or contentions of the existence of material issues of fact. *Id. See also*, *Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, ¶ 10, 146 N.M. 179, 207 P.3d 1156. If the facts are not in dispute, but only the legal effects remain to be determined, then summary judgment is proper. *Roth v. Thompson*, 113 N.M. 331, 335, 825 P.2d 1241, 1245 (1992). The facts in this case are not in dispute.

Plaintiffs filed a Memorandum in Support of their SJM that detailed the material facts involved in the legal issues and included supporting evidence and documentation. [RP 77-159]. Defendant waived his right to challenge the facts asserted by Plaintiffs in the SJM when he failed to respond to the motion. *Lujan v. City of Albuquerque*, 2003-NMCA-104, ¶ 18, 134 N.M. 207, 75 P.3d 423.

Further, Defendant failed to establish the existence of any disputed material facts. Pursuant to Rule 1-056D(2), "[a]ll material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted." In addition, Subsection E provides in pertinent part that: "If he does not so respond, summary judgment, if appropriate, may be entered against him." Rule 1-056(E) NMRA.

Reed v. Nellcor Puritan Bennett, 312 F.3d 1190, 1195 (2002) held that the district court may not grant a summary judgment motion for a failure to respond without first making the determinations required by Fed. R. Civ. P.56(c). However, the *Reed* Court also held that by failing to file a response within the time specified by the local rule, the nonmoving party waives the right to respond or to controvert the facts asserted in the summary judgment motion. *Reed*, at 1196. Defendant incorrectly asserts that "the district court erred in its punitive application of *Lujan's* adoption of *Reed*," by not allowing Defendant to controvert the facts alleged in

Plaintiffs' SJM. [BIC 13]. The *Lujan* court agreed with the manner in which the *Reed* court dealt with the duty of district courts when the non-movant does not respond to a motion for summary judgment. *Lujan* at ¶ 18. The district court applied these exact procedures here.

Contrary to Defendant's assertions, the district court did not grant Plaintiffs' SJM simply because Defendant failed to respond to the motion. [BIC 13-14]. At the April 23, 2008 hearing, the district court quoting *Lujan v. City of Albuquerque*, *supra*, noted that, "Before entry of an order granting summary judgment, that the court is required to assess the merits regardless of whether there has been a response or not." [Tr. Vol. 1: 8, Lines 13-16.]. The district court properly applied the holding of *Lujan* to the facts of this case and accepted as true all material facts asserted and supported in Plaintiffs' SJM and supporting Memorandum. Moreover, the district court granted Defendant an additional fifteen days from the date of the hearing to respond to Plaintiff's Motion, but restricted Defendant's response to legal arguments, based on the district court's proper determination that it was bound by the ruling in *Lujan v. City of Albuquerque*, 2003-NMCA-104 at ¶ 18. [Tr. Vol. 1: 18, Lines 1-16].

To the extent Defendant's Statement of Facts or arguments constitute a challenge to the district court's ultimate facts of the case, Defendant has presented

no evidence to support adoption of alternative or additional material facts. *See Ledbetter v. Lanham Constr. Co.*, 76 N.M. 132, 133, 412 P.2d 559, 560 (1966). (findings of trial court upheld where claimant has not furnished references to the transcript showing proof of facts as asserted by him).

Although Defendant makes declaratory allegations that "the facts in Plaintiff's motion were not "properly supported," [BIC 14] Defendant offers no evidence to demonstrate that Plaintiffs' support was deficient nor cites to any evidence in the record that refutes that the findings made by the court are not supported by substantial evidence. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10. (When disputed facts do not support reasonable inferences, they cannot serve as a basis for denying summary judgment.) Defendant alludes to "a host of disputed facts about how Defendant's law practice was operated and the effect of his advertisements." [BIC 16]. However, Defendant's only specific challenge to the facts is that "Plaintiffs presented no evidence of a contract signed by a non-lawyer from Defendant's office." [BIC 15]. This fact is immaterial since there was evidence presented in Plaintiffs' Memorandum supporting the facts that non-attorney staff at the law offices of Michael Gopin interviewed the named Plaintiffs, and contracted with clients for legal services. [RP 75, 78]. In their affidavits, attached to the Memorandum, Plaintiffs attest that they met with non-

attorney staff at Defendant's law office who presented a contract to them and had them sign it. [RP 126, 129 & 131]. In addition, Defendant admits that he did not meet with New Mexico clients. [Tr. Vol. 6: 141, Lines 9-12].

It is Defendant's burden as the party challenging the sufficiency of the evidence to set forth the substance of all the pertinent evidence, and to demonstrate why the evidence fails to support the findings made. *Martinez v. Southwest Landfills, Inc*. 115 N.M. 181, 184, 848 P.2d 1108, 1111 (Ct. App. 1993). Defendant fails on appeal to challenge with specificity any disputed material facts related to the issues in the partial summary judgment. Moreover, Defendant's attorney at the April 23, 2008 hearing admitted, "This is not going to be a very fact-intensive case. This is going to be more of a question of law anyhow." [Tr. Vol. 1: 10, Lines 15-17]. Defendant was allowed to and did respond to the legal issues raised in Plaintiffs' SJM. [RP 225-250] [Tr. Vol. 1: 18, Lines 5-16].

Defendant makes the unfounded assertion that that there was no analysis of the facts or law, prior to the district court granting Plaintiffs' SJM. [BIC 17]. First, the court stated, "I have reviewed each of the issues." [Tr. Vol.1-A, 8]. Prior to the hearing on June 9, 2008, wherein the court granted Plaintiffs' SJM, the district court had numerous pleadings available for review including: Plaintiffs' Complaint [RP 47-66]; Defendant's Original Answer to the Complaint [RP 72-73]; Plaintiffs

Motion for Partial Summary Judgment [RP 75-76] and Memorandum in Support of the Motion [RP 77-116] with exhibits 1-8 [RP 117-185]; Plaintiff's Motion for an Entry of Judgment [RP 189-190]; Defendant's Response to Plaintiffs' Motion for Entry of Judgment [RP 211]; Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment [RP 225-256]; and Plaintiffs' Reply to Defendant's Memorandum in Opposition [RP 261-277]. Second, prior to making her argument at the June 9, 2008 hearing on Plaintiffs' SJM, the attorney for Defendant acknowledged in addressing the court that, "Your Honor, . . . I certainly understand that you always read everything . . ." [Tr. Vol 1A: 5, Lines 10-11].

The district court permitted Defendant fifteen additional days to respond to Plaintiff's SJM on the law, and thus the order granting Plaintiffs' SJM was not a default judgment, but a judgment on the merits. The district court's decision was proper, not an abuse of discretion and in accord with the law.

C. The District Court Did Not Abuse Its Discretion By Prohibiting Defendant From Responding To The Facts In The Partial Summary Judgment Motion Because There Was No Excusable Neglect.

1. Defendant Did Not Preserve This Issue Below.

The Court of Appeals should not consider this argument because Defendant did not properly preserve this issue for appeal or present any evidence to support his contention of excusable neglect. Defendant did not affirmatively

assert the defense of excusable neglect either in his Motion for an Extension of Time [RP 209-210] or at the hearing. [Tr. Vol. 1: 4-7]. Defendant makes no statement in his BIC as to how this issue was preserved in the court below. [BIC 9]. Rule 12-213(A)(4) NMRA. "To preserve an argument for appellate review, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Schuster v. State Dep't. of Taxation & Revenue, Motor Vehicle Div.*, 2012-NMSC-025, ¶ 33, 283 P.3d 288 (internal quotation marks and citation omitted). Where the record fails to indicate that an argument was presented to the court below, unless it is jurisdictional in nature, it will not be considered on appeal. *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987).

In Defendant's Motion for an Extension of Time filed April 22, 2008, and at the hearing on April 23, 2008, Defendant's attorneys argued that the reason for Defendant's failure to respond to Plaintiff's SJM was that Defendant was "attempting to obtain insurance coverage" from his professional liability carriers. [RP 209-210] [Tr. Vol. 1: 5] [BIC 20]. Defendant did not argue that this was "excusable neglect," pursuant to Rule 1-006(B)(2). [RP 209-210]. Defendant did not argue that his failure to file a response to the SJM was due to his attorney(s)' carelessness or because he was unable to obtain an attorney.

2. *Defendant Did Not Demonstrate Excusable Neglect.*

Rule 1-006(B)(2) NMRA states in pertinent part that when an act is required to be done at or within a specified time, the court for cause shown may, at any time in its discretion, "upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect." The *Kinder Morgan* Court adopted the definition of "excusable neglect" as defined by the United States Supreme Court ("USSC") in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, (1993). *Kinder Morgan*, 2009-NMCA-019, ¶ 13. The USSC "in *Pioneer* concluded that, based on the plain meaning of the word "neglect," relief is allowable in situations involving attorney negligence rather than situations where a party's failure is solely due to circumstances beyond their control." (citation omitted). *Kinder Morgan*, ¶ 12. However, the *Kinder Morgan* Court held that federal Rule 60(b)(1) serves as a narrow exception empowering a court with the discretion to grant relief *despite* an attorney's carelessness. *Kinder Morgan,* 2009-NMCA-019, ¶ 18.

Defendant's failure to obtain another party to pay his legal fees is not the same as an inability to retain an attorney, nor is it excusable neglect. Defendant implies in his BIC that he was without counsel prior to his trial counsel's submission of his entry of appearance on April 17, 2008. [BIC 18]. A New Mexico

attorney submitted Defendant's Answer to the Plaintiffs' Complaint on January 7, 2008. [RP 72-73]. The district court found that "Defendant is an attorney and is and has been represented by a New Mexico licensed attorney." [RP 223]. At the first hearing on April 23, 2008, Defendant had two attorneys representing him. [Tr. Vol. 1: 3].

Defendant asserts that *Skeen v. Boyles*, 2009-NMCA-080, ¶ 46, 146 N.M. 627, 213 P.3d 531, and *D'Antonio v. Garcia*, 2008-NMCA-139, ¶¶ 16-18, 145 N.M. 95, 194 P.3d 126, demonstrate that the district court abused its discretion by failing to allow Defendant to respond fully to the summary judgment. [BIC 19, 20]. Defendant's discussion of *Skeen* and *D'Antonio* is misplaced, as the issue in these cases is not excusable neglect. In *Skeen*, the district court awarded attorney fees in favor of plaintiffs based on an "unopposed" motion, when defendants failed to respond timely. *Skeen*, ¶ 39. The district court in *Skeen* denied defendants' request for an extension of time, because it was not justified by excusable neglect. *Id.* The *Skeen* Court concluded that prior to granting what was in effect a default judgment, the trial court should have applied the analysis discussed in *Lujan*, 2003-NMCA-104 ¶ 8. *Skeen*, ¶¶ 47, 49. *Skeen* was decided on the district court's failure to apply the correct legal standard and not excusable neglect. *Skeen*, ¶ 49.

Unlike *Skeen*, the district court here did **not** grant final relief on the basis of

a default judgment nor without consideration of the merits of plaintiffs' claims. At the hearing on September 13, 2011, in response to Defendant's assertion to Judge Martin[3] that the granting of the summary judgment was the result of Defendant's failure to timely file a response, the district court clearly stated:

> Judge Robles applied Lujan v. City of Albuquerque correctly where he reviewed all the evidence, and then decided there was no disputed issue of material fact, and summary judgment was correct as a matter of law. He didn't grant a default summary judgment.

[Tr. Vol. 5: 18-19, Lines 21-2].

In *D'Antonio*, 2008-NMCA-139, ¶ 18, the Court of Appeals held that Defendant's failure to act, by not responding to the motion for summary judgment, "leads us to our conclusion that the dismissal of his case was neither arbitrary nor capricious but, rather, was a proper decision, ..." *Id.* Defendant attempts to distinguish *D'Antonio*, by arguing that unlike the defendant in *D'Antonio*, the Defendant here "did not fail to act." [BIC 21]. But that is exactly what Defendant Gopin did; he intentionally failed to respond to Plaintiffs' SJM. Defendant, an attorney, was well aware, as were his hired counselors, of the time restrictions and the potential consequences for failure to file a response to Plaintiffs' SJM.

Finally, there was no need for the district court to apply the multi-factor

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[3] In November 2008, this case was reassigned to Judge James T. Martin upon Judge Robert Robles' appointment to the New Mexico Court of Appeals.

balancing test set forth by our Court of Appeals in *Kinder Morgan* to determine if Defendant's neglect was excusable, because this was not a default judgment. *See*, [Tr. Vol. 5: 18-19, Lines 21-2]. Contrary to Defendant's statements and the cases cited in his BIC at 21, the district court decided Plaintiffs' SJM on the merits.

D. The District Court Did Not Err In Applying Plaintiffs' Partial Summary Judgment Ruling To The Joined Plaintiffs And Named Individuals.

Thirteen Joined Plaintiffs, identified in the original Complaint as "John and Jane Doe" became parties to this suit by Order dated August 2009. [RP 1124]. Plaintiff Attorney General was a party to this suit from the beginning, [RP 47] and signed the March 13, 2008, SJM. [RP 76]. On February 22, 2010, Defendant provided a list of 314 client names to the district court and contracts for *in camera* review as being privileged. [RP 1449-1468]. On June 2, 2010, the district court ordered Defendant to produce the names and agreements to Plaintiff Attorney General. [RP 1482-1483].

At the October 7, 2010, hearing, the district court granted Plaintiff's motion requesting notification to consumers. [Tr. Vol. 4: 16][RP 1493-1494].The Attorney General sent a letter to all clients whose name, address and contract were produced by Defendant. [RP 1497]. Approximately one hundred and ten (110) former clients responded to the AG's letter. *See*, [Ex. AG-3]. These individuals are **not**

joined Plaintiffs; they are named individuals for whom the Attorney General was awarded restitution.

1. The Law Of The Case Doctrine Supports Applying The Partial Summary Judgment To The Joined Plaintiffs And Named Individuals.

Defendant asserts that the district court's decision to apply the partial summary judgment "achieved through a procedural default" to the joined Plaintiffs and the "unnamed" individuals is not justified under preclusion doctrines. [BIC 24] First, the original Plaintiffs were **not** granted a partial summary judgment through a procedural default. Second, Plaintiff Attorney General and unnamed individuals John and Jane Doe 1-99, were Plaintiffs from the beginning of the law suit. [RP 47]. Third, Defendant does not argue that the summary judgment does not apply to the Attorney General. The Attorney General by law has authority to petition the district court for temporary or permanent injunctive relief, and **restitution**. NMSA 1978, § 57-12-8(B). The "named individuals" are not a separate party, but include the 110 individuals on behalf of whom the Attorney General was awarded restitution.

In *Alba v. Hayden*, 2010-NMCA-037, ¶ 7, 148 N.M. 465, 237 P.3d 767, this Court stated that the doctrine of law of the case relates to litigation of the same issue recurring within the same suit, and explained:

> Under the law of the case doctrine, a decision on an issue of law made

> at one stage of a case becomes a binding precedent in successive stages of the same litigation. Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.

(internal quotation marks and citations omitted). Defendant attempts to re-argue that the partial summary judgment decided the facts of the case without giving Defendant an opportunity to rebut them. [BIC 25]. As previously discussed, Defendant waived his opportunity to respond to the facts, by not responding to the SJM. Defendant's second argument is based on the false premise that the doctrine cannot be used to uphold "an incorrect ruling . . . where material facts are in dispute." [BIC 25]. The ruling was not incorrect because it was based on undisputed material facts and the law. [Tr. Vol. 1-A: 8]. Third, Defendant does not explain how allowing restitution to 110 consumers is an "obvious injustice." Finally, the award of civil penalties to the Attorney General based on the 314 voided contracts, does not equate to applying the summary judgment to "hundreds of others." [BIC 25]. The district court did not enter judgment on behalf of 314 individuals. [BIC 1]. The Attorney General is one Plaintiff.

The law of the case applies to questions of law, not "purely fact" questions. *State ex rel. King*, 2009-NMSC-010, at ¶ 21. In *Cordova v. Taxation & Revenue, Prop. Tax Div.*, 2005-NMCA-009, ¶ 38, 136 N.M. 713, 104 P.3d 1104, this Court

stated:

> [A] summary judgment is a decision on the merits of the case. Thus, a Rule 56 motion will be granted on the basis of former adjudication when an earlier summary judgment has disposed of the same issues between sufficiently related parties. (internal quotes and citations omitted).

The current case is distinguishable from both *Alba v. Hayden, supra*, and *Gallegos v. Nevada Gen. Ins. Co.*, 2011-NMCA-004, ¶ 20, 149 N.M. 364, 248 P.3d 912 (filed 2010). In *Alba*, the district court granted Plaintiff's summary judgment motion against the first defendant, Hayden, a pro se litigant, who had failed to respond to Plaintiff's request for admissions and the motion for summary judgment. *Alba*, 2010-NMCA-037 at ¶ 3. Plaintiff argued the law of the case doctrine barred the codefendant, White, from litigating the matter. *Id.* ¶ 5. This Court determined that Hayden's deemed admissions cannot be used against a codefendant because the admissions bind the party making the admissions, not the codefendants. *Id.* at ¶ 10. Here, Defendant is the sole defendant, was represented by counsel, and he responded to Plaintiff's Requests for Admissions. [RP 137]. In addition, Defendant in this case did not present the district court with contradictory facts as did codefendant White in *Alba*. *Alba* 2010-NMCA-037, ¶ 4.

In *Gallegos*, this court determined that a default declaratory judgment in favor of the insurance company against only the insured would not become the law

of the case with respect to the plaintiff driver. *Gallegos*, 2011-NMCA-004 at ¶ 21. In *Gallegos*, the injured Plaintiff was not made a party to the declaratory judgment action. *Id.* at ¶ 4. "Our conclusion that Plaintiff should have been allowed to participate is bolstered by the fact that a default judgment under these circumstances would not bind him." *Id.* at ¶ 19. Both *Alba* and *Gallegos* involved default judgments and the party that was negatively affected by the district courts' decisions was not the original party against whom the decision was made and had little or no influence on the outcome. That is not the situation here.

Unlike *Alba* and *Gallegos*, here, the decision upon which the law of the case doctrine applies is **not** a default judgment. Defendant Gopin is the **only** Defendant, and was a party to the suit from the beginning. The partial summary judgment binds Defendant Gopin because he had notice and an opportunity to respond. Defendant was on notice that unknown Plaintiffs might be made parties to or join the suit because the original complaint included John Doe 1-99 and Jane Doe 1-99. [RP 47].

This case is exactly the situation where the law of the case doctrine is applicable. Law of the case doctrine precludes relitigation of the same issue. *See*, *Cordova v. Larsen*, 2004-NMCA-087, ¶ 10, 136 N.M. 87, 94 P.3d 830. The law of the case doctrine "is a matter of precedent and policy; it is a determination that, in

the interests of the parties and judicial economy, once a particular issue in a case is settled it should remain settled." *Trujillo v. City of Albuquerque,* 1998-NMSC-031, ¶ 40, 125 N.M. 721, 965 P.2d 305.

Defendant has failed to provide a valid argument that the district court's decision was "clearly erroneous" or "resulted in manifest injustice." *Cordova,* 2004-NMCA-087, ¶ 11. The joined Plaintiffs and named individuals asserted and proved the same facts and legal arguments as the original plaintiffs. *See*, Attorney General Complaint for Injunctive Relief and Civil Penalties, [RP 291-300]. Therefore, the district court properly applied the conclusions of law decided in the Order granting Plaintiffs' SJM to the joined Plaintiffs and named individuals who were entitled to the benefits of the June 9, 2008 Order [RP 315, 325-326].

2. Applying The Partial Summary Judgment to the Joined Plaintiffs and Named Individuals Does Not Violate New Mexico Law.

Defendant's contention that *Azar v. Prudential Ins. Co.*, 2003-NMCA-062, 133 N.M. 669, 68 P.3d 909, is analogous to the facts in this case and "demonstrates that the district court committed reversible error," is frivolous. [BIC 27]. The facts and the law are clearly distinguishable. *Azar* involved a class action suit brought by plaintiff life insurance policyholders against defendant insurers. In *Azar*, the trial court granted partial summary judgment to Plaintiffs as to liability on all their New Mexico claims, except the Retail Installment Sales Act claim, even though

only one Plaintiff, Azar, moved for summary judgment on a single claim under the UPA. *Azar*, 2003-NMCA-062, ¶ 20. The trial court determined that it had authority to grant partial summary judgment to all Plaintiffs on all New Mexico claims because there was no genuine issue of material fact in the record before it, and Defendant, Prudential, had moved for summary judgment on the entire amended complaint, thus putting into issue all of Plaintiffs' claims. *Id.* The Defendant insurer filed an interlocutory appeal. *Id.* The New Mexico Court of Appeals made no determination as to whether the partial summary judgment applied to all the Plaintiffs or all claims under the law of the case doctrine or any other theory, because the *Azar* Court concluded that "there are genuine issues of fact concerning the materiality of the undisclosed information in this case that preclude granting summary judgment in favor of Plaintiffs." *Azar*, 2003-NMCA-062 ¶ 71. In contrast, applying Plaintiffs' SJM to a limited number of joined Plaintiffs and named individuals where the same set of undisputed facts and legal arguments apply and Defendant had notice and a fair opportunity to respond is not a violation of New Mexico law. *Cordova v. TRD*, 2005-NMCA-009, ¶ 38.

E. The District Court Did Not Violate Defendant's Due Process Rights By Refusing To Permit Him To Respond To The Facts In Plaintiffs' SJM Or By Applying The Judgment To Joined Plaintiffs And Named Individuals.

As Defendant acknowledges, he did not preserve this issue for review.

[BIC 10]. "It is well settled that an affirmative defense not pleaded or otherwise properly raised is waived." *Xorbox v. Naturita Supply Co.*, 101 N.M. 337, 339, 681 P.2d 1114, 1116 (1984); Rule 1-008(D) NMRA. It was incumbent upon Defendant to raise his due process defense at the time he received Plaintiffs' Motion for Entry of Judgment filed April 4, 2008 [RP 189] or at any point prior to the entry of the judgment granting Plaintiffs' SJM. *See*, *Xorbox, 101 N.M. at 339.* Having failed to do so, Defendant cannot now raise the defense. Issues raised for the first time on appeal may not be considered. *Id.*

Defendant suggests the Court may address this issue if it falls within the "general public interest" or "fundamental rights of a party" exception. [BIC 10] *See*, Rule 12-216(B) NMRA. Defendant provides no arguments or authority as to how or why he specifically is entitled to relief under either of these exceptions, and thus Defendant's arguments should not be considered. The issues involved in the SJM are specific to Defendant and do not invoke the general public interest exception. *See, O'Neel v. USAA Ins. Co.*, 2002-NMCA-028, ¶ 22, 131 N.M. 630, 41 P.3d 356 (declining to review unpreserved challenge to the trial court's award of pre-arbitration attorney fees). Fundamental rights call for discretionary review and most rights, however fundamental, may be **waived** or lost. *State v. Escamilla*, 107 N.M. 510, 515, 760 P.2d 1276, 1281 (1988).

In order to assert a procedural due process claim under the Fourteenth Amendment, a plaintiff must establish deprivation of a legitimate liberty or property interest and that he was not afforded adequate procedural protections. *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 37, 289 P.3d 1232. Defendant had reasonable notice and an opportunity to be heard and present any claim or defense. *See*, *State ex rel. Children, Youth & Families Dep't v. Pamela R.D.G.*, 2006-NMSC-019, ¶ 12, 139 N.M. 459, 134 P.3d 746. The district court's refusal to allow Defendant to controvert the facts presented in Plaintiffs' SJM because Defendant failed to respond, is not a violation of Defendant's right to due process. [BIC 28]. Defendant's argument fails because he did not preserve this issue and it does not fall under any exceptions.

VI. THE DISTRICT COURT DID NOT MISINTERPRET THE UNFAIR PRACTICES ACT IN CONCLUDING THAT DEFENDANT "WILLFULLY" VIOLATED THE ACT.

A. Defendant Engaged In Unfair And Deceptive Trade Practices.

Defendant argues he was not engaged in unfair or deceptive trade practices under the UPA. [BIC 30-31]. In *Atherton v. Gopin*, 2012-NMCA-023, ¶¶ 1, 2, this Court accepted as a fact that "Plaintiffs prevailed in their Unfair Practices Act," and that "Plaintiffs' won partial summary judgment, including judgment that Defendant had violated the UPA." Thus, this issue is moot. Defendant's culpability

under the UPA is not a legitimate contested issue on appeal.

If the Court decides to review this issue, the evidence reveals that after a two day trial, January 4-5, 2012, the district court made eighty findings of fact that replicated and extended the findings in Plaintiffs' original SJM filed March 13, 2008. [RP 2032; RP 325]. The 2012 Judgment concluded as a matter of law that the actions of Michael Gopin were in violation of the UPA. [RP 2043, COL S] "Michael J. Gopin's business practice in omitting his jurisdictional limitation and failing to provide any consultation as advertised is a willful violation of the UPA, at Section 57-12-11." [Tr. Vol 7: 35, Lines 9-12]. [RP 2041, COL D]

The UPA declares as unlawful, "unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce." NMSA 1978, § 57-12-3. The UPA prohibits misrepresentations "knowingly made in connection with the sale . . . of goods or services . . . by a person in the regular course of the person's trade or commerce, that may, tends to or does deceive or mislead any person . . ." NMSA 1978, § 57-12-2D. The UPA is designed to provide a remedy against misleading identification and false or deceptive advertising. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 22, 142 N.M. 437, 166 P.3d 1091. In *Lohman*, this Court acknowledged that, "the focus on advertising suggests that the UPA addresses representations directed at the public

at large, as consumers." *Id.* at ¶ 22. *See, e.g., Jones v. Gen. Motors Co.*, 1998-NMCA-020, ¶¶ 21, 22-23, 124 N.M. 606, 953 P.2d 1104 (proof of monetary damages not required for recovery under the UPA; misleading advertising and promotional statements, directed to the public at large, were sufficient to support a UPA claim).

Encinias v. Whitener Law Firm, P.A., 2013-NMCA-003, ¶ 25, 294 P.3d 1245 (2012), *cert. granted*, No. 33,874 (Dec. 6, 2012) is distinguishable. In *Encinias*, this Court assumed that the UPA applied to attorneys and their advertising, but held that Whitener's "advertisements did not deceive the audience with guarantees or promises." *Encinias*, 2013-NMCA-003, ¶ 28. Unlike Whitener, Defendant Gopin is **not** a New Mexico licensed attorney. Contrary to Defendant's statement in his BIC at page 32, there was no evidence, and Defendant does not cite to any facts that support his claim that the Las Cruces clients were represented by New Mexico licensed attorneys. The district court found that the only contact the plaintiffs in this case, with one exception, had with a licensed New Mexico attorney was **after** settlement had been reached. [RP 2037, FOF 46]. In addition, Gopin advertised for free attorney consultations which he did not provide. [RP 2035, FOF 28]. Defendant's failure to disclose these material facts in his advertisements were false and misleading representations *knowingly made* in

connection with the offering of legal services as defined under the UPA. [RP 2035, FOF's 27, 29].

In addition, Defendant's conduct constituted an unconscionable trade practice in taking advantage of the lack of knowledge of a person to a grossly unfair degree and providing services which resulted in a gross disparity between the value received and the price paid. NMSA 1978, § 57-12-2(E)(1)(2). [RP 2039, FOF 69, 70] [RP 2042, COL I].

B. Defendant's Actions Are Not Exempt Under The UPA.

Defendant is not exempt because his actions are not "expressly permitted" under any regulating agency. Defendant is not a licensed New Mexico attorney and he cannot claim an exemption under New Mexico's Disciplinary Board's rules. Defendant claims that a letter from Christine Long of the New Mexico Disciplinary Board dated August 18, 2006, [RP 396] stating "there does not appear to be any disciplinary action warranted" provides immunity for him under Section 57-12-7. [BIC 33-34]. This letter was in response to a complaint based on the unauthorized practice of law, and does not address Defendant's phone book or other media advertising or his offer of "free initial consultation." [RP 118-120].

Defendant could not have relied on the Disciplinary Board's letter prior to its issuance in August 2006 and many of the Plaintiffs had retained Defendant prior

to the Disciplinary Board's 2006 letter. *See*, [Defendant's Exhibit Binders Vols. 1 and 2]. Defendant's advertising also pre-dates the letter as he opened the Law Offices of Michael J. Gopin in Las Cruces in 2004. [RP 2032, FOF 3].

To be exempt, the challenged actions or transactions must be ***expressly permitted*** by the agency's rules or regulations. NMSA 1978, § 57-12-7. In *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 62, 147 N.M. 583, 227 P.3d 73, the Court explained that the New Mexico legislature in 1999, significantly narrowed the language describing the regulatory exemption in Section 57-12-7 by inserting the limiting term "expressly" before the term "permitted" and by adding the new phrase, "but all actions or transactions forbidden by the regulatory body, and about which the regulatory body remains silent, are subject to the Unfair Practices Act." *Quynh Truong*, 2010-NMSC-009, ¶ 30. Thus, exceptions to the UPA must be narrowly construed. The *Quynh* Court stated:

> in order for an action or transaction to be deemed expressly permitted and thereby exempted from the coverage of the UPA, the permission must be within the authority of the Superintendent to grant and must be specifically articulated in some form of public document.

Defendant's letter from New Mexico's Disciplinary Board does not meet these conditions. The letter has no precedential value and is not a public document. *See*, Rule 17-304 NMRA. Defendant is not a New Mexico attorney.

In *Campos v. Brooksbank*, 120 F. Supp. 2d 1271, 1275-1276 (D.N.M. 2000),

the United States District Court discussed with approval two New Mexico cases that concluded that Section 57-12-2 did not exempt a defendant car seller or a federally regulated bank from the UPA. *See, State ex rel. Stratton v. Gurley Motor Co.,* 105 N.M. 803, 808, 737 P.2d 1180, 1185 (Ct. App. 1987); *Ashlock v. Sunwest Bank of Roswell, N.A.*, 107 N.M. 100, 103, 753 P.2d 346, 349 (1988), overruled on other grounds, by *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 899 P.2d 576 (1995). The U.S. District Court in *Campos* concluded "section 57-12-7 does not provide a blanket exception for attorneys, ..." *Campos*, 120 F. Supp. 2d at 1277. Neither Defendant Gopin nor his law office is exempt from the UPA.

C. The Award Of Civil Penalties And Treble Damages Was Proper Because Defendant Acted "Willfully" Within The Meaning Of The UPA.

1. The District Court Did Not Misinterpret The Term "Willfully" To Mean Knowingly.

NMSA 1978, § 57-12-10(B), is a remedy for private parties and states in pertinent part, "[w]here the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has ***willfully engaged*** in the trade practice, the court may award up to three times actual damages . . . to the party complaining of the practice." (emphasis added).

Pursuant to NMSA 1978, § 57-12-11, "if the court finds that a person is ***willfully using or has willfully used*** a method, act or practice declared unlawful by

the Unfair Practices Act . . . the attorney general . . . may recover a civil penalty of not exceeding five thousand dollars per violation." (emphasis added)

Plaintiffs and the Attorney General agree with Defendant that the standard of *willfulness* is the same for awarding private remedies of treble damages and civil penalties under the UPA. [BIC 40]. *See, Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 14, 121 N.M. 764, 918 P.2d 350 (all parts of a statute must read in connection with every other part to produce a harmonious whole). Therefore the same evidence will support a finding of "willfulness" for purposes of awarding treble damages and civil penalties. Thus, the district court's findings and conclusions of law after trial, that Defendant's actions were willful and deliberate, authorize both the award of treble damages to named Plaintiffs and civil penalties to the State of New Mexico.

Defendant argues that the "district court improperly treated the standard for treble damages and civil penalties as identical to the standard for finding a violation of the Act itself." [BIC 36]. The district court was well aware of the different standards and conducted two hearings on the "willfulness" issue. The district court had previously found Defendant violated the UPA in its Order granting summary judgment to Plaintiffs. [RP 315]. The issue of "willfulness" under the civil penalties Section 57-12-11, was argued at a hearing held September

13, 2011. [Tr. Vol. 5: 16]. The issue of Defendant's willful conduct pursuant to private remedies Section 57-12-10(B) was litigated at trial on January 4-5 2012. [Tr. Vol. 6: 18]. The conclusion in each instance was that the Defendant had "willfully" violated the UPA. [RP 2043, COL T, U].

There is a distinction between a "knowingly made" misrepresentation and one that is "willfull." The standard for finding a violation of the UPA is that the unfair or deceptive trade practice be "knowingly made." NMSA 1978, § 57-12-2(D). A "misrepresentation need not be intentionally made, but it must be knowingly made." *Stevenson v. Louis Dreyfus Corp*, 112 N.M. 97, 100, 811 P.2d 1308, 1311 (1991). In *Ashlock v. Sunwest Bank of Roswell, N.A.*, *supra*, our Supreme Court held that intent to deceive was not part of the essential elements in finding a violation of the UPA. The *Ashlock* court explained that the permissive language of Section 57-12-10(B) "leads us to conclude that it was within the legislature's contemplation that in some cases, but not all, the false or misleading statement would be made at the outset with the intent to deceive, and in such cases triple damages would not be unwarranted." *Ashlock*, 107 N.M. at 101. The willfulness standard under the UPA does not include an actual or deliberate attempt to injure or harm another, as Defendant asserts. [BIC 37, 41].

In *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 158, 899 P.2d 594, 601

(1995), our Supreme Court stated:

> The test for willfulness is a conscious or intentional failure to comply. Willfulness is distinguished from accidental or involuntary non-compliance and may be established even where there is no wrongful intent. [internal quotations and citations omitted]

Black's Law Dictionary 1737 (9th ed. 2009), defines "willfulness" as "the fact or quality of acting purposely or by design; deliberateness; willfulness does not necessarily imply malice but it involves more than just knowledge." The issue is whether the act or practice is being used deliberately or by design, rather than as a result of confusion, mistake or faulty memory. A person that willfully or deliberately engages in or uses an act or practice that violates the UPA is subject to treble damages and civil penalties. The court has discretion to award a civil penalty not exceeding $5,000 per violation under Section 57-12-11 and treble damages for individuals under Section 57-12-10(B). The district court concluded as a matter of law that all actions violating the UPA were known by and under the direction of Defendant Gopin and were willful and deliberate and in willful violation of the UPA. [RP 2043, COL S, T & U]. The court's conclusion that Defendant "willfully" used and engaged in unfair trade practices was based on a number of factors, including Defendant's misleading advertisements, his failure to provide the offered "free consultation" and his collusion with the Las Cruces chiropractor to retain clients.

Defendant cites *Matthews v. State,* 113 N.M. 291, 825 P.2d 224 (Ct. App. 1991) for the proposition that "willful" conduct is the intentional doing of an act with knowledge that harm may result, and argues this is the definition the court should apply as the "willfulness" standard under the UPA. [BIC 37]. Defendant's reliance on *Matthews v. State*, is unfounded and not comparable to this case. *Matthews* involved a personal injury suit brought under NMSA 1978, § 66-3-1013, by a victim that had ridden his motorcycle onto property leased by one of the alleged tortfeasors and was injured when he struck a cable stretched across a roadway. *Id.* at 292. The *Matthews* Court was interpreting the term "directly involved," in light of the Off-Highway Motor Vehicle Act's general purpose and concluded that the legislature intended the words to refer to "willful" or "malicious" conduct, as opposed to ordinary negligence. *Id.* at 296. In *Rivero v. Lovington Country Club*, Inc., 1997-NMCA-114, ¶ 9, 124 N.M. 273, 949 P.2d 287, this Court modified the *Matthews* definition to provide that intentional acts performed "in utter disregard for the consequences" do not provide immunity to landowners under the Act. The Court explained that plaintiffs are not required to prove deliberate intention or purpose to harm in order to rebut a defendant's claim of immunity under the Act. *Rivero*, 1997-NMCA-114, ¶ 10.

The purpose of New Mexico's UPA is to protect the public. *See*, 2007-

NMCA-100, ¶ 25. Interpreting 'willfully engaged" or "willfully using" to include an element of *intent to harm* would frustrate legislative intent and effectively curtail the Attorney General's authority to meaningfully enforce the Act, since an "intent to harm" is a more restrictive and difficult standard to prove. See, *Portales Nat'l Bank v. Ribble*, 2003-NMCA-931, ¶ 8, 134 N.M. 238, 75 P.3d 838. As a remedial statute, "intent to harm" is not the proper standard under the UPA to establish willful conduct. (Nonetheless, the district court found that Defendant's willful acts did result in harm to his clients.) [Tr. Vol. 5: 21-22, Lines 23-02]. The evidence supports the trial court's decision that Defendant's misrepresentations in his advertising, soliciting clients and settling claims were conscious, deliberate and in willful violation of the UPA.

2. The District Court Did Not Err In Imposing Treble Damages And Civil Penalties, And The Application Of The Oil And Gas Act Or Other Jurisdictions' Consumer Laws Do Not Support Defendant's Position.

Defendant asserts that if the legislature intended to penalize a defendant for *knowing* conduct, it could have done so, as it did in the Oil and Gas Act, by stating that any person who knowingly and willfully violates any provision of the Oil and Gas Act shall be subject to a civil penalty. NMSA 1978, § 70-2-31(A). [BIC 39]. Defendant mischaracterizes the standard applied in the Oil and Gas Act. First, the Oil and Gas Act does not penalize a person only for "knowing" conduct; the

violation must be "knowingly and willfully." Second, a comparison of the Oil and Gas Act to the UPA is irrelevant. Under both the Oil and Gas Act and the UPA, a finding of "knowing" and "willful" conduct are required to impose civil penalties. Third, the district court found Defendant had "knowingly" violated the UPA and "willfully" used those statements, acts or method that were declared a violation to deceive the public pursuant to NMSA 1978, Sections 57-12-10(B) and 57-12-11. [RP 2035, FOF 27; RP 2041, COL D].

The case cited by Defendant, *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013 ¶¶ 23, 24, 146 N.M. 24, 206 P.3d 135, does not discuss the standard for applying civil penalties. [BIC 37]. *Marbob* holds that the Energy, Minerals and Natural Resources Department had no authority to impose civil penalties, but that Section 70-2-28 required the Attorney General to bring suit in court to establish liability and to assess whatever penalties are authorized by the Act. *Id.* The Attorney General did exactly that here.

D. The District Court Did Not Err In Granting Partial Summary Judgment To The Attorney General On The Issue Of Willfulness.

1. The District Court Properly Granted The Attorney General's Motion For Summary Judgment On The Issue Of "Willfulness."

On August 12, 2011, Plaintiff Attorney General filed a Motion for Partial Summary Judgment ("AG's SJM") on the issue of whether Defendant willfully

violated the UPA when he failed to disclose his jurisdictional limitation and failed to deliver a "free initial consultation," as advertised. [RP 1651-1659]. Defendant Gopin filed a Response to the AG's SJM on September 8, 2011. [RP 1689-1701].

On September 13, 2011, a hearing was held on the AG's SJM. [Tr. Vol. 5: 34-42]. The district court correctly opined that for an award of civil penalties under the UPA, the intentional act need not be done with intent to harm. [Tr. Vol. 5: 41, Lines 10-13]. Thus the district court granted AG's SMJ and held that:

> ... having reviewed Judge Robles' summary judgment, the motion in support of summary judgment, all of the attachments to that original motion together with the motion and response in this case, I do find that there is no disputed issues of material fact that the advertising used by Mr. Gopin violated the Unfair Practices Act, based on the deposition of Mr. Gopin that that was done willfully was an intentional act, it's not a specific intent to deceive and there is no requirement that there be detrimental reliance upon that advertisement, therefore, I believe that as a matter of law I can and should grant summary judgment in favor of the attorney general on the civil penalty. The civil penalty will be $5,000 per violation.

[Tr.Vol. 5: 42, Lines 10-24].

On December 19, 2011, the Order granting AG's SJM on the issue of willfulness was entered. [RP 1777-1780]. A Transcript of Judgment against Defendant was issued on January 4, 2012, in the amount of $1,570,000 due to the State of New Mexico, Attorney General for civil penalties. [RP 1944].

2. Defendant Did Not Timely Appeal The District Court's Order Granting Attorney General's Motion For Partial Summary Judgment.

The Order granting the AG's SJM on the issue of willfulness and allowing civil money penalties against Defendant [RP 1777] was a final appealable order, for the same reasons, discussed, *infra*, in Section V(A). Defendant never objected either in writing or at the hearing held on January 4-5, 2012 to the district's court's Order granting the AG's SJM. The Order was filed in the district court on December 19, 2011, and Defendant did not submit a notice of appeal within the thirty day deadline dictated by Rule 12-201(A) NMRA. Defendant waived his opportunity to appeal the issue of whether the district court's Order granting Attorney General's summary judgment motion was proper.

Besides, the facts presented and supported in the Attorney General's motion and at the hearing held January 4-5, 2012, fully support a finding of "willfulness." Facts found by the trial court are not disturbed by an appellate court if those factual findings are supported by substantial evidence. *Jones v. GMC,* 1998-NMCA-020, ¶ 18. "An appellate court does not independently weigh the evidence, but resolves disputed facts in favor of the party prevailing below." *Id.* (internal quotations and citations omitted). The court found that there are no disputed issues of material facts that the advertising used by Defendant violated the New Mexico UPA, that the advertising was done willfully, and Defendant was subject to civil penalties.

[RP 1778, ¶¶ 2-4] The district court's decision to grant the AG's SJM was in accordance with the law, not an abuse of its discretion and should be upheld.

E. The District Court Did Not Err in Awarding Post-Judgment Interest To Joined Plaintiffs At The Mandated Statutory Rate.

The district court awarded post-judgment interest at a rate of 15% "because of Defendant's deliberate misconduct, from the date of this Judgment until paid in full." [RP 2027]. NMSA 1978, § 56-8-4(A) applies to post-judgment interest and states:

> Interest shall be allowed on judgments and decrees for the payment of money from entry and shall be calculated at the rate of eight and three-fourths percent per year, unless: . . .
>
> (2) the judgment is based on tortious conduct, bad faith or intentional or willful acts, in which case interest shall be computed at the rate of fifteen percent.

Based on Defendant's egregious conduct and his knowing, deliberate and willful violations of the UPA, the district court awarded the maximum remedies to Plaintiffs at every turn, including treble damages, and the maximum $5,000 per violation in civil penalties. Defendant acknowledges that "the higher interest rate may be applied based on a finding of willful conduct. . . ." [BIC 42]. In *Public Serv. Co. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 57, 131 N.M. 100, 33 P.3d 651 this Court concluded that:

> the legislature intended the phrase "intentional or willful acts," when

> read in conjunction with "tortious conduct" and "bad faith," to provide a guide for a trial court to determine which post-judgment interest rate should apply when the facts show that a defendant acted culpably. *Id.* at ¶ 57.

The Court added, “if a defendant is found to have acted willfully, clearly the higher post-judgment interest rate applies.” *Id.* at ¶ 59.

After a trial on the issues, the district court found as a matter of law that the judgment was based on Defendant’s willful acts, and although not a requirement to establish willful conduct, Defendant’s acts did result in harm to his clients. [Tr. Vol. 5: 21-22, Lines 23-02]. The statute mandates that if judgment is based on “intentional or willful acts” interest **shall be computed** at the rate of fifteen percent.” (emphasis added). *See*, *State v. Lujan*, 90 N.M. 103, 105, 506 P.2d 167, 169 (1977)(use of the word "shall" in a statute indicates that the provisions are intended to be mandatory rather than discretionary.) The district court properly awarded a 15% post-judgment interest. [RP 2044, COL HH].

VII. THE AMOUNT OF CIVIL PENALTES AND RESTITUTION AWARDED TO THE ATTORNEY GENERAL IS NOT ARBITRARY OR EXCESSIVE AND DOES NOT VIOLATE DEFENDANT’S RIGHT TO DUE PROCESS.

The district court entered judgment in favor of the Attorney General in the amount of $1,570,000 for civil penalties determined by multiplying Defendant’s 314 former clients by $5,000. [RP 2026, m]. The court also awarded restitution

totaling $757,358.56 to 110 of Defendant's former clients who responded to the notification of the lawsuit. [RP 2026, n]. Treble damages were not awarded to these plaintiffs. Only the thirteen individual Plaintiffs represented in two groups by two private attorneys were granted treble damages. [RP 2025-2026]. Defendant does not argue that the treble damages amount is excessive.

A. The Unfair Practices Act Is Remedial, And The Civil Penalties Awarded Are Not Punitive, Excessive Or A Violation Of Due Process.

NMSA 1978, § 57-12-11 allows an award of civil penalties for violations of the UPA not to exceed $5,000 per violation. While the question of whether, on a particular set of facts, the district court is permitted to exercise its equitable powers is a question of law, the issue of **how** the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion. *See*, *Eker Bros., Inc. v. Rehders*, 2011-NMCA-092, ¶ 9, 150 N.M. 542, 263 P.3d 319.

1. The Punitive Damages Standard Does Not Apply To The UPA's Civil Penalties.

Defendant has mischaracterized the civil penalties as punitive damages. [BIC 43]. Holdings in cases regarding punitive damages do not apply to statutory penalties due to fundamental differences between punitive damages and such penalties. "To determine whether a sanction is remedial or punitive, a reviewing court begins by evaluating the government's purpose in enacting the legislation,

rather than evaluating the effect of the sanction on the defendant." *City Of Albuquerque ex rel. Albuquerque Police Dep't v. One (1) 1984 White Chevy*, 2002-NMSC-014, ¶ 11, 132 N.M. 187, 46 P.3d 94. *White Chevy* sets forth the following test:

> Then the court must determine whether the sanction established by the legislation was sufficiently punitive in its effect that, on balance, the punitive effects outweigh the remedial effect. Although a civil penalty may cause a degree of punishment for the defendant, such a subjective effect cannot override the legislation's primarily remedial purpose.

Id. (internal quotation marks and citations omitted).

The UPA constitutes remedial legislation. *State ex rel. Stratton v. Gurley Motor Co.*, 105 N.M. at 808. In *Quynh Truong* the New Mexico Supreme Court stated: "Since the UPA constitutes remedial legislation, "we interpret the provisions of this Act liberally to facilitate and accomplish its purposes and intent." *Quynh Truong,* 2010-NMSC-009, ¶ 30. In *Ashlock*, the Court concluded that "the Unfair Practices Act lends the protection of its broad application to innocent consumers." *Ashlock*, 107 N.M. at 102.

New Mexico courts have held that legislation designed to protect the public is remedial in nature and that the civil penalties imposed manifest a remedial and regulatory purpose. *See*, *State v. Kirby*, 2003-NMCA-074, ¶¶ 23, 26, 133 N.M. 782, 70 P.3d 772, (Securities Act has a remedial purpose; the legislative purpose in enacting the civil penalty was "an overall remedial regulatory and administrative

scheme to protect the public."); *State v. Block*, 2011-NMCA-101, ¶¶ 34, 35, 150 N.M. 598, 263 P.3d 940 (New Mexico Voter Action Act is directed to a remedial purpose, and the civil penalty section evinces a remedial and regulatory purpose.) In *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 632, 904 P.2d 1044, 1057 (1995), our Supreme Court held that, the revocation of an individual's driver's license under the Implied Consent Act serves the legitimate nonpunitive purpose of protecting the public from the dangers presented by drunk drivers and helps enforce regulatory compliance.

In most states, civil penalties under the unfair and deceptive trade practices acts are remedial in nature and not a fine. *See*, National Consumer Law Center, Unfair and Deceptive Acts and Practices, §15.5.3.1, pg. 1019 (7th ed. 2008). *See State v. Western Capital Corp.*, 290 N.W.2d 467, 473 (1980)(civil penalty for deceptive trade practices clearly remedial.) Other jurisdictions have determined that the most significant factor supporting the civil penalty was the injury to the public. *See*, *State by Humphrey v. Alpine Air Products, Inc.*, 490 N.W.2d 888, 897 (Minn. Ct. App.1992).

In *Kirby*, this Court looked to aspects of the seven factor "non-exhaustive" analytical framework articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), to determine if a civil remedy was so punitive as to be transformed

into a criminal penalty. *Kirby*, 2003-NMCA-074 at ¶ 28. Application of the *Mendoza-Martinez* factors in this case leads to the same conclusion the *Kirby* Court found, "that the civil penalty imposed upon Defendant . . . was not sufficiently punitive in its effect that, on balance, the punitive effect outweighed its remedial effect." *Kirby*, at ¶ 39. Here, the UPA expressly states the penalties are "civil;" neither money penalties nor debarment has historically been viewed as punishment, *See*, *Hudson v. United States*, 522 U.S. 93, 104 (1997); the sanctions impose no "affirmative disability or restraint" such as imprisonment; the UPA does not come into play 'only' on a finding of scienter; and the monetary civil penalties are used to accomplish some other legitimate governmental purpose. In addition to compensating the State for its expenses involved in this five year lawsuit, the civil penalty monies will be deposited in the consumer protection fund of the Attorney General for the enforcement, litigation, investigation or education activities with respect to consumer protection. [RP 2026]

The UPA is a comprehensive regulatory and administrative scheme designed to protect the public, and its civil penalties have a close and substantial relationship to remedial purposes. The civil penalty applied here is integral to the remedial goals of the UPA and is not excessive in relation to these goals. *See*, *Block*, 2011-NMCA-101, at ¶ 45.

2. The Award Of Civil Penalties Is Not Grossly Excessive And Does Not Violate Due Process.

Even if the punitive damages standard is applied, the award is not excessive or a violation of due process. In *Jolley v. Energen Res. Corp.*, 2008-NMCA-164, ¶ 31,145 N.M. 350, 198 P.3d 376 this Court, in considering on appeal whether a punitive damages award violates due process, considered the factors set forth in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574 (1996). Those factors are:

> 1) the degree of reprehensibility of the defendant's misconduct; 2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Jolley, 2008-NMCA-164, ¶ 31.

In *BMW v. Gore, supra*, the jury awarded actual damages of $4,000 and punitive damages of $4,000,000. The USSC held that petitioner's conduct was not particularly reprehensible because it only caused minor economic harm and the 500 to 1 ratio of punitive damages to compensatory damages was not reasonable. In *Jolley*, this Court concluded that a ratio of 6.76 to 1 did not exceed constitutional limits. *Jolley*, 2008-NMCA-164, ¶ 38.

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003), the USSC stated, "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may

comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." (internal quotation marks omitted). The USSC declined to impose a bright-line ratio which a punitive damages award cannot exceed. *Id.* at 426.

Defendant calculates the punitive damages ratio as 1:24 (*sic*). [BIC 43]. When compared to the 500 to 1 ratio in *BMW*, or the 145 to 1 ration in *State Farm*, 24 to 1 is not grossly excessive. Indeed, this ratio is not excessive, in light of the *BMW* Court's acknowledgement that a "reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW,* 517 U.S. at 583. In *Weidler v. Big J Enters.*, 1998-NMCA-021, ¶ 45, 124 N.M. 591, 953 P.2d 1089, this Court stated, "[t]his Court will rarely disturb a punitive damages award."

Further, Defendant's method of calculating the ratio is distortive. Defendant adds the civil penalties awarded to the State ($1,570,000) and the treble damages awarded to the individual Plaintiffs ($144,148.83) and compares this number to the compensatory damages ($72,074.19). [BIC 43, fn.3]. The award of treble damages to individual Plaintiffs and the award of civil penalties to the State are distinct and should be analyzed separately. The civil penalties, as discussed above,

are not punitive and should not be included in the equation. Using Defendant's numbers, ($144,148.83 ÷ $72,074.19) [BIC 43] the ratio of compensatory damages to Plaintiffs' treble damages is 2:1; clearly not excessive.

Additionally, Defendant cites to no authority to support his contention that the multiplier for the civil penalties should have been the number of false or misleading advertisements and not the number of voided contracts. [BIC 44]. Other courts have awarded the stated penalty for each victimized consumer. *See*, *State ex rel. Corbin v. United Energy Corp.*, 151 Ariz. 45, 52, 725 P.2d 752,759 (1986) (Arizona Court of Appeals affirmed the jury award of $5,000 for each of eleven consumers.)

In *People v. JTH Tax, Inc.*, 212 Cal. App. 4th 1219, 1254-55, 151 Cal. Rptr. 3d 728,757-58 (2013), the Court of Appeal of California held that the trial court did not commit legal error or abuse its discretion in awarding civil penalties of $2,500 per violation of California's unfair competition law and its false advertising law based on gross circulation figures for print publications and Nielsen ratings for television shows. The California court determined that the appropriate method of determining what constitutes a violation under these civil penalties provisions was correctly decided in *People v. Superior Court* (*Olson*), 96 Cal. App. 3d 181, 157 Cal. Rptr. 628 (1979). *JTH Tax* 212 Cal. App. 4th at 1250. The *Olson* court

instructed the trial court to follow a reasonable approach that took into account the particular circumstances of a case. The *Olson* court stated:

> a reasonable interpretation of the statute in the context of a newspaper advertisement would be that a single publication constitutes a minimum of one violation with as many additional violations as there are persons who read the advertisement or who responded to the advertisement by purchasing the advertised product or service or by making inquiries concerning such product or service. Violations so calculated would be reasonably related to the gain or the opportunity for gain achieved by the dissemination of the untruthful or deceptive advertisement. *Olson*, 96 Cal. App. 3d at 198.

Here, Defendant is an out-of-state attorney who knowingly and willfully used his legal skills to take advantage of New Mexico consumers who were already traumatized by an accident involving personal injuries. Defendant intentionally structured his advertising, his law office practices, his attorney fee agreements and the settlement disbursements to maximize his own profit at the expense of his clients. The district court found that Defendant's practices violated the Rules of Professional Conduct and were in willful violation of the UPA. [RP 2041, COL D]; [RP 2042, COL I, J] [RP 2043, COL S, T, & U].

Thus the district court reasonably applied the civil penalty to each of Defendant's clients that had entered into a contract declared void by the court. The district court did not abuse its discretion in awarding the maximum civil penalty for each known victim. To do otherwise would circumvent legislative intent.

B. The Award Of Restitution For The 110 Named Consumers Is Not Excessive Or Arbitrary And Does Not Violate Due Process.

Traditionally, restitution is thought of as an equitable remedy. *Eker Bros.*, 2011-NMCA-092, ¶ 8. How the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion. *Eker Bros.*, 2011-NMCA-092, ¶ 9. The reviewing court finds an abuse of discretion when the lower court's decision is without logic or reason, or clearly unable to be defended. *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 158, 899 P.2d 594, 600 (1995). The district court awarded restitution in the amount of $757,358.56 to 110 consumers. [RP 2026, FOF n]. This amount **does not** include treble damages. It is the total settlement amounts collected for all 110 clients ($919,466.19) + ($73,390.15 Medpay) + ($10,000 administrative fees) = $1,002,856.34 minus the amounts already paid to the clients from the settlements ($245,497.78). *See*, Exhibit AG-3. Defendant claims there is no evidence to support that he received a benefit of $757,358.56 to which he was not entitled. [BIC 46]. That is not the inquiry.

Defendant violated the UPA and he received a benefit as a result of his illegal conduct. His benefits include the entire settlement amount, which rightly belongs to the client, minus the amounts previously paid to the clients. Defendant cannot collect under the contracts because the district court declared the attorney fee contracts void. [RP 2041, COL G]. In addition, the district court found as a

matter of law that the court had previously voided the Defendant's contingency fee contracts, which left him with an unwritten contingency fee contract that was unenforceable. [RP 2043, COL J]. The district court also concluded that the Law Offices of Michael Gopin is not entitled to retain any funds collected by the firm under a legal theory of *quantum meruit*, in the representation of the named plaintiffs or the parties named by the Attorney General. [RP 2044, COL DD]. Thus an award of the full restitution amount minus funds already received, to Defendant's former clients is appropriate [RP 2042, COL L], is not excessive and does not violate due process.

VIII. THE DISTRICT COURT DID NOT ERR IN AWARDING RECOVERY OF GROSS RECEIPTS TAXES.

A. Defendant Did Not Preserve This Issue For Review On Appeal.

This issue should not be considered on appeal because Defendant did not raise this issue below. Defendant cites to a statement in his *Requested Findings of Fact and Conclusions of Law,* [RP 1945-1951] as support for preservation of the issue. [BIC, 9]. However, the only statement regarding gross receipts tax is at RP 1950, ¶ 11, which states: "[t]he Law Offices of Michael J. Gopin had a legal obligation to pay the gross receipts tax to the State of New Mexico." In *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273, this Court stated, "on appeal, the party must specifically

point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue." Defendant argued at the hearing on the issue of damages that the administrative fees, and the costs should not be awarded to Plaintiffs, but he never mentioned gross receipts taxes, nor did he argue that an award of gross receipts taxes would effect a double recovery. [Tr. Vol. 7: 15-17].

B. The Award of Gross Receipts Taxes Was Not A "Double Recovery."

Defendant's arguments are based on the false premise that "inclusion of gross receipts tax in the damages award effects a double recovery." [BIC, 47]. This is incorrect. Neither the individual Plaintiffs nor the State received a "double recovery" for gross receipts taxes paid. Defendant's payment of gross receipts taxes to the State and the inclusion of taxes in the award of damages and restitution to Plaintiffs are different transactions governed by different statutes and rules. There is no "double recovery" because the same Plaintiffs were not awarded the same damage/restitution amounts twice, nor is the Defendant paying damages in the form of gross receipt taxes to the ***same*** Plaintiff twice. Defendant paid his gross receipts taxes **collected from his clients** to the State; Defendant was ordered to repay those amounts as part of the damages/restitution owed to plaintiffs and former clients, respectively. Defendant is not paying gross receipts tax to the State.

The case cited by Defendant, *Washington v. Atchison, Topeka and Santa Fe Rwy Co.*, 114 N.M. 56, 57, 834 P.2d 433, 434 (Ct. App. 1992) involved an employee who successfully sued his employer for injuries sustained during his employment. The employee had previously received benefit payments from the Railroad Retirement Board and other sickness benefits as a result of his on-the-job injuries during the pendency of his action. *Id.* at 58, 435. As part of the collective bargaining agreement, Defendant employer had reimbursed the Railroad Retirement Board for payments made to the Plaintiff employee. *Id.* Employer's set-off claim was based on a provision in the collective bargaining agreement stating that benefits paid under the plan are not intended to duplicate recovery for lost wages. *Id.* at 59, 436. The Court of Appeals affirmed the district court's judgment that Defendant employer was entitled to a set-off of monies previously paid to the employee. *Id.* at 61, 438. Without the set-off the Plaintiff employee in *Washington* would have received payment for the same lost wages twice-from the Railroad Retirement Board and then from his employer. That is **not** the situation here.

The State of New Mexico through the Attorney General's Office was not awarded gross receipts tax damages; it was awarded a civil penalty of $5000 per violation under NMSA 1978, Section 57-12-11. [RP 2164, ¶ m] and [RP 2176, COL F]. Thus, the State of New Mexico did not receive a "double recovery" of

gross receipts taxes. Similarly, none of the Plaintiffs received reimbursement twice for gross receipts taxes. Defendant collected gross receipts tax on the settlement amounts, and allegedly paid those gross receipts taxes to the New Mexico Taxation and Revenue Department ("TRD") for taxes he owed at that time.

Unlike a sales tax, New Mexico's gross receipts tax is imposed on the *seller* of the goods or services. NMSA 1978, § 7-9-3.5(A)(1). Section 7-9-4 imposes an excise tax on the gross receipts of any person engaging in business in New Mexico. Defendant testified that he collected gross receipts taxes from his clients and paid the "proper people." [Tr Vol. 6: 195]. However, Defendant presented no documentation to substantiate the tax amounts, if any, that he paid to TRD. Regardless, Defendant's payments of gross receipts taxes to the State and damages /restitution awarded to individuals which includes amounts charged for gross receipts taxes is **not** a "double recovery" for the joined Plaintiffs, named individuals or the State.

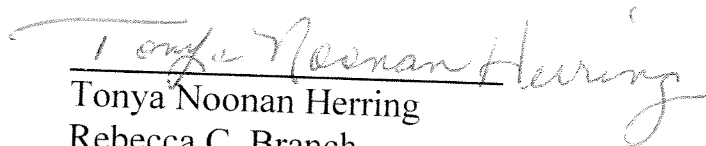
Since Defendant's clients are not liable for the gross receipts taxes, they would be unable to claim a refund from the State for payment of those tax amounts to Defendant, and would be left without a remedy. Pursuant to NMSA 1978, § 7-1-26(A), Defendant is the only person who may make a claim for refund of any gross receipts taxes paid, but not owed.

The record indicates and the Settlement Distribution Agreements support that Defendant collected gross receipts taxes on his attorney fees. [Ex. AG-3]. The district court properly ordered that the damages suffered by Plaintiffs included the gross receipts tax amounts charged by Defendant on the unlawful and voided contracts. [Tr. Vol. 7: 34]. There is nothing fundamentally unfair about requiring Defendant to make monetary restitution for the entire amount he illegally collected from his victims.

IX. CONCLUSION AND RELIEF REQUESTED

Defendant knowingly and willfully violated the Unfair Practices Act; the district court's award of treble damages for private remedies to the joined Plaintiffs, and restitution and civil penalties to the State of New Mexico, Attorney General was not excessive or arbitrary, and in accordance with the law. For the foregoing reasons, the Court should affirm the district court's judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed by first class U.S. Mail, postage prepaid, a true and correct copy of the foregoing Plaintiffs-Appellees Answer Brief on this 6th day of June 2013, to:

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