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

REPLY BRIEF

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

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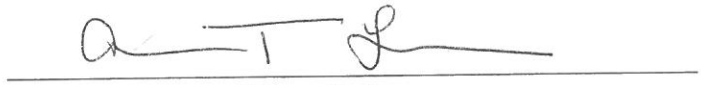
STATEMENT OF COMPLIANCE

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 Reply 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 3,899 words. The word count is obtained using Microsoft Word 2010.



Alice T. Lorenz

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In their brief-in-chief the City of Farmington, the City of Farmington Police Department ("FPD") and Chief Westall (hereinafter sometimes jointly "Farmington"), explained that Plaintiff, Frank Dart, had written a March 10, 2011 memorandum in which he expressly accused FPD of, *inter alia*, committing fraud on the FBI, asking Dart to obey an "unlawful directive to investigate CYFD referrals," and mishandling investigation of the Messenger case [Tr.III:98-100]. Farmington established that, at the summary judgment stage, the district court determined that Dart had not had a good faith belief that FPD was committing fraud, or that FPD's order that he handle CYFD referrals, or its handling of the Messenger case, had been unlawful. Thus, to the extent Dart's attempted Whistleblower Protection Act claims were based on these accusations, they failed [RP 214-19]. *See* NMSA 1978 § 10-16C-1 et seq. (2010) (the "WPA").

Although Dart had not expressly accused Farmington of violating NMSA 1978 § 32A-4-3, the district court specifically concluded that an inference that Dart was also claiming a violation of that statute could be drawn from the March 10th memo. This ruling allowed Dart to escape summary judgment [RP 218].

Farmington's position is that, because Dart's memo did not give fair notice of his accusation, there was no evidence that the required inference had actually been drawn by anyone in Dart's chain of command, or that that inference had

formed a basis for Farmington's decision to remove Dart from the FBI Cyber Crime Task Force ("CCTF"), Dart had failed to meet his burden of proof under the Whistleblower Protection Act, NMSA 1978 § 10-16C-1 et seq.

On appeal, in addition to showing that Dart produced no evidence that Farmington understood that Dart had been attempting to insert, among his express charges, an implied accusation that FPD was violating Section 32A-4-3, Farmington provided evidence that their decisions were justified by the circumstances as Farmington actually understood them. Farmington also demonstrated that, absent Dart's erroneous reading of Section 32A-4-3, the inference of illegality that the district court thought possible simply does not arise.

Farmington also raised the matter of the district court's refusal to admit two business records, Exhibits L and O, which documented the information that was being considered by Dart's superiors. Farmington explained that the excluded documents supported Defendants' testimony that the inference upon which Dart's Whistleblower claim rested had not, in fact, been drawn, and that Dart's removal from the CCTF resulted from his refusal to obey a direct order, his own statements about his inability to do both jobs, and FPD's need for Dart to continue his work as a detective focused on child abuse.

In response, Dart claims that he was not obligated to prove that his interpretation was correct in order to show "good faith," and that whistleblowing

need not be the sole motive for retaliation—neither of which are actually at issue. With respect to the "good faith" issue that Farmington did raise, Dart argues that he had a subjective good faith belief that FPD was violating a criminal statute [see Ans. Brief, 16 (arguing Farmington's conduct was unlawful in Dart's "heart and mind")]. But the standard is one of *objective* good faith [RP 262]. *See* NMSA 1978 §10-16C-2(A). The language of Section 32A-4-3 establishes that, as a matter of law, Dart could not meet that standard.

Dart argues that Exhibits L and O were properly excluded because they were hearsay. But Dart provides no supporting authority, and does not even discuss the New Mexico cases that address Rule 11-803(6).[1] Dart also claims that Exhibits L and O were "duplicative." That claim ignores both Dart's attacks on the credibility of his superiors, and his argument that his history of requesting more help and resources for CYFD investigations supported an inference that his superiors would have understood his March 10 memo as referencing Section 32A-4-3. Given the credibility attacks and the inferences on which Dart relied, his claim that exclusion of Farmington's corroborative evidence was not prejudicial is not reasonable.

Dart also argues that his counsel's statement that the Defendants were "trying to get around having to call Perez because he sued the Department," was not improper because, in closing arguments, one can comment on a party's failure

[1] These cases are discussed in the Brief-in-Chief at 38-39.

to call a witness [*See* Tr.III:95]. But he fails to state the entire rule—that, in a closing argument, a party may comment on the absence of a witness who was under the opposing party's control, so long as the comment does not implicate or refer to matters that are not in evidence or are immaterial. As it was undisputed that (1) Perez was not FPD's employee at the time of trial, or otherwise under Farmington's control, (2) the statement included matters not in evidence, and (3) Dart has admitted that the reason for Perez' absence was immaterial, his effort to justify his counsel's statement fails [Ans. Brief 8, 10].

Dart simply does not address the absence of evidence that Farmington understood that he was attempting to level an accusation against FPD of violation of a criminal statute. Instead, Dart: (1) relies on the fact that *the jury* interpreted the statute as he had [Ans. Brief, 23-24], (essentially admitting that an issue of law was improperly left to the jury to decide), and (2) argues that Farmington was obligated to prove a negative—the absence of causation [see Ans. Brief, 33-34]. And he deflects attention from the real issues by arguing a case that was simply not made below.

Although his brief contains impassioned claims about a "code of silence," it is devoid of any record or transcript references. That is because no claim of any "code of silence" was litigated below. This new claim, along with Dart's attempts to slip the Messenger case and the complaints about FPD's obligations under the

Memorandum of Understanding ("MOU") with the FBI back into the case, [*see* Ans. Brief 1-2], are entitled to no consideration.

When the focus is returned to what was actually litigated, and the evidence or lack of evidence on required elements of Dart's claim are analyzed based on controlling New Mexico law, the conclusion becomes inescapable that Dart failed to meet his burden of proof. In the absence of evidence supporting a conclusion that FPD understood that Dart was implicitly claiming unlawful conduct based on Section 32A-4-3, or based its conduct upon that understanding, the jury had to have placed inference upon inference in order to have found for Dart. Dart has not attempted to argue that stacked inferences are sufficient to meet his burden.

II. FACTS MATERIAL TO THE ISSUES PRESENTED

Dart's brief is replete with statements unsupported by the record, ranging from arguments about a "code of silence" that have no bearing on the case actually tried, to speculation about Farmington's thought processes, the reasons for Farmington's appeal and for the jury's decision, derogatory characterizations of Farmington's counsel's demeanor and that of Chief Westall, and misstatements about what Dart communicated to his superiors [*see e.g.* Ans. Brief 3, 4, 12-13, 18 20-21(speculation without citation), 8, 32, 42-43 (derogatory characterizations and claims unsupported by the record), 17 (mischaracterizing Dart's refusal of a direct order by leaving out the fact that Dart was claiming that the order was

"unlawful")].[2] Dart also asserts that Sgt. Perez was available to testify, but the citation provided does not support this assertion and there is, in fact, nothing in the record that does support it [*see* Ans. Brief 37; Tr.Vol.III:93-94]. All of Dart's unsupported speculation and derogatory references to Chief Westall and opposing counsel should be disregarded.

The facts that are pertinent to the issues raised include the undisputed facts that:

(1) Dart refused a direct command, which turned out **not** to be unlawful, and he repeatedly told his superiors that he could not do his FPD job and participate in the CCTF [RP 72-77, 100, 164-65; Tr.II:234; III:24-25; Exs. 8, N]. Thus, Dart himself established a legitimate basis for his removal from the Task Force, and for the reference in his subsequent evaluation to insubordinate conduct;

(2) Dart's express accusations did not qualify as protected communications under the WPA and were not made in good faith [Exs. 8, N; RP 214-19; Tr.II:238, 250-52, 255-57];

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[2] For example, the record does not support Dart's claim that Ms. Anderman's statement about "moving things along" was said "loudly" or was heard by any juror. The comment was made at the bench, and no one complained that it was loud or said it had been heard by any juror, even after FPD's counsel had complained about the jury hearing Dart's attorney's remark [*See* Tr.III:94].

(3) The accusation that Dart claimed could be inferred from his March memo was of a violation of Section 32A-4-3(B) and (C) [*see* Tr.II:16-17; RP 235-38];

(4) The statute does not make a police department's failure to immediately investigate CYFD reports of investigations that CYFD was already pursuing a misdemeanor. *See* Section 32A-4-3(F) (making only a person who violates *Subsection A* guilty of a misdemeanor);

(5) One must misread the statute to believe that a failure to immediately investigate CYFD reports constitutes a criminal violation. There was no direct evidence that anyone in Dart's chain of command misread the statute and no evidence that any of them understood, when Dart refused to comply with a direct order, that he was claiming a violation of Section 32A-4-3. All of the testimony was that they had not understood that that accusation had been made [Tr.III:88, 97-100, 102-05, 125-26, 133-34, 153-60, 163-69, 176, 187-88, 199-210, 205, 209-10]. Exhibits L and O corroborate that testimony.

(6) Absent the misinterpretation of the statute, Dart's complaints about FPD's allocation of manpower and resources amounted to no more than complaints about management decisions. These types of decisions are not bases for WPA claims. *Wills v. Board of Regents of University of New Mexico*, 2015-NMCA-105, ¶ 17, 357 P.3d 453; *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");

(7) Dart feared that he would be fired, and interpreted events that followed his insubordinate behavior as retaliatory; however, even assuming the truth of his characterization of all of these events, none can be viewed as being in retaliation for his only arguably WPA protected statement—his implicit accusation of violation of Section 32A-4-3—unless Farmington actually knew that that accusation had been leveled against it.

III. POINTS AND AUTHORITIES

A. Actual knowledge of a protected whistleblowing activity, essential to a WPA claim, was not proved

To constitute 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." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 131 S.Ct. 1325, 1334-35 (2011), (addressing the FLSA). The requirement that an employer "must have actual knowledge that an employee is making a complaint that could subject the employer to a later claim of retaliation" requires a plaintiff to prove that the employer understood the complaint as one asserting protected rights. *Id.*

The question whether a statement or accusation gives fair notice that a protected right is being asserted can be determined as a matter of law. *Ellison-Harpole v. Special School District No. 1*, 2008 WL 933537, *3 (Minn. App. 2008), *rev. denied* (May 28, 2008). Here, the possible inference upon which the district court relied in denying summary judgment did not, as a matter of law, provide the fair notice required. [see Ex. B]. *Id.* The element of *communication* of the accusation to Farmington was not established. The testimony was undisputed that those in Dart's chain of command read the statute as written, not as Dart misconstrued it. Thus, the claim should never have gone to trial.

Once the case did go to trial, Farmington should have been granted judgment as a matter of law because of Dart's failure to prove that he had given fair notice that he was complaining of a violation of Section 32A-4-3(B) and (C), and because New Mexico law does not permit a plaintiff to meet his burden of proof by simply piling inference upon inference. *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). A 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.

Dart does not address the fact that, as a law enforcement officer, he was particularly capable of specifically identifying a statute if he intended to invoke it. And, instead of addressing the lack of evidence on the required element of fair notice and actual communication to Farmington of a WPA protected statement, Dart claims to have believed that it was "obvious" that he meant to refer to Section 32A-4-3, and so did not need to actually say so. That conclusion is odd, to say the least, given that he did say, specifically and unambiguously, exactly what he meant when he levelled all of his other accusations. Finally, Dart falls back on the fact that the jury found in his favor. But that is of no moment when the jury's decision was not firmly rooted in actual evidence establishing each and every one of the requisite elements of the claim at issue. *Id.*

B. Exclusion of Exhibits L and O was error because they qualified as business records under Rule 11-803(6) NMRA, and were critical to Farmington's defense

The district court's refusal to let Hardy authenticate Exhibits L and O, and exclusion of Exhibits L and O, because they were not comprised of "data" or "statistics," was based upon its misunderstanding of Rule 11-803(6) NMRA. *See Apodaca v. AAA Gas Company*, 2003-NMCA-085, ¶ 59, 73 P.3d 215 (questions about the accuracy of documents tendered under Rule 11-803(6) go to weight, not admissibility); *Roark v. Farmers Group, Inc.*, 2007-NMCA-074, ¶ 24, 162 P.3d

896 (to admit a business record "the testifying witness need not be the person who supervised its creation or actually created the record").

Where a court's analysis requires interpretation of rules of evidence, review is de novo. *Williams v. BNSF Railway Company*, 2015-NMCA-109, 359 P.3d 158. In this case proper interpretation of Rule 11-803(6) results in the conclusion that Exhibits L and O were not excludable as hearsay, as Dart claimed, or because they contained information other than "data" or "statistics," as the district court ruled.

In *State v. Ruiz,* 1980-NMCA-123, ¶ 13, 617 P.2d 160, the court said that the starting point is: "[i]f the records are admissible under the evidence rules, it [is] an abuse of discretion to exclude them." And a court abuses its discretion when, as here, it misapprehends the law. *Tierra Realty Trust LLC v. Village of Ruidoso*, 2013-NMCA-030, ¶ 7, 296 P.3d 500.

The error in excluding these business records was prejudicial. Exhibits L and O were contemporaneously created records, which corroborated Defendants' testimony that Dart's complaints were not understood by his chain of command to encompass an accusation that FPD was acting illegally. They also corroborated Farmington's testimony about the reasons for Dart's removal from the CCTF, the credibility of which Dart was attacking. Thus, the exclusion of Exhibits L and O prejudicially hampered Farmington's ability to prove its defense, requiring reversal.

C. Dart's counsel's comment was improper because Sgt. Perez was not exclusively within Farmington's control, an explanation for his anticipated absence had been offered and Dart's counsel referred to extraneous matters

In *Graves v. United States*, 150 U.S. 118 (1893), the Supreme Court found a prosecutor's comment on an absent witness to be improper. But, discussing the missing witness issue for the first time, it said in dicta that where "a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *See also Revisiting the Missing Witness Inference—Quieting the Loud Voice from the Empty Chair*, 44 Md.L.Rev. 137, 138-39 and n.3 (1985).

The *Graves* rule, permitting comment in a closing argument on the absence of a witness, as it has developed now generally applies when it is shown that the witness is available to only one of the parties and no explanation is offered for the witness' absence. *Id.*, at 147-48; "*Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party-modern cases*," 80 A.L.R. 4TH 405 (Orig. published 1990, updated weekly); Stein, *Closing Arguments* § 1:56 (2015-2016 Ed.) (where there is no explanation for the absence of a witness, who is peculiarly available to a party, counsel may properly comment; but where the witness is equally available to either party it is not proper for counsel to comment); 88 C.J.S. *Trial* § 311 (Database updated

December 2015) (it is improper to comment on the failure to call a witness when that witness is not under the opposing party's control); *Jefferson-Gravois Bank v. Cunningham*, 674 S.W.2d 561, 564 (Mo. App. 1984) (stating that it is reversible error to argue a negative inference when witness is equally available to both parties).

New Mexico case law has not often addressed the problem of the missing witness. In *State v. Martin*, 1926-NMSC-048, ¶ 44, 250 P. 842, the defendant's mother was sworn as a witness in his prosecution for murder, but did not testify. In addressing the claim of error based upon the prosecutor's comment on her failure to testify, the court looked to other criminal cases, including *Morgan v. State*, 124 Ga. 442, 52 S.E. 748 (1905), wherein the court had concluded that, where "extraneous facts" were not injected" or "improper language used" a prosecutor could comment on a criminal defendant's failure to call a witness, so long as the comment was based on facts brought to light upon the prosecutor's investigation.

In *State v. Soliz*, 1969-NMCA-043, ¶¶ 12-14, 454 P.2d 779, wherein both parties requested instructions on the failure to call witnesses, the court explained that the conditions that had to exist for a comment to be proper included that the witness was within the power of the party to produce, the witness must not be so prejudiced against the party that the latter could not expect to obtain the truth from him, the testimony is important, non-cumulative, and not inferior to testimony

already received and the witness is "not equally available to both parties." It upheld the district court's refusal to give a missing witness instruction.[3]

In *Chavez v. Atchison, T. & S.F. Ry. Co.*, 1967-NMSC-012, ¶ 26, 423 P.2d 34, citing 68 A.L.R. 2d 1074, the court first noted that the complaining party's employee had been available to testify, and then applied the rule that it was permissible for counsel to comment on the failure of a party to produce their own employee to testify, if that employee was qualified to testify.

Some confusion about the circumstances that would make a comment permissible, or the scope of permissible comment, may have been created by *Central Sec. and Alarm Co., Inc. v. Mehler*, 1996-NMCA-060, ¶ 41, 918 P.2d 1340. In addressing a comment about an opposing party's failure to produce records, it stated, in dicta, that "New Mexico has long recognized the ability of counsel to comment on the failure of the opposing party to call competent and available witnesses to testify at trial." But because the court then cited to *Chavez*, *Martin* and *Soliz*, all of which require that the witness be available to only one of the parties, and which prohibit references to extraneous and prejudicial matters, the truncated statement in *Central Sec. and Alarm* should not be read as eliminating

[3] While Dart cited to the UJI Civil and UJI Criminal Instructions in support of the argument that the comment was proper, UJI Civil 13-2104, "Failure of a party to produce evidence or a witness-*No instruction to be given*" states only "no instruction to be given," while the Use Note explains that, while such instructions are found in other states, they are based on a type of statute that New Mexico does not have. UJI Criminal 14-5011 also provides that no instruction is to be given.

these requirements. Instead, the limitations on such comments remain intact and preclude the conclusion that Dart's counsel's comment was permissible. Because the remark likely led to the jury inappropriately drawing an adverse inference from Perez' absence, it was prejudicial. *Krupien v. Rai*, 742 A.2d 1270, 1272 (Conn.App. 1999) (reversing and remanding for new trial, where jury may have drawn adverse inference from improper remark about the opposing party's failure to call a witness, because under those circumstances, the court could not say that the error was harmless)

D. The WPA does not permit punitive damages; therefore the award for emotional distress that is, at least in part, punitive in nature, is improper

Dart, by arguing that the jury was incensed by the demeanor of one or more of the defendants and the conduct of their trial counsel, angered by Farmington's actions having been "destructive to the community," by causing it to lose a "supremely qualified officer" from "a critical position," who had been protecting their children, when Farmington allegedly knew that they would be liable "in the tragic event a child was harmed," is essentially acknowledging that the damage award is, at least in part, punitive. [*See* Ans. Brief 4, 13, 15, 20-21].

There is no dispute about the intensity or duration of Dart's distress, the counseling he underwent, or his current status. His own evidence was that he dealt successfully with something that he found profoundly upsetting—to the point that he felt no need of further counseling after three months—and was able to begin

work as a private detective shortly after his retirement [Tr.II:10, 130-31, 176, 182, 285-90; III: 18, 26]. That evidence simply does not support a $200,000 emotional distress award.

Dart's counsel's comment, when combined with her arguments about Farmington having deprived the community of a dedicated detective, not caring about his feelings, etc., shifted the focus from compensating Dart to punishing Farmington. This was improper. *State Farm Mut. Auto Ins. Co. v. Thorne,* 110 So.3d 66, 74-75 (Fla.App. 2013) (concluding that, where counsel's argument shifted the focus from compensation to punishment, reversal was mandated). Thus, even assuming *arguendo* Dart had met his burden of proof on liability, the damage award should not be permitted to stand. *Lujan v. Reed*, 1967-NMSC-262, ¶ 32, 434 P.2d 378 (an award presents grounds for a new trial when excessive damages appear to have been given under the influence of passion and prejudice); *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 16, 103 P.3d 571 (remittitur is proper where the verdict appears to have been based either on sympathy or on an improper motive to punish the defendant).

IV. 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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