IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FRANK DART,

Plaintiff-Appellee

vs.

Ct. App No.34,675
Eleventh Judicial District
No. D-1116-CV-2012-216

CHIEF KYLE WESTFALL,
CITY OF FARMINGTON
POLICE DEPARTMENT, and
CITY OF FARMINGTON

Defendants-Appellants

BRIEF IN CHIEF

On Appeal from the Eleventh Judicial District Court, County of San Juan
The Honorable Louis E. DePauli Jr.

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A)(1)(c), Defendants-Appellants, Chief Kyle Westall, City of Farmington Police Department and City of Farmington, state that this Brief in Chief complies with the length limitations of Rule 12-213(F) NMRA. The brief uses a proportionately spaced font, has a typeface of 14 points, and contains 10,734 words. The word count is obtained using Microsoft Word 2010.

Alice T. Lorenz

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

Plaintiff Frank Dart filed this action against the City of Farmington and its Police Chief, Kyle Westall, pursuant to the Whistleblower Protection Act, NMSA 1978 § 10-16C-1 et seq. (2010) (the "WPA"), and Article II, Section 17 of the New Mexico Constitution and the Tort Claims Act. He also alleged claims for prima facie tort, and intentional infliction of emotional distress [RP 1-21].

Dart, a Farmington Police Department ("FPD") Detective, claimed that he had been retaliated against by FPD for whistleblowing concerning a case he called the "Messenger Case," for complaining that FPD was failing to devote sufficient resources and manpower to the investigation of crimes against children, and complaining that FPD was engaging in fraud and breaching its contract with the FBI respecting the joint Farmington-FBI Cyber Crime Task Force ("CCTF") [RP 2, 8-13, 17-18]. The claimed retaliation included Dart's removal from the CCTF [RP 18-19].

B. Course of Proceedings and Disposition Below

Dart's Complaint was filed February 23, 2012 [RP 1-21]. Chief Westall and Farmington (hereinafter sometimes jointly "Farmington"), moved for summary judgment on August 27, 2013 [RP 68-112]. In support of the motion, Farmington explained that in 2010 FPD entered into a Memorandum of Understanding

("MOU") with the FBI to participate in a task force that would address all types of computer based crime, including crimes against children [RP 71, ¶¶ 4-5]. Farmington was to assign members of FPD to participate in the CCTF, and provide data and statistics to the FBI, while the FBI would provide overtime pay, training and equipment [Id.]. Farmington would continue to pay the salaries of its CCTF members, who remained full-time FPD employees [RP 71-72].

Farmington established that Dart's claim that he could not be asked to handle CYFD reports[1] for FPD while assigned to the CCTF was not supported by the MOU or by FBI Agent Susan Ferensic, who ran the CCTF [RP 72-74]. Farmington's position was that Dart's claim that it had been illegal for his Sergeant to assign CYFD reports to him, and that FPD was in breach of the MOU and was committing fraud, were not communications made with a good faith belief that the actions were unlawful or improper [RP 71-77].

Farmington maintained that Dart's complaints about FPD's allocation of finite resources was not the kind of complaint the WPA was designed to address, his disobedience of a direct order, based on his misunderstanding of the MOU, was

[1] CYFD reported to FPD on cases where CYFD had opened investigations. *See* NMSA 1978 § 32A-4-3(C), which requires the recipient of an initial report of child abuse to take "immediate steps to ensure prompt investigation…" and NMSA 1978 § 32A-4-3(B), which requires CYFD and law enforcement agencies to transmit to each other the facts of an initial report of abuse and the name, address and phone number of the reporter within 48 hours.

the reason for the verbal reprimand, and that Dart's statement that he could not do both his job as an FPD Detective and participate in the CCTF was the legitimate reason for removing him from the CCTF [RP 72-77, 100, 164-65]. Farmington supported its position with affidavits from Chief Westall and Dart's supervisor, Sergeant Perez, Dart's March 10 and March 15 memoranda to Perez, Perez's March 10 memorandum to Lt. Hardy and March 15 memorandum to Dart [RP 85-90, 98-112 (tendered as Trial Exhibits L and O)]. Lastly, Farmington maintained that Dart's remaining claims failed as a matter of law [RP 82-83].

In Response Dart relied on claims that Farmington had: (1) failed to meet its obligations under the MOU, stating that he had reported "that the department was misusing federal funds," and that FPD was committing "fraud;" (2) that "his superiors retaliated against him after he complained that a sex abuse case (the Messenger case) was mishandled, and (3) that he had been complaining that "for years the department 'has not provided adequate resources to investigate crimes against children,' which endangered the community at large" [RP 115-118, 128].

Dart's affidavit backtracked from his allegation that he had been involuntarily transferred, acknowledging that, after deciding that he could no longer be effective in investigating child abuse cases, Dart requested the transfer to Patrol [RP 128, 146-47, ¶¶ 24-25]. Dart attached Perez's March 10 memorandum to his affidavit [RP 151].

Dart voluntarily dismissed his claims of prima facie tort and intentional infliction of emotional distress [RP 201].

In Reply Farmington explained, *inter alia*, that the WPA definition of good faith was that "a reasonable basis exists in fact as evidenced by the facts available to the public employee," NMSA 1978 § 10-16C-2(A) (2010). It argued that this objective standard was not met by complaints from a police officer who "should be capable of identifying what conduct reasonably constitutes an illegal or unlawful activity, in contrast to what are simply policy matters based on allocation of limited resources and departmental decisionmaking" (sic) [RP 161]. Farmington maintained that Dart's affidavit demonstrated that Dart had a "personal grievance as opposed to a matter of public concern" [RP 163].

By Order entered March 6, 2013 [RP 214-19] the district court ruled that Dart's complaints about the Messenger case were not protected under the WPA, that his claims of fraud and breach of contract could not have been made in good faith, as defined by § 10-16C-2(A), and that, as a matter of law, Perez's order was not unlawful or improper . Therefore, "Plaintiff's refusal to obey that order was not protected pursuant to § 10-16C-3(C)" [RP 215].

The court found that there were disputed issues of material fact respecting Dart's claim that he had reported that FPD was violating NMSA 1978 § 32A-4-3, and whether those communications were protected pursuant to Section 10-16C-

3(A) of the WPA [RP 215]. It expressly based its finding on Dart's March 10, 2011 memorandum [RP 218].

Finally, the court determined that the WPA provided the only basis for relief, in that "no cognizable cause of action exists based upon a violation of Article 2 Section 17 of the New Mexico Constitution or the First Amendment of the United States Constitution" [RP 215]. It stated that Dart's claim "should be allowed to proceed" only on the question whether he communicated to FPD "a failure by it to obey § 32A-4-3 NMSA 1978" [RP 219].

On April 5, 2013, Farmington moved to reconsider the denial of summary judgment on the one remaining claim [RP 220-232]. Farmington pointed out, *inter alia*, that nowhere in his March 10 memorandum had Dart mentioned Section 32A-4-3 [RP 225]. Farmington maintained that the language of the statute foreclosed Dart's claim that a failure to comply with either subsection B or C constituted a misdemeanor [RP 225-26]. And Farmington explained that Plaintiff's memo "was not written to complain of corrupt behavior." Instead Dart's contention was that if the FPD "had more manpower and resources, it would not have to ask him, a CCTF member, to undertake CYFD investigations" [RP 226]. Farmington maintained that this disagreement with FPD management's allocation of resources did not qualify as a report of illegality or unlawfulness [RP 228].

Dart's Response reaffirmed that he was claiming that FPD had violated a criminal statute by failing to investigate CYFD reports, argued that his internal memoranda made it "obvious" that he was alleging that FPD was failing "to uphold NMRA §§32A-4-3(B) and 32A-4-3(C)," and argued that there were genuine issues of fact concerning his communications about CYFD reports [RP 235-38]. Dart's Response relied, *inter alia*, on Perez's March 15 memorandum [RP 240-41].

Farmington's motion to reconsider was denied September 10, 2013, the court concluding that the March 10 memorandum "by legitimate inference" stated Dart's belief that FPD was "in violation of section 32A-4-3 NMSA 1978" [RP 261]. The court confirmed that, to have a WPA claim, the employee "must have a reasonable belief that the employer's conduct was unlawful" [RP 262].

In Dart's First Amended Exhibit List, filed July 29, 2014, he included, *inter alia*, Perez's memos of March 10 and March 15 [RP 478]. In Farmington's First Amended Trial Exhibit List, filed August 1, 2014 they also included, *inter alia*, both Perez memoranda. Farmington listed them again in the Pretrial Order, entered August 4, 2014 [RP 640]. Prior to trial Dart expressed no objection to these records.

Trial began on August 5, 2014, and lasted four days. Perez's March 10 and March 15 memoranda, Exhibits L and O, were excluded. The jury returned a special verdict in which it found that Dart had:

> engaged in protected activity by communicating to his superiors his belief that Defendants were violating state law by failing its duty required by state law." (sic)

[RP 849]. The jury also found that Dart acted in good faith, was retaliated against, that his protected activity was a cause of the retaliation, that he suffered economic harm in the amount of $4,000, and emotional pain and suffering in the amount of $200,000 [RP 849-50].

Final Judgment was entered October 20, 2014 [RP 865-66]. Farmington's Post Trial Motion for Judgment as a Matter of Law and Motion for Remittitur, or in the Alternative, a New Trial, were denied by orders entered on March 25, 2015 [RP 984 and 985-86].

C. Summary of Facts

Dart began working as an FPD officer in 1995 and became a detective in 2001[Tr.III:11-12]. When the detective primarily responsible for handling crimes against children was retiring, Dart volunteered for that assignment. That work included investigating reports CYFD sent to FPD [Tr.II:12-13,185].

Dart maintained that it was a misdemeanor offense not to immediately investigate CYFD reports [Tr.II:16-17]. He claimed that FPD, throughout his

career, had been unable to meet that requirement and that he had repeatedly tried to bring the need for more personnel and resources to the attention of his department. He said that in 2002 he spoke with his supervisor, Ken Walker, about his inability to get all reports investigated and that Walker told him he just had to keep doing the best he could. Dart said he continued to investigate to the best of his ability [TrII:18-19].

Dart said he was responsible for CYFD investigations from 2001 until 2004 or 2005 [Tr.II:13, 16]. While on occasion other detectives would assist, Dart believed his requests for more manpower and resources were not timely fulfilled [Tr.II:200-01, 217-18]. Dart said he had to triage cases and focus on those that presented the most danger to a child [Tr.II:16, 40]. In 2004 Detective Jimmy Dearing was assigned as a second detective for child abuse cases and handled quite a few cases [Tr.II:38-39, 186, 200].

In 2006 Dart became the first person in FPD to investigate and prosecute internet child predators. In 2007 Dart told then Lieutenant Westall that he had many cases he could not get to and needed help and resources. Westall responded that he could get Dart more equipment but could not get more people at that time, because FPD did not have anyone who could be assigned [Tr.II:38, 98-99, 220-222]. Dart admitted that he did not mention any statutory obligation to Westall [Tr.II:222-23].

Chief Westall recalled that, when he had been the Lieutenant in charge of Detectives, he had unsuccessfully asked Chief Burridge for more detectives and that, when he was Chief, the country was in the midst of a recession, leaving FPD unable to hire and instead cutting positions through attrition [Tr.III:147-49, 209-10].

Dart testified that he asked Perez for help and about having other units take on cases and that Perez' response was that other units did not work for the Detectives Division, and could not be called in to help [Tr.II:55-56, 99-100]. Chief Westall recalled that Perez asked him for more detectives [Tr.III: 209].

While Dart did not receive the extra personnel or resources he wanted, he acknowledged that other detectives, specifically Philip Mondragon and Matt Veith, occasionally assisted, taking one or two cases at a time [Tr.II:55].

In 2008 Dearing was assigned to conduct computer forensics, and so investigated fewer child abuse cases [Tr.II:39]. Detective Heather Chavez, began in 2009 to handle child abuse cases and, as Dart trained her, began taking on more of them [Tr.III:230-33; and see Tr.II:233].

Dart admitted that he could request assistance when he needed it and that he was never criticized for his handling of CYFD cases. He also admitted that he knew of no instance where another law enforcement agency, including CYFD, had

requested FPD's assistance in a child abuse investigation, and failed to receive that assistance [Tr.II:200-01, 214].

Nicole Garcia, the CYFD San Juan County Office Manager, and a member of the San Juan County multidisciplinary team on which Dart also served, testified that FPD was one of the most responsive of the agencies that were involved in addressing issues of child abuse [Tr.III:216-19]. Both Chief Westall and Garcia confirmed that reports that FPD received from CYFD were reports on cases on which CYFD had already initiated investigations [Tr.III:157, 188-89, 211-12, 219-20]. Garcia also confirmed that all agencies responsible for addressing child abuse felt ongoing needs for additional manpower and resources [Tr.III:218]. She testified that lack of resources is a common theme [Id.].

Dart did not dispute that other agencies dealing with child abuse felt an ongoing need for more resources and manpower [Tr.II:215-17]. Although Dart disagreed with the allocation of manpower within FPD between the various units (such as gang, narcotics and burglary units), he acknowledged that budgets and allocation of manpower were matters for management and involved decisions that management had to make [Tr.II:222].

Dart carried a heavy caseload throughout his time at FPD. He believed that he averaged about $12,000 a year in overtime [Tr.II:35, 40-41, 46]. FPD was aware that Dart carried a heavy load. Despite this caseload, an investigation into a

child pornography ring being run from the Farmington area triggered Dart's interest and led to his specialized training in the area of internet child predators [Tr.II:19-22]. Dart eventually developed a program for cyber investigations of child predators [Tr.II: 46-48, 148]. Once Dart developed an expertise in the field of internet child exploitation and enticement he began to train other officers at the Farmington Police Academy and Farmington Citizens Academy [Tr.II:48, 148]. Dart found this work particularly satisfying because it allowed law enforcement to be proactive and sometimes intervene before a child was hurt [Tr.II:44-45].

Dart did not claim that, before his dispute with his chain of command about his duties while participating in the CCTF, he had ever been retaliated against as a result of requests for additional personnel or resources. In fact, it was undisputed that he received consistently strong evaluations from all of his supervisors, including Perez [Ex. 1F; Tr. Tr.II:23-24, 33-34]. Dart admitted that he had not told any of his supervisors that he believed that they were breaking the law, and that he had not drawn Section 32A-4-3 to their attention or claimed they were in violation of it [Tr.II:190, 222-23].

In the spring of 2010, FBI Agent Bill Hall, who was aware that Dart had established an undercover cybercrimes program at FPD, advised Dart and Dearing that the FBI wanted to pursue a Cyber Task Force in the Farmington area [Tr.II:58]. Following discussions with former FPD Chief Jim Runnels, in June

2010 FPD entered into the CCTF MOU with the FBI [Tr.II:60]. That MOU anticipated that participating officers would earn overtime of up to $17,000 from their work with the CCTF [Tr.II:59].

Dart acknowledged expecting to earn up to $17,000 in overtime, and commented that the CCTF assignment would permit him to be paid for afterhours work catching internet predators [Tr.II:59, 71]. That was important because those hours were the times predators were most likely to be on-line. Dart said he had not been paid for afterhours work involving internet predators before this [Tr.II:63-64]. Somewhat inconsistently, Dart claimed that he believed that, because his role in the CCTF would require him to devote 30 hours to the CCTF, he would be left with only 10 hours within which to fulfill FPD duties.

CCTF investigations were not limited to crimes against children. Instead its mission included all crimes involving misuse of technologies [Tr.II:226-28]. The MOU provided that CCTF's mission was:

> ...to investigate, and to prevent, when possible, criminal cases and national security threats when: (1) Computers and high technologies are the target of a crime; (2) computers and high technologies are the principal instrumentality of a crime, or (3) Computers and high technologies are misused to facilitate violations of other criminal laws or threats to the national security and a specialized understanding of technology is required for investigation or prosecution.

[Ex. 2]. The MOU stated that "As a general matter, all personnel shall work in a full-time capacity at the CCTF (and at a minimum not less than 3 days a week)...."

Id. Dart understood that FPD would continue paying his salary and overtime, and would pay for CCTF overtime, and could then seek reimbursement from the FBI for that overtime. Id.

On or about March 8, 2011, Perez assigned Dart review of CYFD reports [Tr.II:72, 94]. Dart responded that he should no longer have to investigate CYFD reports; a view with which Perez disagreed [Tr.II:234; III:24-25]. Dart then refused the assignment, claiming it was an "unlawful order," and wrote his March 10 memorandum (the document the court relied upon in denying summary judgment) [Tr.II:94-95, 235].

While Dart's memorandum suggested that there was "potential negligence" in FPD's budgeting or allocation of resources, at no point did Dart use the terms "illegal," "unlawful," or "improper." At no point did Dart refer to Section 32A-4-3, or any other statute. [Ex. 8]. Dart testified that he believed FPD would only hear his complaint that "they were being negligent in not following our obligations under the law" if it was in writing [Tr.II:101].

Dart' memorandum acknowledged that he had been given a direct order "to review several CYFD reports and to open appropriate police reports/investigations on the said CYFD referrals" [Ex. 8]. After reiterating that he had articulated his "understanding of" his "current position (assignment to the Task Force)" as not including the investigation of CYFD reports, he acknowledged being told that the

FBI did not support his understanding and that he was to follow Perez's orders [Id.].Dart also indicated his understanding that he was being asked only to handle cases involving children under 5 years of age, while Detectives Chavez and Solomon would handle the remaining CYFD referrals [Id.].

Dart then said:

> I have been in the detective division for ten years. For eight of those years, I have tried my best to help you, other supervisors, and administrators (some of who are now in staff positions) to understand the magnitude of child abuse investigations, including the exploitation of children via the internet. I have also tried to help many of you understand the magnitude and volume of CYFD reports involving child abuse and neglect our agency receives.
>
> Furthermore, I have tried to help each of you to understand the department's potential negligence in failing to assign the appropriate number of resources to address this issue. By now, you must have realized we may receive as many as 20 to 30 reports a week of child abuse and/or neglect through CYFD reports. Your inability to obtain additional resources to address this problem, as well as, the department's failure to provide the necessary resources brings us to our current dilemma.
>
> For many years, I have tried to address these concerns by myself at the same time attempting to maintain a highly technical case load and countless patrol initiated reports. As you know, The Farmington Police Department recently entered into an agreement with the Federal government involving the establishment of a FBI Cyber Taskforce. This agreement was in the form of a written contract, indicating the agreement required anyone assigned to the taskforce would work a minimum of three days a week on cyber related crime.
>
> I also made it quite clear to you and the other supervisors in our division I would not choose to participate in the cyber taskforce and still attempt to work the other types of cases (including CYFD cases). Your discussion with me about this matter implies we simply do not have the resources to address the many needs we are facing. This does not seem to be

the case when we look at staffing for the gang unit, the community policing unit, or the Marshall's warrant unit.

I recognize the dilemma with having all of the reports to assign, when this department has chosen to take away from our secretarial staff and has failed to assign personnel to vacated detective positions from our division for a long period of time, but that is not my fault, nor my responsibility. It is not as though you or they have not known about these problems. Now, to your orders to me about the CYFD reports.

I believe we have a written contract with the Federal government, which conflicts with your orders. I do not mean to be argumentative or disrespectful, but I believe your order to be an unlawful order as it conflicts with this agreement and I do not intend to follow it....

I am deeply saddened by our state of affairs on this issue. I have done nothing in my over 15 year career here except to come to work every day and try to save the lives of children in our community. I have asked for your help and this department's help in protecting children several times over the years. Here we are, nearing the end of my career and we still will not give priority to children in our community! Still we assign greater priority to gang investigation and community meetings! Shame on us! Shame on me for not helping you and your peers to see the light!

***

[Id.]. Dart advised that he was sending the memorandum to those he understood to be in his chain of command, so as to "make sure we are complying with a written contract..." and opining that if FPD did not intend to honor the MOU they would need to notify the Federal government and seek to terminate it [Id.].

Dart's claim at trial was that a failure by FPD to investigate CYFD reports was a misdemeanor offense [Tr.II:16-17]. He also said that, when he refused to investigate CYFD reports, he communicated concerns to Perez that those cases were already three to four weeks old and that assigning them to him at that point

was not in compliance with the FPD's duty to immediately investigate [Tr.II:100; III:24-25]. He admitted not telling anyone in his chain of command that he thought they were breaking the law, saying he believed it would have been "redundant" to do so [Tr.II:203; Tr.III:8, 10].

During trial the district court reiterated its ruling that Perez's order to investigate the CYFD reports was not an unlawful order, that Dart could not have believed in good faith that it was an unlawful order, and could not have believed in good faith that FPD was committing fraud [Tr.II:238, 250-52, 255-57].

On March 15, 2011, after being counseled about refusing a direct order, Dart wrote a second memorandum, in which he again represented that he could not participate in the CCTF and continue to fulfill his FPD duties [Ex. N]. Perez advised Dart that it was based upon Dart's representations that Dart could not fulfill both his CCTF responsibilities and his FPD duty to investigate CYFD referrals that the FPD decided to take Dart off the CCTF [Tr.II:266; Ex. O (admission refused)].

Dart was extremely upset about this decision [Tr.II:104-05]. Dart believed he was removed because of his memos [Tr.II:268]. He considered being relieved of his CCTF duties and the loss of benefits, including a vehicle, a Blackberry, and additional training and equipment, which had come with the CCTF assignment, to be punishment for his March 10 memorandum [Tr.II:109]. Dart also believed he

was assigned a substandard vehicle, prohibited from driving his own vehicle, and told to surrender a key to the computer forensic lab as "punishment." These actions, which he viewed as retaliatory, caused him concern about getting fired before he could retire [Tr.II:109-118, 121].

Dart remained a detective, at the same rate of pay, after he requested reassignment to Patrol [Tr.II:270]. But Dart testified that he had been concerned about his 2011 evaluation because the Department took a long time completing it and he believed the overall situation made him less able to do his work effectively [Tr.II:122-23, 125].

Throughout his career Dart had been commended for his dedication to the identification, apprehension and prosecution of child predators and for his understanding and interpretation of the law [Tr.II:23-24, 33-34]. But Dart was wrong about NMSA 1978 § 32A-4-3. One need only read the statute to realize that Dart's claim that the statute made a law enforcement agency's failure to immediately investigate (a matter addressed in Section B), a misdemeanor, when the statute only makes it a misdemeanor to violate Section A (which requires law enforcement officers to report reasonable suspicions to a local law enforcement agency or CYFD or a tribal law enforcement or social services agency) is erroneous [Tr.II:16-17, III:153-60, 161].

The evaluation that followed Dart's refusal of Perez's order, and rated Dart's performance from April 2010 to April 2011, gave Dart high marks in virtually every category [Plaintiff's Exhibit 1G]. It acknowledged, *inter alia*, his expertise in the field of crimes against children, his "intense work ethic," the excellence of his reports, his high caseload, proficiency in using available resources, "high motivation," and knowledge of the criminal laws [Id.].

The evaluation also stated that while Dart "usually accepts direction and instruction from superiors," he had "openly refused a directive from his supervisor." It added that "[b]ecause he failed to understand his responsibilities to an FPD/FBI taskforce, the program was temporarily suspended and overtime funding/vehicles lost to another taskforce member [Id.]." In the *Supervisor Comments*, Perez stated:

> Frank recently decided to leave the Detective Bureau, but prior to his departure, his vast knowledge of the investigative process was a great asset to the Detective Division. Frank is not only highly motivated when it comes to the pursuit of child predators but he is a great investigator overall. Frank is a visionary and he has grand ideas for the future of the Division as it relates to the investigation of Internet Crimes Against Children…Recently Frank was involved with a Cyber Crimes Taskforce (FPD/FBI) that encompassed a time sharing format so that he and another detective could continue to work FPD cases and FBI cases as assigned, in exchange for federal vehicles and overtime reimbursement. This arrangement was misunderstood by Frank and explanation did not seem to clarify the matter for him. Upon his refusal to follow supervisory directives, he received Verbal Counseling for his actions (031011) and was later removed from the Taskforce. Following this, Frank quit driving his assigned unit as directed in policy to and from work and resumed only when directed. He also removed himself from a scheduled training in San Jose, CA, without authorization,

> leaving no time to fill the slot with another qualified detective. I have worked with and supervised Frank for several years now and his actions at the end of this evaluation period were greatly uncharacteristic of him. Although reflected in this evaluation, without question, Frank's great accomplishments during his investigative career and over the past evaluation year, greatly overshadow any issues that resulted from his actions while briefly attached to the FPD/FBI Taskforce. Frank is an asset to the Farmington Police Department and even though his return to the Patrol Division will undoubtedly benefit them, he will be missed in the Detective Bureau [Id.].

In the *Officer Comments* portion of the report Dart responded that he believed the Perez's order conflicted with the MOU, leaving him with a moral, ethical and legal requirement to contest it. He also said that he did later investigate the CYFD reports, and that "state law requires that they be investigated, not just 'reviewed'. [sic] Members of the detective division are keenly aware we are not handling CYFD reports in a manner consistent with state law [Id.]."

In his *Officer Comments* Dart continued to maintain that his supervisors misunderstood the requirements of the MOU, that their orders violated it, that he had the right to call into question any order he felt was unethical, immoral, or illegal, and that he had been "punished" for exercising that right. He did not cite NMSA 1978 § 32A-4-3 [Id.].

There was no evidence that Perez or Westall understood that, along with his express, albeit erroneous, allegations of fraud, breach of contract and "unlawful" orders, Dart had included an implicit claim of a violation of Section 32A-4-3. All

the evidence was to the contrary [Tr.III:88, 97-100, 102-05, 125-26, 133-34, 153-60, 163-69, 176, 187-88, 199-210, 205, 209-10].

Dart he feared the division was looking for reasons to fire him so he requested reassignment to Patrol [Tr.II:135]. Although neither Perez nor Westall wanted him to transfer, Dart began working in Patrol in May 2011 [Id.]. While he initially took some cases with him, some four or five weeks after he had gone to Patrol those cases were assigned to other detectives [Tr.II:145-48;III:112-15]. Dart was upset about this [Tr.II:147]. Dart's overall pay decreased following his move to Patrol, largely due to decreased overtime [Tr.II:178-79].

Due to feelings of anger, rage and depression from his work situation, Dart saw a counselor for about three months in 2011[Tr.II:130-31, 285-90; III:18, 26]. At that point he and his counselor agreed that he did not need further sessions [Tr.II:290]. He did not seek counseling thereafter [Id.]. He was never put on any medication [Id.]. He testified that he had everything under control at the point where he stopped the counseling sessions [Id.]. Dart retired with full benefits at the end of 2013, at age 46. Dart now owns a private investigations business, Fidelis Investigations [Tr.II:10, 176, 182].

D. Exclusion of Exhibits and Dart's Counsel's Comment

During Defendants' cross examination of Dart, his counsel objected to a line of questioning that included Exhibit O, Perez's March 15 memo to Dart in which

he relieved Dart of his CCTF responsibilities [Tr.II:239-48]. The objection took Farmington by surprise because Dart had previously relied on both this exhibit and Exhibit L (Perez's memo to Hardy of 3/10/11) and Dart had not objected to them when he filed his objections to the Defendants' exhibit list [Tr.II:254; RP 367-68]. Exhibit O was offered as a business record pursuant to Rule 11-803(6) NMRA [Tr.II:246]. The bases for the objection were hearsay and relevance [Tr.II:239, 240, 242, 246, 248]. Although Farmington explained it was a business record that was fundamental to its defense, the court concluded that it was hearsay and could only be authenticated by Perez [Tr.II:246, 248, 249-50].[2]

Lieutenant Hardy later testified that Exhibit L was prepared as part of FPD's regular practice, in the ordinary course of its business [Tr.III:92-93]. Dart objected to Exhibit L, Perez's report to Hardy of Perez's discussion with Dart about his failure to follow a direct order--a conversation that no one disputed had occurred [*see* Tr.II:239, wherein Dart stipulates that he did not follow a direct order]. In response to Dart's objection to Exhibit L as "hearsay," and the court's question "Are you going to have Perez testify?" FPD's counsel again explained that the document was being offered as a business record [Tr.III:93-95].

During the discussion at the bench, Dart insisted that the records could only be authenticated by Perez. Dart's counsel then commented, in the hearing of the

[2] Dart included his own memorandum of March 15 in his objection [Tr.II:239-61]. It was admitted as Exhibit N.

jury, that the Defendants were "trying to get around having to call Perez because he sued the Department" [Tr.III:95]. When defense counsel stated "I think the jury heard that" and added that she was upset about Dart's counsel's conduct, the judge cut her off, asked her to step back, and proceeded to rule [Tr.III:95-96].

The court's ruling was that, while the records may have been generated in the ordinary course of business, he did not believe that the business record exception applied, because the documents' content was not data or statistics, but instead contained data from Perez, which was "unique to him" [Tr.III:95-96]. He then ruled that Exhibit L could not come in through Lieutenant Hardy [Id.]. At no point had Dart argued that the memoranda were "untrustworthy" as defined in Rule 11-803(6) NMRA, or articulated a basis for exclusion, other than that the memoranda were hearsay that could only be authenticated by Perez [see Tr.III:93-96].

During her subsequent cross exam of Hardy, Dart's counsel inquired in detail about a complaint Perez had filed years before the issues with Dart arose [Tr.III:123030]. Hardy testified that he had not agreed with Perez with respect to that complaint, but that it had not caused him to have reason to doubt Perez's reliability, and that he knew of nothing else that would cause him to doubt Perez's credibility [Tr.III:123-25].

After lunch, Defense counsel raised Dart's counsel's announcement of Perez's lawsuit with the court. When the judge asked "how does that impact the case?," she explained that jury speculation about either the reason Perez was not a witness or about Perez's lawsuit was not "evidence" that the jury should consider [Tr.III:176-82]. When, as part of her response Ms. Kennedy argued that she could expressly raise Perez's lawsuit in her cross exam of Chief Westall, the judge responded "It ain't coming in" [Tr.III:180-81].

When the judge stated that he had not heard the comment, but that he was hard of hearing, one or more individuals sitting at counsel table for Defendants and others in the courtroom volunteered that they had heard Ms. Kennedy's comment [Tr.III:182]. But Ms. Kennedy's assistant said she had not [Id.]. FPD's counsel told the judge that she wanted to discuss the matter with her clients and consider whether there was any cure [Tr.III:181]. But the judge decided just "to leave it alone." He instructed Ms. Kennedy to stay away from the reason Perez was not being called [Tr.III:182-83].

Ms. Kennedy's cross exam of Chief Westall followed this admonishment. She questioned the Chief about his disagreements with Perez until FPD's objection was sustained, briefly moved to a different line of questioning, and then asked "And then in 2013 was Sergeant Perez fired from the police department?"

[Tr.III:208]. The court again sustained an objection, noting that the matter was "irrelevant" [Id.].

After the trial, Ms. Parmley, defense counsel's paralegal, was advised by one of the jurors that some of them, having heard Kennedy's remark that Perez was suing the City, had discussed it during the breaks. Parmley advised the court of the content of her conversation with the juror in an affidavit filed with the Motion for Remittitur Or, in the Alternative, New Trial [RP 894-95].

II. POINTS AND AUTHORITIES

A. Summary of Argument

What is protected by the WPA is the communication of a matter of public interest. *Wills v. Board of Regents of University of New Mexico*, 2015-NMCA-105, ¶ 19, 357 P.3d 453. Here, while the district court thought it could be inferred from Dart's March 10 memo that he was claiming a violation of NMSA 1978 § 32A-4-3, there was no evidence that anyone in Dart's chain of command actually drew that inference. Particularly given that Dart's implied reference to 32A-4-3 was buried in a memo that made express, albeit erroneous, complaints of fraud, breach of contract, mishandling of the Messenger case and an "unlawful order," there was nothing to support the notion that anyone in Dart's chain of command would have drawn the inference upon which Dart's claim depends. The fact that one would have to misread the statute in the same way Dart did to glean any such meaning,

and that there was no evidence that anyone other than Dart misread the statute, negates any such conclusion.

Dart's attempt to meet his burden of proof by piling an unsupported inference that the FPD had understood his memo as referencing Section 32A-4-3 atop the initial inference that his memo addressed this statute, could not serve to meet his burden of proof. On the other hand, the inferences Farmington could have raised if it had been permitted to demonstrate, through contemporaneously prepared business records, included the inference that no report of any WPA protected statement was communicated to Dart's chain of command. This was critical to Farmington's defense.

Precluding Farmington from introducing Exhibits L and O, which established that the report up the chain was solely of Dart's refusal to obey a direct order, and that it was Dart's own repeated representations that he could not do both jobs that led to his being relieved of one of them, prevented Farmington from putting on its full defense. Although Farmington was easily able to establish that the statute had **not** been violated, in the absence of Exhibits L and O, Farmington was hamstrung in its effort to establish that Defendants had been unaware that Dart, based upon his unique misreading of the statute, was attempting to accuse Farmington of illegal or unlawful activity.

Dart's objection was a legally incorrect claim that the memoranda were hearsay. The district court's ruling was based upon a different objection that it crafted *sua sponte* and its mistaken interpretation and application of Rule 11-803(6). Thus, its exclusion of the memoranda was both an error of law and an abuse of discretion.

Finally, there are vast discrepancies between the amount of Dart's economic loss ($4000), his evidence of a brief period of distress, resolved through counseling, and the jury's award of $200,000 for emotional distress. The inference that Farmington wanted to conceal Perez's testimony, arising from Dart's counsel's remarks, provides the most likely explanation for the jury's having made what is almost certainly a punitive award.

B. The Court Erred by Concluding That Dart's Memorandum Qualified as Protected Activity Under the WPA When There Was No Evidence That Farmington Understood That Dart Was Implying Illegality and, as a Matter of Law, The Implied Claim Could Not Have Been Made in Good Faith.

1. The WPA requires actual, good faith, communication of a matter of public concern.

The WPA, enacted in 2010, and modeled after the federal Whistleblower's Act, provides that a public employer shall not take any retaliatory action against a public employee because the public employee:

> A. communicates to the public employer or a third party information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act;...

Wills, 2015-NMCA-105, ¶ 19 (explaining that the WPA was modeled after "its federal counterpart").

The WPA defines an "unlawful or improper act" as a practice, procedure, action or failure to act on the part of a public employer that: "(1) violates a federal law…a state law…or a law of any political subdivision of the state…." It also contains an objective definition of "good faith." It defines "good faith" as "*a reasonable basis exists in fact* as evidenced by the facts available to the public employee" (emphasis added). NMSA 1978 § 10-16C-2(A).

The WPA is intended to protect an employee who risks his job security by exposing matters of public concern. *Wills*, 2015-NMCA-105, ¶ 17. As explained in *Wills*, it is not intended to include "communications regarding personal grievances that primarily benefit the individual employee." *Id.* (*citing Whitmore v. Dep't of Labor,* 680 F.3d 1353, 1368 (Fed.Cir.2012)); *accord Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶¶ 15, 18, 917 P.2d 1382 (under common law whistleblowers must show that their actions furthered a public interest rather than a private one).

Looking to federal law, the Court in *Wills* confirmed that a communication had to relate to a matter of public concern to qualify under the WPA. In so doing it cited to and quoted with approval *Winfield v. Department of Veterans Affairs,* 348 Fed.Appx. 577, 580 (Fed.Cir.2009) (per curiam) ("Whistleblower protection does

not extend to an employee's personal grievances about his job."); *Riley v. Dep't of Homeland Sec.,* 315 Fed.Appx. 267, 270 (Fed.Cir.2009) (stating that "personal disagreements with legitimate managerial decisions" do not demonstrate abuse of authority or "any other kind of activity that could be considered a whistleblowing disclosure"); *Willis v. Dep't of Agriculture,* 141 F.3d 1139, 1143 (Fed.Cir.1998) (stating that the federal whistleblower protection laws are "designed to protect employees who risk their own personal job security for the benefit of the public"); and *Montgomery v. E. Corr. Inst.,* 377 Md. 615, 835 A.2d 169, 180 (2003) (discussing the legislative intent of the federal whistleblower protection laws and stating that the term "whistleblowing," which generally evokes the type of public disclosure that "serve[s] the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary government expenditures[,]" does not include an individual's communications regarding a supervisor's maltreatment of him personally (emphasis, internal quotation marks, and citation omitted)).

What Farmington understood from Dart's March 10 memorandum was that Dart had a personal grievance or disagreement with a management decision. Thus, his communication does not qualify as one protected under the WPA.

2. Dart failed to give fair notice that he was asserting a protected right.

The district court erred in considering Dart's implied accusation as sufficient to constitute a protected statement. As the Court explained in *Kasten v. Saint-*

Gobain Performance Plastics Corp., 563 U.S. 1, 131 S.Ct. 1325, 1334-35 (2011), (addressing the FLSA), to constitute protected whistleblowing activity there must be "some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged." An employer must have actual knowledge that an employee is making a complaint that could subject the employer to a later claim of retaliation. *Id.* And the complaint should be "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context," as an assertion of protected rights." *Id.*

A complaint gives fair notice when "a reasonable, objective person would have understood the employee to have put the employer on notice that [the] employee is asserting statutory rights...." *Id.* A court may determine as a matter of law if conduct constitutes a report within the meaning of a whistleblower statute. *Ellison-Harpole v. Special School District No. 1*, 2008 WL 933537, *3 (Minn.App. 2008), *rev. denied* (May 28, 2008).

A failure to require proof that the attempted communication provided actual and fair notice that the employee was asserting a statutorily protected right is incompatible with the statute's purpose. It leaves governmental employers in the impossible position of having to prove a negative--that they didn't understand an implication or draw a possible inference. Vulnerability to WPA claims by employees who had not, in fact, alerted their employers that they were asserting

protected rights serves no legitimate purpose. Rights afforded under anti-retaliatory legislation "should be viewed as a shield against employer retaliation, not a sword with which an employee may threaten supervisors." *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998).

The implication of an accusation that the court determined that could be inferred from Dart's memo is a far cry from the "sufficiently clear and detailed" statement that "a reasonable employer" would understand "in light of both content and context," as a protected complaint. *Kasten,* 131 S.Ct. at 1334-35. As noted *supra*, Dart presented no evidence that anyone in his chain of command actually drew the inference that the district court considered possible. One would have to have misread Section 32A-4-3 in the same way Dart did to have drawn that inference. There was no evidence that anyone else misread the statute.

The district court allowed Dart to slide past his burden of proof with a possible inference (piled on yet another inference, as opposed to actual evidence), when he, as a police officer, was perfectly capable of having cited the statute and otherwise made himself clear. This was error.

The WPA is intended to address actual retaliation. Retaliation for a protected statement cannot occur absent knowledge that a protected statement has been uttered. An implied reference to an unnamed statute, which was buried in a mass of

other allegations and complaints that were found not to have been made in good faith, should have been held, as a matter of law, inadequate to meet Dart's burden.

3. Dart failed to show his grievance was actually communicated to his chain of command

Lack of evidence on a required element of a claim defeats that claim whether or not other elements are present. *Platt v. Martinez*, 1977-NMSC-026, ¶ 4, 563 P.2d 586; Rule 13-304 NMRA (party seeking a recovery has the burden of proving every essential element of the claim). The element of actual communication of a matter of public concern is essential to a WPA claim. *Wills*, 2015-NMCA-105, ¶ 15. As explained in *Wills*, "the WPA exclusively protects an employee's communications." *Id.* Thus, the language of the statute necessarily requires that, to prove a protected communication, a plaintiff must show that the employer understood that what was being communicated was a claim of illegality, unlawfulness, or other matter of public concern.

Here, the only claim Dart was permitted to take to the jury was a claim that Dart reported, by implication, his belief that FPD was committing misdemeanors by violating Section 32A-4-3, in his March 10 memo. Therefore, Dart had to prove that FPD understood that Dart's memorandum included a claim that FPD had violated Section 32A-4-3. But Chief Westall testified that his understanding was that Dart was claiming the FPD was defrauding the Federal government by having Dart do anything other than CCTF duties [Tr.III:163-67, 192, 199, 201].

No evidence was adduced that indicated anyone at FPD misinterpreted Section 32A-4-3 as Dart did. No reasonable inference of such an understanding could be drawn from the evidence Dart adduced. *Williamson v. Piggly Wiggly Shop Rite Foods, Inc.*, 1969-NMCA-088, ¶ 17, 458 P.2d 843 (reasonable inferences are rational and logical deductions from facts established by evidence). As no evidence supported an inference that anyone in Dart's chain of command would have understood that he was accusing them of behaving illegally or unlawfully, Dart failed to establish an essential element of his claim [*See* Tr.III:153-60, 161,189].

4. Dart failed to establish objective good faith

Dart could not meet the objective "good faith" standard of the WPA, NMSA 1978 §10-16C-2(A) (defining "good faith" as "a reasonable basis exists in fact as evidenced by the facts available to the public employee."), because the unambiguous language of Section 32A-4-3 contradicts Dart's claim that it was a misdemeanor for FPD to violate Section B. The statute makes a misdemeanor *only* the failure to comply with Section A. No reasonable person could have believed that a failure to comply with Section B had been made a misdemeanor. *See* Section 32A-4-3(F) ("*A person who violates Subsection A of this section* is guilty of a misdemeanor…" (emphasis added)).

Long established rules prohibit courts from reading language into statutes which is not there. *Faber v. King*, 2015-NMSC-015, ¶ 15, 348 P.3d 173. As a detective, Dart had significantly less excuse for his misreading of the statute than a layman would have had. As the court explained in *Wichita County v. Hart*, 989 S.W.2d 2, 6, 10-11 (Tex. App. 1999):

> The objective reasonableness of the employee's belief must be viewed in light of his training and experience. Consequently, those who are trained in law enforcement and investigation are held to a higher burden in establishing the reasonableness of their belief of criminal law violations.

Given their training and knowledge, the reasonableness of an officer's belief of a violation should be examined closely. A report by an officer cannot qualify as a protected activity if no reasonably prudent officer would believe he was reporting a violation of law. *Donlevy v. City of the Colony*, 8 S.W. 3d 754, 757 (Tex. App. 1999). The unambiguous limitation of misdemeanor offense to Section A left no room for Dart's after-the-fact claim that FPD's alleged failure to meet the requirements of Section B was a criminal violation. The absence of an objectively reasonable basis for the claim of unlawfulness removes Dart's communication from those that are protected under the WPA. NMSA 1978 §10-16C-2(A). Thus, the court erred in concluding that the implied accusation of a violation of Section 32A-4-3 could meet Dart's burden to prove good faith.

5. Because piling inferences upon inferences could not meet Dart's burden of proof at the summary judgment stage, the case should never have gone to trial

Because the court had to pile inferences upon inferences to reach a conclusion of retaliation, the initial inference that the March 10 memorandum referred to the statute was not sufficient to preclude summary judgment. *Tapia v. Panhandle Steel Erectors Company*, 1967-NMSC-108, ¶ 5, 428 P.2d 625 (permissible inferences must be reasonably based upon *facts established in evidence and not* upon mere conjecture or *other inferences*) (emphasis added); *Rekart v. Safeway Stores, Inc.*, 1970-NMCA-020, ¶ 6, 468 P.2d 892 (court cannot put inference upon inference).

Where a purely legal question is presented in a summary judgment motion, denial of that motion may be raised post-trial. *Chaara v. Lander*, 2002-NMCA-053, ¶¶ 9-15, 19-20, 25, 45 P.3d 895 (Where the only dispute on summary judgment is the legal significance of the facts, denial of the motion remains subject to review following the jury trial). Here the court assumed that, because one could draw the inference from the March 10 memorandum that Dart was complaining of a statutory violation, Dart had established a sufficient genuine issue of material fact. But Dart was required to have raised genuine issues on all of the essential elements of his claim, including actual communication of the allegedly protected statement to his chain of command, made in good faith, as defined by the WPA.

As the Court explained in *Wills*, it is the *communication* that is protected by the WPA, 2015-NMCA-105, ¶ 15. Therefore, a plaintiff must show that his message was actually communicated and that the complained-of actions were taken in retaliation for a protected communication that the defendant actually received. Absent a showing that his employer understood the implied claim of a violation of Section 32A-4-3 as such, there was no proof of the essential element of actual communication of a WPA protected complaint. *Id.*; *Platt v. Martinez*, 1977-NMSC-028, ¶ 4. Because the failure to present evidence on an essential element left the court with a legal issue on which Farmington was entitled to a favorable ruling, Farmington's motion for summary judgment and its motion for rehearing should have been granted. *Chaara*, 2002-NMCA-053, ¶¶ 9-15.

6. Dart's attempt to establish his claim at trial by piling inference upon inference should have been rejected.

It was undisputed that Dart never mentioned Section 32A-4-3. There was no evidence that FPD understood that Dart was accusing FPD of a misdemeanor. On the evidence that was presented at trial, the jury would have to have inferred that Dart was referring to Section 32A-4-3 in his memorandum, and then piled a second inference, unsupported by any evidence, on the first, by inferring that Defendants would have misunderstood the statute exactly as Dart did. Yet another inference--that based upon that misunderstanding FPD would have read the memo as an accusation of illegality--was then required. Finally, the jury would have had to

infer that Defendants retaliated against Dart based upon their having inferred a claim of a state law violation from Dart's memorandum.

This pile of inferences could not serve to meet Dart's burden of proof. *Rekart.*, 1970-NMCA-020, ¶ 6; *Tapia*, 1967-NMSC-108, ¶ 5 (evidence adequate to support a conclusion has been defined as evidence of substance which establishes *facts* from which inferences may be drawn (emphasis added)).

7. Farmington established legitimate reasons for its actions while Dart presented no evidence of any retaliatory motive.

There was no testimony that anyone in Dart's chain of command was or could have been harmed by Dart's (attempted) disclosure of a statutory violation, particularly given that no one else in FPD misread the statute, and his Chief possessed a correct understanding of it. Thus, no reason for FPD to have retaliated against Dart was established.

It was undisputed that, even after they explained to Dart, his error in concluding that FPD was in breach of its MOU or was defrauding the FBI by asking Dart to do his job, Dart disobeyed a direct order. It was also undisputed that Dart was not fired or demoted, and that the decision to take him off of the CCTF followed his repeated representations that he could not do his job and be part of the CCTF. [See Tr.II:230-31, 265-66; RP 13, ¶ 55, wherein Dart admits making it "clear" to his superiors that he could not do both CYFD investigations and FBI cyber investigations; Exhibits L, N].

Dart's speculation about the state of mind of his superiors was not competent evidence that could function as a foundation upon which an inference of retaliation could rest. His fear that he might be retaliated against in his performance review (which did not happen), or might be fired (which did not happen), did not support his claim of retaliation. All that Dart had at trial was his belief that anything and everything that he perceived as negative, and that happened after he refused Perez's order, was done in retaliation for his having accused FPD of committing misdemeanors. Even assuming *arguendo* that belief to have been objectively reasonable, that cannot suffice to establish a claim under the WPA. *Tapia*, 1967-NMSC-108, ¶ 5.

C. The Court Erred in Refusing Admission of Two Exhibits Critical to The Defense, Based on Its Own *Sua Sponte* Objection.

A court abuses its discretion when it misapprehends the law. *Tierra Realty Trust LLC v. Village of Ruidoso*, 2013-NMCA-030, ¶ 7, 296 P.3d 500; *Parkview Community. Ditch Ass'n v. Peper*, 2014-NMCA-049, ¶ 23, 323 P.3d 939 (district court decision based on misapprehension of law constituted abuse of discretion). The appellate courts review de novo a misapprehension of the law upon which a lower court bases an otherwise discretionary decision. *State v. Duran*, 2015-NMCA-015, ¶ 11, 343 P.3d 207.

Rule 11-803(6) NMRA excludes from the rule against hearsay:

"A record of an act, event, condition, opinion, or diagnosis, if

(a) the record was made at or near the time by – or from information transmitted by – someone with knowledge,

(b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit,

(c) making the record was a regular practice of that activity, and

(d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Paragraph 11 or Rule 11-902 NMRA or Paragraph 12 of Rule 11-902 NMRA or with a statute permitting certification. This exception does not apply if the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness.

State v. Ruiz, 1980-NMCA-123, ¶ 13, 617 P.2d 160,[3] explains that the starting point is: "[i]f the records are admissible under the evidence rules, it [is] an abuse of discretion to exclude them." Questions about the accuracy of documents tendered under Rule 11-803(6) go to weight, not admissibility. *Apodaca v. AAA Gas*, 2003-NMCA-085, ¶ 59, 73 P.3d 215.

To admit a business record "the testifying witness need not be the person who supervised its creation or actually created the record." *Roark v. Farmers Group, Inc.*, 2007-NMCA-074, ¶ 24, 162 P.3d 896. Quoting *State v. Ruiz*, the Court in *Roarke* said "[t]he phrase 'other qualified witness' should be given the broadest interpretation; he need not be an employee of the entity *so long as he understands the system.*' (emphasis in original)." *Id.*

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[3] *Superseded by statute on other grounds*, NMSA 1978, § 30-14-1 (1995), *as stated in State v. McCormack*, 101 N.M. 349, 351, 682 P.2d 742, 744 (Ct. App. 1984).

Exhibits L and O met the definition of Rule 11-803(6). They were records of an act or event made at or near the time, by someone with knowledge of the act or event, kept in the course of a regularly conducted activity of an institution, and making the record was a regular practice. Dart and Hardy both met the requirements for authenticating them. Dart's objection, that only Perez could authenticate Exhibits L and O, was flat out wrong. Because Dart never asserted a valid objection, both records should have been admitted.

Even if Dart had objected on the basis of trustworthiness, it is settled that the party seeking to exclude a record has the burden of establishing untrustworthiness. *Roark*, 2007-NMCA-074, ¶ 32. Dart made no effort to meet that burden. The court should not have interposed its own objection given the presumption of admissibility. Its *sua sponte* "objection" misconstrued the rule.

The Rule's reference to "trustworthiness" states that the hearsay exception does not apply "*if the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness*." The Rule does not permit a finding of untrustworthiness because the subject matter is not comprised of data or statistics. There was no evidentiary basis for the court to conclude that Perez was untrustworthy or that the manner in which he prepared his memoranda indicated a lack of trustworthiness. In fact, the information conveyed by these memoranda was almost entirely undisputed.

The district court's exclusion of Exhibits L and O because they were not comprised of data or statistics, and requirement that Perez authenticate them, demonstrates that the court misunderstood the Rule. The contents of Exhibit L—a report to Hardy of verbal counseling resulting from Dart's refusal of a direct order, with no mention of any arguably protected speech and no reference to Section 32A-4-3—and Exhibit O—Perez's written notification to Dart that, due to his inability to balance FPD and CCTF responsibilities, he was relieved of his CCTF responsibilities—demonstrate that their exclusion prevented Farmington from putting on its full defense.

Written confirmation that no one in Dart' chain of command ever reported that Dart was claiming a violation of Section 32A-4-3, and that what was conveyed was the admitted failure to obey a direct order and Dart's own representations that he could not do his job and be on the CCTF, was vital to Farmington's defense. Without these documents Farmington had only post-lawsuit testimony, rather than contemporaneously prepared documents, to prove that it had **not** understood that Dart was attempting to complain of a illegality or unlawfulness.[4] Exclusion of these Exhibits, therefore, requires reversal and a new trial.

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[4] Chief Westall's testimony that his understanding was that Dart's claim was a claim of fraud of the FBI, based on Dart's misreading of the MOU, appears at Tr.III:163-67, 192, 199, 201.

D. Dart's Counsel's Comment That FPD Was Not Calling Perez Because He Was Suing FPD Prejudiced the Jury by Placing Before it a Damaging Piece of Irrelevant Information

Whether improper statements made in the presence of the jury should result in a new trial is a matter within the court's discretion. *Romero v Melbourne*, 1977-NMCA-015, ¶ 15, 561 P.2d 31. To justify a new trial, counsel's conduct must have prejudiced the opposing party or resulted in an unfair trial. *Id.*

Comments like the one made herein have been recognized as improper. *See e.g. Young v. Guild*, 7 So.3d, 251, ¶ 39 (Miss. 2009) (comment to jury that they would not hear from a witness, which allowed jury to consider that testimony would have been prejudicial to opposing party, was improper). A jury should be immediately told to disregard such remarks. *Estate of Gibson v. Magnolia Healthcare, Inc.*, 91 So.3d 616, ¶ 37 (Miss. 2012).

Dart's counsel's improper remark and her question about Perez having been fired invited the jury to wander onto the path of speculation, to wonder what Perez might have said about Dart's case, why Farmington would not have wanted the jury to hear him, whether this lack of candor extended to other aspects of the case, and whether Farmington had mistreated Perez. Stating that Farmington did not want Perez at trial necessarily implied that Perez's testimony would have been unfavorable to Farmington. The mention of Perez being fired and his suit against Farmington necessarily implied that Farmington had been a bad actor *vis a vis*

another of its employees and invited the jury to base its decision on the resulting negative opinion of the Defendants, rather than on the evidence.

A verdict is excessive if the evidence does not provide substantial support for the amount awarded or if there is an indication of passion or prejudice. *Scott v. Woods*, 1986-NMCA-076, ¶ 54, 730 P.2d 480. While there is no fixed standard for measuring the value of pain and suffering, here the evidence was that Dart was not fired or demoted, received a favorable review after his refusal of a direct order, asked to be transferred, and continued to work as a police officer until his chosen retirement date. Lost wages were minimal. Dart testified to distress of a few months duration, curable through counseling, leading to no absences from or inability to perform at work. He presented no evidence of any costs incurred for counseling. Under these circumstances, and given the inferences likely to have been drawn from the improper remarks, the conclusion that the emotional distress award of $200,000 was punitive is inescapable.

Punitive damages may not be awarded under the WPA. Therefore, this award, albeit made under the guise of emotional distress damages, should have been negated through the grant of a motion for remittitur or a new trial. *Stonehill College v. Massachusetts Comm. Against Discrimination*, 808 N.E.2d 205, 225 (Mass. 2004) (emotional distress damages should be "proportionate to the distress suffered" and should not be awarded as a substitute for punitive damages).

In the case of *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 16, 136 N.M. 647, the Court found that a jury's verdict was based either on sympathy or an improper motive to punish the defendant where the plaintiff was not fired, demoted, suspended or disciplined, had presented no evidence of concrete special damages, had received no professional health care, the discrimination alleged was limited to a nineteen month period and plaintiff received two-and-a-half times the amount requested in his counsel's closing argument. The trial court's remittitur from $285,000 to $90,250 was affirmed.

In the instant case, Dart was not fired, demoted, or suspended, presented no evidence of concrete special damages, presented evidence of only a minimal loss of pay, of a short period of worry about potential consequences following his removal from the CCTF, and of successful counseling, concluded when both he and his counselor had determined it was no longer necessary. A $200,000 award is not in keeping with this evidence. *Compare Weidler v. Big J Enterprises, Inc.*, 1998-NMCA-021, ¶ 39, 953 P.2d 1089, wherein an employee who had been fired, saw a counselor to deal with anger, anxiety, distress, distrust, feelings of being victimized, suffered weight loss and was in a fragile physical and mental condition, was awarded $10,000 for his distress.

Requesting remittitur was appropriate. *Littell v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 58, 561 P.2d 31 (remittitur is appropriate when a court finds that the

verdict "was infected with passion, prejudice, partiality, sympathy, undue influence,…."). The amount of the award also presented grounds for a new trial because the excessive damages appear to have been given under the influence of passion and prejudice. *Lujan v. Reed*, 1967-NMSC-262, ¶ 32, 434 P.2d 378.

Cases are supposed to be decided on the evidence. Arguments and remarks of counsel are not evidence. *Cain v. Champion Window Co. of Albuquerque, LLC*, 2007-NMCA-085, ¶ 14, 164 P.3d 90. The Parmley affidavit established that jurors heard and discussed the remarks, thereby departing from the evidence. Because information outside the evidence was brought to the attention of the jury Farmington's right to a fair trial was violated. Thus, a new trial is required.

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth herein, Farmington requests that the Judgment be reversed, and that Judgment be entered in favor of Farmington. In the alternative, Farmington requests that the Judgment be reversed and the case remanded for a new trial.

Respectfully submitted.

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I hereby certify that on the 23rd day of November 2015, I sent, via first class mail, copies of the forgoing to:

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