IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ALISHA TAFOYA LUCERO,

Plaintiff/Appellee,

v.

Ct. App.No. 35,438
Dist. Ct. No. D-101-CV-2013-03206

NEW MEXICO CORRECTIONS DEPARTMENT,

Defendant/Appellant.

BRIEF OF AMICUS CURIAE NEW MEXICO ASSOCATION OF COUNTIES IN SUPPORT OF DEFENDANT/APPELLANT NEW MEXICO CORRECTIONS DEPARTMENT

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT, DIVISION VI COUNTY OF SANTA FE, STATE OF NEW MEXICO, HONORABLE DAVID K. THOMSON PRESIDING

Submitted by:

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STATEMENT OF COMPLIANCE

This brief was prepared using a proportionally-spaced type style or typeface, Times New Roman, and the body of the brief contains 2,284 words, as indicated by Microsoft Office Word version 2010.

I. STATEMENT OF INTEREST

The New Mexico Association of Counties ("NMAC" or "the Association") is a non-profit corporation registered in the State of New Mexico, that exists to advance the common goals among the counties and officials of this State in matters that affect the rights and liabilities of counties. At present, all 33 counties in New Mexico are dues-paying members of NMAC, and this amicus brief is submitted with the approval and authorization of the NMAC Board of Directors which governs the Association. NMAC submits this amicus brief in support of Defendant-Appellant New Mexico Corrections Department's position because NMAC is concerned that the trial court's erroneous decision impermissibly defrays the blanket of sovereign immunity that protects the state and its political subdivisions, and subjects governmental bodies to potential lawsuits for which the legislature did not intend to waive immunity.

II. SUMMARY OF PROCEEDINGS

NMAC adopts and incorporates by reference the Summary of Proceedings outlined in Defendant-Appellant New Mexico Corrections Department's Brief in Chief at pages 1-2.

II. SUMMARY OF ARGUMENT

In its Order granting Defendant-Appellant's Rule 12-503 Petition for Writ of Error, the Court directed the parties to brief "...whether the governmental

immunity at issue in this case satisfies the requirements of the collateral order doctrine; specifically, whether the immunity at issue should be construed as immunity from suit or as immunity from liability." RP 304. NMAC relies upon Defendant-Appellant New Mexico Corrections Department's able treatment of the collateral order issue in its Brief-in-Chief, and will not attempt to echo or supplement NMCD's arguments on that score. Rather, NMAC focuses its *amicus curaie* efforts here in arguing the trial court's reasoning was erroneous and that the immunity at issue should be construed as immunity from suit, and not just from liability, because the Court's determination of that issue will directly and significantly impact the counties. The 33 counties employ approximately 10,500 people. To confer a potential cause of action upon 10,000-plus employees against counties[1] where no such conferral was intended by the state legislature is to subject the counties to unwarranted exposure, expense and effort.

Because the district court's reasoning and resulting opinion are fundamentally flawed, the Court should reverse the decision below.

III. ARGUMENT AND AUTHORITIES

A. The Trial Court's Decision Is Based Upon a Faulty Premise of Explicit Waiver.

[1] Although the law is entitled "Fair Pay for Women Act," NMSA 1978, §§ 28-23-1 (2013), by its terms, the cause of action is not limited to only women, but to "any individual employed by an employer." NMSA 1978, §§ 28-23-2 (D)(2013).

The trial court's decision hinges upon a premise that because the legislature incorporated the Human Rights Act in drafting the Fair Pay for Women Act, the definition of "employer" in the HRA—which expressly equates the state as a "person" within its meaning—has been overlain onto the FPWA which does not expressly include the state within the meaning of "employer." Indeed, in the Order Denying Defendant's Motion to Dismiss on Tort Claim Immunity and Granting Immunity Protection to Punitive Damages Claim, RP 210-22, the trial court unequivocally signals the basis for its rationale in the wording of the section heading: "Fair Pay for Women Act Waives Immunity, Explicit Waiver in NMSA 1978, §§ 28-23-4A(2)." RP 210-22, p.7. Section 28-23-4A(2) of the Fair Pay for Women Act allows an aggrieved person to "seek relief under the Human Rights Act [NMSA 1978, §§ 28-1-1] pursuant to the process set out in Sections NMSA 1978, §§ 28-1-10 through 28-1-13." In the trial court's view, then, by allowing a means of enforcement of the FPWA through the mechanism provided by the HRA, the FPWA's definition of "employer" is transformed into HRA's more expansive definition of "employer." This reasoning flies directly in the face of long-standing concepts of sovereign immunity waiver and, if left to stand, opens a dangerous gate to allowing backdoor claims against the State and its political subdivisions.

It is well-established that the first rule of statutory construction is that the plain language of a statue is the primary indicator of legislative intent. *Bishop v.*

Evangelical Good Samaritan Soc'y, 2009-NMSC-036, 146 N.M. 473, 212 P.2d 361. It is equally well-established that the court will not read into a statute or ordinance language which is not there. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, 126 N.M. 413, 970 P.2d 599. Also firmly rooted is the proposition that had the legislature wanted to subject governmental entities to suit under a particular statute, it knows full well how to do so. *Stansell v. N.M. Lottery,* 2009-NMCA-062, 147 N.M. 417, 211 P.3d 214. In the face of these bedrock principles, the trial court's creative incorporation of the HRA's definition of "employer" into the FPWA's construct lacks the substantive strength to hold up against scrutiny. The trial court's self-professed "incorporation" of the HRA's definition of "employer" into the FPWA is a patent example of reading into a statute that which is not there—one of the foremost prohibitions in statutory construction. *Burroughs v. Bd. Of County Comm'rs,* 88 N.M. 303, 306, 1975-NMSC-051, 540 P.2d 233 (the court will not read into a statute or ordinance language which is not there).

The trial court's reliance on *Luboyeski v. Hill*, 1994-NMSC-079, 94 N.M. -032, 872 P.2d 753, in support of its rationale for adopting the HRA's definition of "employer" in FPWA actions, is misplaced and ignores a critical distinction in the *Luboyeski* court's analysis. In finding that the New Mexico Tort Claims Act does not trump the express waiver of sovereign immunity contained in the New Mexico

Human Rights Act, the *Luboyeski* court relied on the very concept that the trial court has ignored here: to wit, the HRA contains express language waiving immunity, thereby clearly evincing the legislature's intent.

As noted by NMCD in its Motion to Dismiss below, the Minimum Wage Act, NMSA 1978, §§ 50-4-19 to -4-30 (2013), the Whistleblower Protection Act, NMSA 1978, §§ 10-16C-1 to -16C-6 (2013), the Tort Claims Act NMSA 1978 §§ 41-4-1 to -4-29 (2013), and indeed the Human Rights Act itself, NMSA 1978 §§ 28-1-2 to -1-14 (2000), are all examples of express legislative intent to waive sovereign immunity and include the state and its political subdivisions as appropriate targets of a claim under those Acts. Absent such an express waiver in the Fair Pay for Women Act, the trial court's determination of a waiver involves a stretch of logic that this Court should decline to make.

B. The Immunity At Issue is Immunity Against Suit, Not Immunity From Liability.

NMCD asserts that because the Fair Pay for Women Act does not expressly waive sovereign immunity, it does not apply to state agencies or governmental entities that otherwise are entitled to immunity. RP 98-109. . By declining to include express immunity waiver language in a statute creating a cause of action, it is understood that the legislature did not intend said cause of action to apply to the state. That is to say, the court does not acquire jurisdiction over state agencies in FPWA cases because the legislature did not see fit to confer jurisdiction in such

causes of action. *See Spray v. City of Albuquerque,* 94 N.M. 199, 201, 608 P.2d 511, 513 (1980)(the issue of governmental immunity is jurisdictional in nature). The New Mexico Association of Counties joins NMCD in urging the Court to find that the immunity at issue here is immunity against suit, and not merely immunity against liability.

As precedential cases make clear, the distinction between immunity from suit and immunity from liability is a practical one. To be immune from suit is to be spared the costly and time-consuming burdens of litigation, the benefits of which is effectively lost if such a case is erroneously permitted to proceed through trial. *See Hamaatsa, Inc. v. Pueblo of San Felipe*, 2016 N.M. LEXIS 148; *see also Handmaker v. Henney*, 128 N.M. 328, 333, 1999-NMSC-043 ¶13 (immunity from suit is an entitlement not to stand trial or face the other burdens of litigation); *see also Campos de Suenos, Ltd. V. County of Bernalillo*, 2001 NMCA-043, ¶ 14, 130 N.M. 563, 28 P.2d 1104 (immunity from suit relieves the governmental entity from the burdens of a trial on the merits).

In *State ex rel. State Highway Comm'n v. Grants*, 69 N.M. 145, 148, 1961-NMSC-133, 384 P.2d 853, the New Mexico Supreme Court, citing Justice Holmes in *Kawananakoa v. Polyblank,* 205 U.S. 349, 27 S.Ct. 526, 527, 51 L.Ed. 834, stated:

> Both legally and practically we consider the state's immunity from suit too important a matter to be trifeld with. A

> sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends...[t]he Legislature, not to mention the courts, should proceed slowly and with caution in subjecting the state itself to the exigencies of litigation." (internal citation omitted)

In the analogous context of qualified immunity in civil rights actions, this Court noted the importance of immunity from suit because "...exposure to civil rights suits may result in the distraction of officials from their governmental duties, inhibition of discretionary action and deterrence of able people from public service." *Starko, Inc. v. Gallegos,* 140 N.M. 136, 141, 2006-NMCA-085, 140 P.3d 1085.

To be sure, the burdens of litigation are a heavy load upon governmental agencies and its employees. As the *Starko* court recognized, being involved in litigation is a distraction from regular governmental duties, and indeed, responding to discovery requests and preparing and appearing for depositions, settlement conferences and at trial can oftentimes consume an entire department's resources for an extensive period of time. By way of example, in the two-year period from January 1, 2013 to December 31, 2015, there were 262 lawsuits brought against the county members of NMAC's Multi-Line and Law Enforcement Pools, at a

resulting cost of just over $22 million[2] in settlements, judgments, costs and attorneys fees. While NMAC and the counties recognize and fully accept their responsibilities in engaging in the judicial process in those instances where the legislature has deemed it appropriate that they be subject to suit, absent a clear and unequivocal expression of such legislative intent, the public treasury and the resources of governmental entities should be spared. The lack of clear waiver of sovereign immunity in the Fair Pay for Women Act must mean that jurisdiction over governmental entities was never created, and as such, the State and its political subdivisions are immune from suit under the FPWA.

IV. CONCLUSION

Because the district court improperly found that the Fair Pay for Women Act, while itself silent on a waiver of sovereign immunity, incorporated the definition of "employer" from the Human Rights Act which expressly includes the State, this Court should reverse the decision of the district court and find that the FWPA does not apply to the State and its political subdivisions.

[2] Several of the cases filed in this period are still pending and open, so the $22 million dollar figure is certain to increase.

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2016, pursuant to Rule 12-504(E) NMRA, New Mexico Association of Counties served a true and correct copy of the foregoing pleading by electronic mail on the following:

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