IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

WILLIAM SHAWN CATES and
BOBBY CHERESPOSY, on behalf of
themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

Ct. App. No. 34,867

MOSHER ENTERPRISES, INC.,

Defendant-Appellee.

APPELLANTS' BRIEF IN CHIEF

Appeal from the Second Judicial District
County of Bernalillo
Cause No. D-202-CV-2011-03068
Honorable Nan G. Nash

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ORAL ARGUMENT REQUESTED

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COME NOW Plaintiffs, by and through their counsel, Youtz & Valdez, P.C. (Shane Youtz, Stephen Curtice & James Montalbano), and file this Brief in Chief.

INTRODUCTION

This case presents a relatively straight-forward question of statutory interpretation: did the Legislature intend to create a private right of action under the Public Works Minimum Wage Act ("PWMWA") (NMSA 1978, §§ 13-4-10 through -17 (1963, as amended through 2011)? Plaintiffs contend that it did because the Legislature (1) provided that any contractor, subcontractor or employer who violates the Act "shall be liable to any affected employee" for unpaid wages, and (2) further provided that in an action brought "pursuant to" this section making the violator directly liable to the employee, the court can award "attorney fees and costs to an employee adversely affected" by the violation. From a contrary determination of the District Court, raised *sua sponte* on the eve of trial, Plaintiffs appeal to this Court.

SUMMARY OF PROCEEDINGS

A. Nature of the Case

This case involves the renovations to the University of New Mexico Arena, commonly known as "the Pit." This was a public works project subject to the terms of the PWMWA. The dispute centers on whether one of the subcontractors, Defendant Mosher Enterprises, Inc. ("Mosher") should have paid its employees

based on the 2008 prevailing wage determined by Department of Workforce Solutions ("DWS"), or the more up-to-date 2009 wage rate for work performed in 2009.

In 2008 DWS issued a wage decision to Flintco West, Inc. ("Flintco"), who was the Construction Manager at Risk for UNM for the Project. The request for wage decision indicates that "[s]ome preliminary preparation work will begin soon, ***for which this wage decision will apply***, and the remaining work ***will be bid by the CM at Risk later***." **[RP 287 (emphasis added)]** The wage decision, which also notes it was issued for the preliminary work, indicates that it "expires for bids: 12/31/08." **[RP 288]**

Under the 2008 version of the contract between Flintco and UNM, Flintco, as the Construction Manager at Risk, was responsible for, and only authorized to perform, certain preconstruction activities. That Contract broke the work down into "preconstruction" and "construction" phases. **[RP 365 at § 3.1 (identifying the preconstruction phase services to be performed by Flintco); RP 368 § 3.2 (identifying the construction phase services to be performed by Flintco *if UNM accepts Flintco's subsequent bid for a Guaranteed Maximum Price*)]** The preconstruction services included various activities; relevant to this case, they included assisting UNM in determining subcontractors to be used during the construction phase, should that phase be awarded to Flintco. **[RP 367, at § 3.1.6]**

The contract expressly provided that it would be limited to just those preconstruction services "unless (i) the parties execute a GMP [Guaranteed Maximum Payment] Amendment or (ii) the parties execute an Early Work Amendment...." **[RP 369, at § 3.2.3 (emphasis added)]** If the parties should prove unable to agree upon the GMP, then UNM could terminate the contract "without liability" and Flintco's remuneration would be limited to the set fee for its preconstruction services. **[RP 376, at § 6.5]** If the parties did execute such a GMP amendment, however, Flintco could move on to the "construction phase." **[RP 363, at § 1.9 (defining construction phase)]**

The fact that the Contract was so limited was expressly discussed by the University of New Mexico Regents when the contract was let:

> The Construction Manager at Risk Committee recommends the University Arena contract be awarded to Flintco West, Inc. In response to Regent inquiry, the final value of the contract is to be established over time, and the proposals received were based on a nominal construction value of $40 million. In response to Regent inquiry, Flintco's fee percentage is 5.5% of construction costs, and the duties of Flintco are preconstruction services, including estimation services during the design phase to guide the architect to an affordable solution that fits within the available budget. They will also gather estimates from the subcontractor community, design a schedule during the design phase, and clarify expectations for subcontractors. In response to Regent inquiry, ***approval of Construction Management at Risk does not guarantee Flintco will have an automatic role as contractor***. Construction will begin next year.

[RP 451 (Emphasis added)]

The GMP Amendment was not executed until June 2, 2009. **[RP 384]** As a result, Flintco did not become the general contractor until that date, which was after the Wage Decision for "preliminary work" expired. Meanwhile, effective January 1, 2009, DWS issued a new wage determination with a higher wage rate to reflect intervening changes in the labor market. **[RP 296]**

As part of its preconstruction role, Flintco prepared and issued a Request for Proposal on March 26, 2009, indicating that the bids would be awarded on April 27, 2009. **[RP 382]** Then, on or about April 24, 2009, Defendant Mosher Enterprises, Inc., submitted its proposal. **[RP 291-95]** Despite the fact that the contract for Mosher's work was not let until 2009, Mosher used the expired 2008 prevailing wage rates to pay its employees. This resulted in Mosher's employees being paid approximately $1 an hour less than what the 2009 wage determination identified as the prevailing rate. **[RP 314, ¶ 14 (admitting that Mosher "paid its 'Wiremen/Technicians' that worked on the Pit renovation project based on the 2008 Wage Decision, <u>not</u> the 2009 wage determination.")]**

Plaintiffs contend this resulted in a violation of the PWMWA; Defendants, on the other hand, claim that the 2008 Wage Decision applied to the whole Pit Project regardless of the date Mosher's portion was bid. Whether Plaintiffs were correct that they should have been paid based on the 2009 rate, or whether Defendant was correct that the 2008 rate applied to the entire project was never

decided by the District Court, and is not before this Court. Rather, as discussed below, on the eve of trial the District Court *sua sponte* raised the question whether it had jurisdiction to hear this case. The District Court did not believe that the PWMWA conferred a private right of action outside of the administrative procedure outlined in NMSA 1978, § 13-4-14 (A) & (B) (2009), and dismissed the case without prejudice for Plaintiffs to pursue their administrative remedies. This appeal ensued.

B. Course of the Proceedings

Plaintiffs, on their own behalf and on behalf of others similarly situated, filed suit against Mosher enterprises on March 18, 2011. **[RP 1-6]** Their complaint alleged violations of the PWMWA as well as the New Mexico Minimum Wage Act (NMSA 1978, §§ 50-4-19 through -30 (1963, as amended through 2009)), and further alleged that Defendant had been unjustly enriched by failing to pay the required wage rates.

On April 19, 2011, Defendant moved to dismiss Plaintiff William Shawn Cates as a party, based on the fact that he had filed a complaint with DWS which had originally found in his favor and instituted an action in Metropolitan Court on his behalf but, for unexplained reasons, had dismissed that case. **[RP 14-20]** Defendant argued that Mr. Cates's unsuccessful attempt to have the DWS bring a claim on his behalf constituted res judicata. Plaintiff argued that, pursuant to

Southworth v. Santa Fe Servs., Inc., 1998-NMCA-109, 125 N.M. 489, 963 P.2d 566, the determination of DWS not to pursue the case on Mr. Cates' behalf is not entitled to preclusive effect. **[RP 22-28]** The motion was fully briefed in due course but, for some reason, the hearing was not scheduled until October 16, 2012, a year and a half after the motion to dismiss was filed. The Court denied the motion to dismiss and entered a Rule 16 scheduling order. **[RP 49-54].**

On January 18, 2013, Plaintiffs filed a motion for class certification pursuant to Rule 1-023(B)(3) NMRA. **[RP 69-89]** The motion was fully briefed, and on April 16, 2013, the Court granted the motion and certified the case to proceed as a class action. **[RP 123-25]**

After a failed mediation attempt, on November 19, 2013, Defendant filed an unopposed motion to amend the scheduling order and for leave to file a third-party complaint against Flintco. **[RP 137-56]** The Court granted that motion **[RP 157]**, and Defendant filed its third-party complaint on November 27, 2013. **[RP 159-76]** In response, Flintco moved to dismiss the third-party complaint or, in the alternative, to defer the matter to the mediation/arbitration provisions in the contract between Flintco and Defendant. **[RP 180-200]** Defendant did not oppose deferring the matter to the mediation/arbitration provisions **[RP 201]**, and the Court entered a stipulated order to that effect on March 19, 2014 **[228-30]**.

The Court entered an amended Rule 16 Scheduling Order on May 5, 2014, which set the matter for trial on June 2-19, 2015. **[RP 233-36]** On November 26, 2014, after another failed mediation attempt, Defendant filed an opposed motion for leave to file a first-amended third-party complaint. **[RP 247-58]** Following a January 21, 2015, hearing the Court entered an order denying that motion on February 16, 2015. **[RP 306-07]**

Meanwhile, on January 19, 2015, Plaintiffs filed a motion for partial summary judgment on the issue of liability, which was completely briefed and ready for hearing on March 15, 2015. **[RP 278-99 (motion); 308-50 (response); 351-87 (reply)]** On March 23, 2015, Defendant filed its motion for summary judgment, which was completely briefed and ready for hearing on April 20, 2015. **[RP 392-431 (motion); 437-54 (response); 455-89 (reply)]**

At the April 28, 2015, hearing on the motions for summary judgment, the Court *sua sponte* raised the question whether the PWMWA contains a private right of action. **[Tr. (4/28/15/) 2:11-3:2 (noting that it was "the Court's concern, not raised by – by any of the parties")]** By letter dated April 29, 2015, the Court directed the parties to file a five-page brief addressing the "issue of statutory interpretation" whether the PWMWA allows for a private right of action or limits employees to the administrative procedure described in NMSA 1978, § 13-4-14(A) & (B) (2009), despite the acknowledged lack of any exhaustion requirement in the

statute. **[RP 492-93]** That letter also noted that the comparable Federal Davis-Bacon Act did not allow for a private right of action.

Both parties filed briefs. **[RP 496-506 (Plaintiffs' brief); 507-32 (Defendant's brief)]** On May 27, 2015—a little more than four years after the case was filed—the Court entered its Order on Jurisdiction, determining that the PWMWA "does not confer a private right of action to Plaintiffs" but instead "contemplates an administrative procedure and directs the Director to make the initial determination of PWMWA violations and the subsequent reference for appropriate legal action." **[RP 533-36]** In support, the Court cited NMSA 1978, § 13-4-14 & -15 (2009). On that basis, the District Court concluded that it lacked jurisdiction to hear the Complaint, and dismissed the case without prejudice "to allow Plaintiffs the opportunity to pursue their administrative remedies before bringing the case before the district court." That order claimed that Plaintiffs did not pursue their claims at the administrative level, despite the Court's prior order denying Defendant's motion to dismiss Plaintiff William Shawn Cates as a party even though he filed a wage claim with the DWS, who initially sought, but then abandoned, relief on his behalf. **[RP 16-20]** Appellants timely filed their Notice of Appeal on June 24, 2015. **[RP 537-42]**

C. Summary of Relevant Facts

As noted, the District Court *sua sponte* raised an issue of statutory construction: whether the PWMWA provides for a private right of action or whether it requires claimants to proceed through the DWS and the District Attorney. As the decision of the District Court was limited to an issue of statutory construction, the only facts necessary for consideration of the issues presented is the language of the relevant statutory provision. As described above, the relevant statute is Section 13-4-14. That statute has four subsections. Subsections A and B govern the Director's role in enforcing the act. They provide, in full:

> A. The director shall certify to the contracting agency the names of persons or firms the director has found to have disregarded their obligations to employees under the Public Works Minimum Wage Act and the amount of arrears. The contracting agency shall pay or cause to be paid to the affected laborers and mechanics, from any accrued payments withheld under the terms of the contract or designated for the project, any wages or fringe benefits found due to the workers pursuant to the Public Works Minimum Wage Act. The director shall, after notice to the affected persons, distribute a list to all departments of the state giving the names of persons or firms the director has found to have willfully violated the Public Works Minimum Wage Act. No contract or project shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership or association in which the persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of the persons or firms. A person to be included on the list to be distributed may appeal the finding of the director as provided in the Public Works Minimum Wage Act.
>
> B. If the accrued payments withheld under the terms of the contract, as mentioned in Subsection A of this section, are insufficient to reimburse all the laborers and mechanics with respect to whom there

> has been a failure to pay the wages or fringe benefits required pursuant to the Public Works Minimum Wage Act, the laborers and mechanics shall have the right of action or intervention or both against the contractor or person acting as a contractor and the contractor's or person's sureties, conferred by law upon the persons furnishing labor and materials, and, in such proceeding, it shall be no defense that the laborers and mechanics accepted or agreed to less than the required rate of wages or voluntarily made refunds. The director shall refer such matters to the district attorney in the appropriate county, and it is the duty and responsibility of the district attorney to bring civil suit for wages and fringe benefits due and liquidated damages provided for in Subsection C of this section.

These sections are comparable to the Federal Davis-Bacon Act. *See also Memorial Med. Center, Inc. v. Tatsch Construction, Inc.*, 2000-NMSC-030, ¶ 26, 129 N.M. 677, 12 P.3d 431 (noting the similarity with the Davis-Bacon Act, and further concluding that the act is remedial in purpose and should be read "broadly to effectuate the intent of the legislature"). The remedial section of the federal law (40 U.S.C. § 3144) provides:

> (a) Payment of wages.—
>
> (1) In general.--The Secretary of Labor shall pay directly to laborers and mechanics from any accrued payments withheld under the terms of a contract any wages found to be due laborers and mechanics under this subchapter.
>
> (2) Right of action.--If the accrued payments withheld under the terms of the contract are insufficient to reimburse all the laborers and mechanics who have not been paid the wages required under this subchapter, the laborers and mechanics have the same right to bring a civil action and intervene against the contractor and the contractor's sureties as is conferred by law on persons furnishing labor or materials. In those proceedings it is not a defense that the laborers and mechanics accepted or agreed to accept less than the required rate of

wages or voluntarily made refunds.

(b) List of contractors violating contracts.—

(1) In general.--The Comptroller General shall distribute to all departments of the Federal Government a list of the names of persons whom the Comptroller General has found to have disregarded their obligations to employees and subcontractors.

(2) Restriction on awarding contracts.--No contract shall be awarded to persons appearing on the list or to any firm, corporation, partnership, or association in which the persons have an interest until three years have elapsed from the date of publication of the list.

Subsection C of the PWMWA—which has no counterpart in the Federal Davis-Bacon Act—provides that employers who violation the Act are directly liable to the employee for unpaid wages or fringe benefits, and may also be liable to the employee for liquidated damages. This section was added to the PWMWA in 1963. *Compare* 1937 N.M. Laws, Ch. 179, § 3 (containing only subsections A & B), *with* 1963 N.M. Laws, Ch. 304, § 3 (adding a subsection C). It provides in full:

> C. In the event of any violation of the Public Works Minimum Wage Act or implementing rules, the contractor, subcontractor, employer or a person acting as a contractor responsible for the violation ***shall be liable to any affected employee*** for the employee's unpaid wages or fringe benefits. In addition, the contractor, subcontractor, employer or person acting as a contractor ***shall be liable to any affected employee*** for liquidated damages beginning with the first day of covered employment in the sum of one hundred dollars ($100) for each calendar day on which a contractor, subcontractor, employer or person acting as a contractor has willfully required or permitted an individual laborer or mechanic to work in violation of the provisions of the Public Works Minimum Wage Act.

(Emphasis added).

In 2005, the Legislature added Subsection D to this Section. *See* 2005 N.M. Laws, Ch. 253, § 3. That section—which also has no counterpart in the Federal Davis-Bacon Act—allows employees to recover their costs and attorney fees for any action brought pursuant to Subsection C. It provides in full:

> D. In an action brought ***pursuant to Subsection C*** of this section, the court may award, in addition to all other remedies, ***attorney fees and costs to an employee adversely affected*** by a violation of the Public Works Minimum Wage Act by a contractor, subcontractor, employer or person acting as a contractor.

(Emphasis added).

The DWS has adopted regulations governing their handling of investigation of alleged violations and bringing actions pursuant to Section 13-4-14(A) & (B). Those regulations are found at 11.1.2.15 NMAC. While imposing a mandatory duty on the Director to investigate complaints, they also provide that "[t]he provisions of this subsection do not affect any worker's right to make a claim through the wage and hour bureau" (as Plaintiff William Shawn Cates did **[RP 16-20]**) "***or*** appropriate court for payment of prevailing wages...." 11.1.2.15(A)(2) NMAC (emphasis added). This last option was the one pursued by Plaintiffs in this case.

ARGUMENT

I. Because the PWMWA, Unlike the Federal Davis-Bacon Act, Expressly Makes Violators "Liable" to Employees for Unpaid Wages and Fringe Benefits and Allows Courts to Award "Attorney Fees and Costs to an Employee Adversely Affected" by a Violation of the Act in Such a Suit, it Clearly Contemplates a Private Right of Action.

"Whether a private right of action can be implied from a statute is a question of law that we review de novo." *Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, ¶ 29, 146 N.M. 179, 207 P.3d 1156. *See also Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69 ("Statutory interpretation is a question of law, which we review de novo.").

As the District Court noted, the PWMWA is akin to the Federal Davis-Bacon Act. *See Memorial Med. Center, Inc. v. Tatsch Construction, Inc.*, 2000-NMSC-030, ¶ 26, 129 N.M. 677, 12 P.3d 431 (noting the similarity with the Davis-Bacon Act, and further concluding that the act is remedial in purpose and should be read "broadly to effectuate the intent of the legislature"). Particularly after 2005, however, there is a significant deviation in the remedial scheme, one that acknowledges a private right of action.

It is important to note the legal background against which that 2005 amendment was enacted. First, the Davis-Bacon Act. The remedial provisions of the two acts (40 U.S.C. § 3144 for the Davis-Bacon Act and Section 13-4-14 of the PWMWA) are set forth above. Obviously, the major difference between the

PWMWA and the Davis-Bacon Act is the provision in Subsection C of Section 13-4-14 of the PWMWA that makes violators directly liable to employees, and Subsection D (added in 2005), which allows the Court to award "attorney fees and costs ***to an employee*** adversely affected" by the violation. (Emphasis added). Neither of these two subsections have any counterpart in the federal law; they are unique to New Mexico's remedial scheme.

Without comparable provisions in the federal act, many courts have concluded that there is no private right of action under the Davis-Bacon Act, although that is not a uniform rule. *Compare, Operating Engineers Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671 (9th Cir. 1998) (noting that courts have generally declined to infer a private right of action under the Federal Davis-Bacon Act given the limited remedies identified in the Act), *with McDaniel v. University of Chicago*, 548 F.2d 689, 695 (7th Cir. 1977) ("In sum, we hold that implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute.").

The second backdrop against which the 2005 amendment to the PWMWA should be understood is *Grauerholtz v. New Mexico Labor and Industrial Commission*, 1986-NMSC-071, 104 N.M. 674, 726 P.2d 351. In that case, the Supreme Court determined that the Labor Commissioner lacked the authority to order payment of the wages required by the act. Instead, "in securing compliance

with its wage determinations, the Labor Commissioner is limited to the remedies and procedure specified in Section 13-4-14. ... If the Labor Commissioner has determined that a person or firm has failed to pay the prevailing minimum wages, then the certification procedure outlined in Subsection 13-4-14**(A)-(B)** must be followed." *Id.* ¶ 8 (emphasis added). That is, the Commissioner is limited to the provisions in Subsections A and B; the case, however, did not address an action brought by an employee pursuant to Subsection C.

In 2005 the Legislature enacted 2005 N.M. Laws, Ch. 253. Its title was:

> AN ACT RELATING TO PUBLIC WORKS; INCREASING THE MINIMUM CONTRACT VALUE FOR THE MINIMUM WAGE ON PUBLIC WORKS; REVISING THE DUTIES AND AUTHORITY OF THE DIRECTOR OF THE LABOR AND INDUSTRIAL DIVISION OF THE LABOR DEPARTMENT; CLARIFYING THE DEFINITION OF WAGES; ***INCREASING LIABILITY AND REMEDIES***; AMENDING SECTIONS OF THE NMSA 1978.

(Emphasis added). It "increase[ed] liability and remedies" in part by adding what is now Subsection D to Section 13-4-14. As noted, that subsection provides: "In an action ***brought pursuant to Subsection C*** of this section, the court may award, in addition to all other remedies, ***attorney fees and costs to an employee*** adversely affected by a violation of the Public Works Minimum Wage Act by a contractor, subcontractor, employee or a person acting as a contractor." (Emphasis added).

This is important in two respects. First, it refers to an "action brought pursuant to Subsection C," whereas in *Grauerholtz* the Court noted that the

Commissioner's powers were limited to the processes described in Subsections A and B. Second, in such an action, the Court may award "attorney fees and costs ***to an employee***" (emphasis added). Clearly, if the employee does not have a private right of action, then it would be impossible to award that employee his or her attorney's fees and costs. If the action were brought by DWS or the District Attorney, there would be no attorney fees to award to the employee. The 2005 amendment recognizes a private right of action under Subsection C, separate and distinct from the DWS-initiated actions described in Subsections A & B.

As noted, this is an exercise in statutory interpretation. In general, when a Court construes statutes, its "charge is to determine and give effect to the Legislature's intent." *Moongate Water Co. v. City of Las Cruces,* 2013-NMSC-018, ¶ 6, 302 P.3d 405 (internal quotation marks and citation omitted). "To discern the Legislature's intent, the Court look[s] first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *State v. Almanzar,* 2014-NMSC-001, ¶ 14, 316 P.3d 183 (alteration in original) (internal quotation marks and citation omitted).

The specific question of statutory interpretation, then, is whether the Legislature intend a private right of action by adding Subsections C and D to a remedial scheme otherwise patterned after the federal law. In determining whether

a statue contemplated a private right of action, New Mexico Courts have looked to the following three factors:

> (1) Was the statute enacted for the special benefit of a class of which the plaintiff is a member? (2) Is there any indication of legislative intent, explicit or implicit, to create or deny a private remedy? [and] (3) Would a private remedy either frustrate or assist the underlying purpose of the legislative scheme?

Yedidag v. Roswell Clinic Corp., 2015-NMSC-012, ¶ 31, 346 P.3d 1136 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)); *see also Nat'l Trust for Historic Pres. v. City of Albuquerque*, 1994-NMCA-057, ¶¶ 7, 11, 117 N.M. 590, 874 P.2d 798 (listing the *Cort* factors and stating that the first three *Cort* factors, while not irrelevant, do not exclusively determine whether to imply a cause of action). All three factors point to a private right of action pursuant to Section 13-4-14(C).

First, there can be no dispute that, as employees working on a public works project, Plaintiffs were members of a class for whose special benefit the statute was enacted. Indeed, the statute was expressly enacted to determine those employees' wages for the work performed on public works projects such as the Pit renovation.

As to the second and third factors, the legislature expressly allowed a court to award "attorney fees and costs ***to an employee*** adversely affected by a violation of the [PWMWA]" in an action brought "pursuant to" Subsection C, which itself provides that "a contractor, subcontractor, employer or a person acting as a

contractor responsible for the violation ***shall be liable to any affected employee*** for the employee's unpaid wages or fringe benefits." (Emphasis added). By so stating, the Legislature has provided strong evidence that: (1) it contemplated a private right of action, and (2) that such a right of action would promote, rather than frustrate, the legislative scheme.

The provision regarding attorney fees is particularly compelling. For, in other cases where courts had to determine whether a private right of action exists, such a provision allowed the courts to infer that the legislative body intended a private right of action. *E.g. Bloom v. Martin,* 865 F. Supp. 1377, 1384 (N.D. Cal. 1994) (noting that the inclusion of remedies including treble damages and attorneys' fees in one section of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. §§ 2601–2617), but not in another section, allowed the court to infer that Congress intended to create a private right of action in the section providing for those remedies, but not in the other section not containing those remedies); *see also Cannon v. University of Chicago*, 441 U.S. 677, 699-700 (1979).

Moreover, it is difficult to see what the purpose of Subsection D would be if there was no private right of action, because an employee would not have "attorney fees" if he or she had no right to a private right of action. Under bedrock principles of statutory construction, all parts of a statute must be read together to accurately reflect legislative intent, and courts must "read the statute in its entirety

and construe each part in connection with every other part to produce a harmonious whole." *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 14, 121 N.M. 764, 918 P.2d 350. In so doing, a court may not read any provision of the statute in a way that would render another provision of the statute "null or superfluous," *State v. Rivera*, 2004-NMSC-001, ¶ 18, 134 N.M. 768, 82 P.3d 939. Yet, this is exactly what the District Court did in concluding that there was no private right of action under the PWMWA.

II. Nothing in the PWMWA Requires an Employee to Pursue Administrative Remedies Prior to Filing Suit, and the DWS—the Agency Responsible for Administrative Enforcement—Has Adopted Regulations Disavowing any Such Requirement.

As the District Court noted **[RP 492-93]**, nothing in the text of the PWMWA requires an individual employee to seek to have DWS enforce the PWMWA pursuant to Subsections A or B of Section 13-4-14 prior to bringing an individual action pursuant to Subsection C. Indeed, the Legislature has distinguished between the DWS's powers and processes under Subsections A and B, and an individual's right of action under Subsection C (in which case Subsection D allows that individual to recover his or her attorney's fees and costs).

This dual enforcement scheme (public and private) mirrors the scheme in the PWMWA's cousin, the New Mexico Minimum Wage Act. *See* NMSA 1978, § 50-4-26 (2013) (requiring DWS to enforce the act, but recognizing private rights of action and, like the PWMWA, providing for attorney's fees in that case). Given

that the New Mexico Supreme Court has admonished that the PWMWA should be read "broadly to effectuate the intent of the legislature," *Tatsch Construction, Inc.*, 2000-NMSC-030, ¶ 26, this should be the end of the exhaustion inquiry.

However, were there any doubt regarding the lack of an exhaustion requirement, that doubt would be removed by the DWS's implementing regulations. "Although we are not bound by an agency's interpretation of statutes and rules because 'it is the function of the courts to interpret the law,' ... we afford administrative agencies considerable discretion to carry out the purposes of their enabling legislation, ... and we give deference to an agency's interpretation of its own regulations." *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 25, 140 N.M. 464, 143 P.3d 502 (quoted authority omitted).

The section that addresses how DWS will investigate complaints is 11.1.2.15 NMAC, entitled "Procedure for Investigation of Violations." It describes what DWS will do to investigate claimed violations of the PWMWA in order to bring an enforcement action under its authority pursuant to Section 13-4-14(A) & (B). Importantly, 11.1.2.15(A)(2) NMAC provides that "The provisions of this subsection do not affect any worker's right to make a claim through the wage and hour bureau ***or appropriate court*** for payment of prevailing wages and does not diminish the prime's or subcontractor's duty to cooperate with the wage and hour

bureau." (Emphasis added). That is, the regulations recognize that the duty of the DWS to investigate claims and bring actions pursuant to Section 13-4-14(A) & (B) does not in any way limit the employees' ability to bring his or her own action in Court pursuant to Section 13-4-14(C). There is no exhaustion requirement, as the two enforcement mechanisms are wholly separate.

III. Even if, Despite the Language of the PWMWA and the Implementing Regulations, a Court Would Conclude that the DWS Has Primary Jurisdiction over Wage Claims Brought Pursuant to the Statute, that Would not Deprive the District Court of Jurisdiction.

Lastly, the District Court incorrectly determined that Plaintiffs' alleged failure to bring an administrative action prior to this suit was a jurisdictional defect that could be brought by the Court *sua sponte* and at any time. As argued above, the District Court erred in determining (1) that there was no private right of action under the PWMWA, and (2) that Plaintiffs had to first file a claim with DWS prior to any suit. Nonetheless, even if there were some argument that DWS had primary jurisdiction to first hear claimed violations of the PWMWA—despite its own regulations providing to the contrary—that would not deprive the District Court of jurisdiction as the District Court determined.

Pursuant to N.M. Const. Art. VI, § 13, District Courts in New Mexico are courts of general jurisdiction with "original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law...." The District Court's dismissal of the

case without prejudice to file a claim with DWS appeared to be based on the notion that DWS had primary jurisdiction to hear such a complaint. In *State ex rel ENMU Regents v. Baca*, 2008-NMSC-047, ¶ 15 n.1, 144 N.M. 530, 189 P.3d 663, the Supreme Court concluded that such a concern does not deprive a District Court of jurisdiction.

> The doctrine of primary jurisdiction, related to the requirement of exhaustion of administrative remedies, arises when both a court and an administrative agency have concurrent jurisdiction. ... The doctrine is not technically a matter of jurisdiction. ... It is a prudential rule used by courts to allocate between courts and agencies the initial responsibility for resolving a dispute when their jurisdictions overlap. ... It is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. ...

(Quotation marks and quoted authority omitted); *see also McDowell v. Napolitano*, 1995-NMSC-029, ¶ 11, 119 N.M. 696, 895 P.2d 218 ("Under the principle of comity, the court may choose to defer to the administrative agency where the interests of justice are best served by permitting the agency to resolve factual issues within its peculiar expertise."). Because it was not truly a jurisdictional argument, the Supreme Court in *Baca* declined to address the primary jurisdiction claim on appeal, because it had not been argued below.

This understanding of primary jurisdiction is important in two respects. First, if it is a matter of "promoting proper relationships between the courts and administrative agencies" or a "principle of comity" then surely it is relevant that

the administrative agency in question—DWS—has stated that its own investigation of violations under the Act should not "affect any worker's right to make a claim through the wage and hour bureau ***or appropriate court*** for payment of prevailing wages." That being the case, there is no grounds for a district court to disclaim its general jurisdiction to hear alleged violations of the PWMWA.

Second, because it does not raise a jurisdictional question, *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300—which concluded that a court is compelled to consider jurisdiction at any stage of case even if neither party raises the issue—does not apply. Thus, because neither party raised the issue within the timeframe established by the District Court's Rule 16 scheduling order, the District Court erred in dismissing the case on this non-jurisdictional basis. *Cf. Birdo v. Rodriguez*, 1972-NMSC-062, ¶ 11, 84 N.M. 207, 210, 501 P.2d 195 (noting that "dismissal *sua sponte* should be sparingly exercised").

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court **REVERSE** the Decision of the District Court and **REMAND** for further processing of the case consistent with this Court's opinion.

Dated: January 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day March, 2016, I caused a true and correct copy of the foregoing pleading to be mailed, via regular U.S. mail, postage pre-paid and affixed thereto, to the following:

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