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IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

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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.

DEFENDANT-APPELLANT NEW MEXICO CORRECTIONS DEPARTMENT'S REPLY BRIEF

ORAL ARGUMENT HAS BEEN REQUESTED

Ellen S. Casey
Jaclyn M. McLean
HINKLE SHANOR LLP
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
Telephone: (505) 982-4554
Facsimile: (505) 982-8623
Attorneys for Defendant New Mexico Corrections Department

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I. INTRODUCTION

In its Brief in Chief, Defendant-Appellant, New Mexico Corrections Department ("NMCD"), established:

1. That the Fair Pay for Women Act[1] ("FPWA") contains no language demonstrating a legislative intent to create a right of action by a state employee against the State of New Mexico or its executive agencies;

2. That the FPWA contains no language demonstrating a legislative intent to waive the State's sovereign immunity to unconsented suit for money damages;

3. That the New Mexico Human Rights Act[2] ("NMHRA") in contrast to the FPWA, expressly creates a cause of action against the State by including the phrase " . . . the state and all of its political subdivisions," within the definition of "person" (employer) who may be sued for violations of the NMHRA;

4. That the NMHRA, in contrast to the FPWA, contains an express waiver of the State's sovereign immunity in NMSA 1978, Section 28-1-13(D) ("[i]n any action or proceeding under [the NMHRA] . . . the state shall be liable the same as a private person.");

5. That the state's Legislature is fully aware of how to create rights of action against state employers and how to waive the State's sovereign immunity and

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[1] NMSA 1978, §§ 28-23-1 to -6 (2013).
[2] NMSA 1978, §§ 28-1-1 to -15.

deliberately chose not to create such a right of action or to waive sovereign immunity in the FPWA;

6. That the trial court erred when it substituted the NMHRA's language defining the State as a "person" subject to suit and waiving the State's sovereign immunity for the total lack of any such expression of legislative intent in these areas in the FPWA;

7. That the trial court erred when it concluded that the Tort Claims Act and the New Mexico Human Rights Act provided a waiver of sovereign immunity for FPWA claims missing in the FPWA, itself.

In their appellate briefing, Plaintiff and Amici raise wholly new arguments that are diametrically opposed to Plaintiff's position in the trial court, assert that the trial court's reasoning on the immunity analysis was wrong and urge the Court to ignore the rules of statutory construction and substitute Amici's vision of "right" public policy for the plain language of the statute at issue. *See Mendoza v. Tamaya Enterprises, Inc.*, 2011-NMSC-030, ¶ 11, 150 N.M. 258 (when reviewing a motion to dismiss for failure to state a claim that hinges upon the construction or on statute, the Court "first look[s] to the plain language of the statute, giving words their ordinary meaning, unless the legislature indicates a different one was intended").

II. ARGUMENT

A. Plaintiff had not demonstrated the existence of a waiver of the State's sovereign immunity to FPWA claims.

In her briefing, Plaintiff[3] provides only cursory support for the trial court's determination that the FPWA[4] should be rewritten by the Court to include the NMHRA's express waiver of the State's sovereign immunity [Answer Brief ("AB") 13-14]; [Brief of Southwest Women's Law Center as Amici Curiae ("SWLC"), 6-7]. After concluding, without authority of any kind, that the trial court was justified in substituting the language of waiver[5] appearing in the NMHRA for the FPWA's legislative silence on this issue, the Plaintiff blithely reverses course and her support for the trial court's decision and jumps on Amici's band wagon. On appeal, Plaintiff disassociates herself from the trial court's conflation of the NMHRA and the FPWA into a single immunity waiving statute [AB 10-13].

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[3] Amici do not support, at all, Plaintiff's and the trial court's original theory that the Legislative decision to expressly waive governmental immunity in the NMHRA can be substituted for legislative silence on this matter in the FPWA. Rather, Amici acknowledges that the FPWA does not contain any waiver language [SWLC 7].

[4] [RP 214-219].

[5] The trial court acknowledged, spurred on by Plaintiff below, that the State could not be sued for violations of the FPWA without a waiver of the State's sovereign immunity [RP 213, 216-218]. Amici's support for the trial court's analysis consists of one sentence, "adopting" Plaintiff's halfhearted defense of the court's decision [SWLC 1].

After repeating her own (and the trial court's) analysis that Section 41-4-21 of the New Mexico Tort Claims Act[6] could supply the waiver of sovereign immunity missing from the FPWA [AB 14-16], Plaintiff argues, "conversely," that Section 41-4-21 is *not* actually a waiver of immunity but rather a provision of the TCA excluding employment[7] claims from the ambit of claims for which immunity was restored by the TCA [AB 11-12].

Plaintiff thus, both re-asserts and abandons her original argument that Section 41-4-21[8] should be interpreted as a waiver of the NMCD's immunity to suit on a statute [the FPWA] enacted some thirty-seven (37) years *after* the Legislature originally enacted this section of the TCA [RP 116]. Plaintiff's argument, that the FPWA was a "personnel act" or a "provision of law governing the employer-employee relationship" for which Section 41-4-21 created a special immunity waiver, [RP 116], [AB 11-14], was expressly rejected in *Rubio v. Carlsbad Mun. Sch. Dist.,* 1987-NMCA-127, ¶ 12, 106 N.M. 446, and by the Federal Court of

[6] NMSA 1978, §§ 41-4-1 to -27.
[7] Amici, too, cites Section 41-4-21 for their startling and wholly unsupported assertion that, "...the Legislature chose not to assert immunity for employment matters..." *[SWLC 7]*.
[8] Section 41-4-21 states: "[t]he provisions of the Tort Claims Act shall not affect the provisions of any personnel act, any rules or regulations issued therein or any other provision of law governing the employer-employee relationship."

Appeals construing this portion of the TCA, in *Regents of Univ. of N.M. v. Knight* 116 Fed. Appx. 258, 261 (Fed. Cir. 2004).

In *Rubio*, this Court held that Section 41-4-21 does not provide a waiver of the State's immunity to any common law or statutory claim, be it "employment related" or otherwise. The Court explained that the TCA was intended to, and does provide governmental entities and public employees immunity from all tort liability *except as waived under* Sections 41–4–5 to –12. Absent a waiver under these sections, the State's immunity to suit for negligent hiring and any other employment matters is preserved. *See Rubio*, 1987-NMCA-127, ¶ 12; *see also Silva v. Town of Springer*, 1996-NMCA-022, ¶ 27, 121 N.M. 428 (affirming grant of summary judgment to defendant on plaintiff's tort claim for wrongful discharge because it is not a specifically recognized waiver of the TCA re-imposition of sovereign immunity).

The *Rubio* Court explained that, in enacting Section 41–4–21, the Legislature had not intended to subject the Carlsbad Municipal School District to suit for claims of alleged negligent hiring. *See Rubio*, 1987-NMCA-127, ¶ 12. Instead the section "simply mean[t] that *if a waiver of immunity exists* that would entitle an injured party to bring a claim, the Tort Claims Act [was not to] affect personnel acts, rules or regulations, or other provisions of law governing the employer-employee relationship." *Id.*

In *Regents of Univ. of N.M. v. Knight*, the Federal Circuit Court of Appeals rejected a similar argument regarding Section 41-4-21 and noted that Section 41–4–21 "was designed to preserve employment relations, not to provide a waiver of immunity." *Knight*, 116 Fed. Appx. at 261 (quoting *Rubio*).

In her Section 41-4-21 as waiver of immunity argument, Plaintiff cites to *Garcia v. Purcell* No. 94-220-M Civil, 1995 US Dist. Lexis 2199 at * 28 (D.N.M. Sept. 7, 1995), for the proposition that a public employer may be sued under the Tort Claims Act for retaliatory discharge pursuant to Section 41-4-21 [AB 14]. While the relevance of the federal district court's misinterpretation of Section 41-4-21 to the issues of legislative intent and waiver *in the FPWA* is attenuated, at best, it is certain that *Garcia's* interpretation of Section 41-4-21 has long been rejected by New Mexico state and the federal courts. *See, e.g. Rubio*, 1987-NMCA-127; *Knight*, 116 Fed. Appx. 258. This Court expressly determined, after *Garcia*, that the State may not be sued for the tort of wrongful or retaliatory discharge[9] because such claims are

[9] In 2010, the Legislature enacted the New Mexico Whistleblower Protection Act, NMSA 1978, §§ 10-16C-1 to -6 (2010), which expressly creates a cause of action against "public employers" who retaliate against "public employees" for "communicating" "fraud, waste and abuse." *See Wills v. Bd. of Regents of Univ. of N.M.*, 2015-NMCA-105, ¶ 14, 357, P.3d 453. The WPA prohibits not only retaliatory discharge but all adverse employment actions motivated by retaliatory animus tied to whistleblowing. *See* NMSA 1978, § 10-16C-3.

not within the waivers provided in Sections 41-4-5 to -12 *See Silva*, 1996-NMCA-022, ¶ 27.

Plaintiff's new argument, adopted wholesale from Amici – that Section 41-4-21 somehow negates the Tort Claims' Act's re-imposition of sovereign immunity as to the FPWA [AB 11-12], is equally unsupported by any authority on it is at odds with the holdings in *Rubio*, *Knight* and *Silva* where New Mexico courts have repeatedly held that public employers are immunized from suits involving "employment matters" *by the TCA.* Most importantly, Section 41-4-21 neither answers nor even addresses the question of whether the FPWA waives the State's sovereign immunity to suit for claims created by that Act. Neither, Plaintiff nor Amici make any effort to address or counter NMCD's authority holding that since the re-imposition of sovereign immunity by the TCA and by Section 37-1-23 in the contract setting, this Court and the New Mexico Supreme Court have routinely determined the question of whether governmental immunity is waived for particular statutory and common law causes of action (both in and out of the employment realm), without mentioning § 41-4-21. *See e.g., Luboyeski v. Hill,* 1994-NMSC-079, 117 N.M. 380; *Stansell v. N.M. Lottery*, 2009-NMCA-062, ¶¶ 11-12, 146 N.M. 417.

After arguing § 41-4-21 as a bar to state sovereign immunity for statutory employment claims, Plaintiff and Amici cite to *Hicks v. State of N.M.,* 1975-NMSC-

056, 88 N.M. 588, for the proposition that "*Hicks* and its progeny require the State to expressly assert immunity from statutorily created causes of action…" because it "abolished" all sovereign immunity [SWLC 6].

Plaintiff's alternative argument that no waiver of sovereign immunity is needed in statutes creating new causes of action after the decision in *Hicks*, is diametrically opposed to her "waiver of sovereign immunity for FPWA claims is necessary" argument made below, adopted by the trial court and made again in her appellate briefing [AB 13-16], [RP 116, 216-19].

Plaintiff's new argument that governmental sovereign immunity to newly created statutory claims was "swept away" in *Hicks* and, thus, need not be legislatively waived, is not supported by the case law cited, the New Mexico appellate courts' holdings on this issue or by the legislative practice of specifying when the laws enacted since the *Hicks* decision do subject the State to suit.

As an initial matter, the New Mexico Supreme Court held in *Hicks* that, "[C]ommon law sovereign immunity [being a judge made immunity] may no longer be interposed as a defense by the state, or any of its political subdivisions, in tort actions." *Hicks*, 1975-NMSC-056, ¶ 9. Plaintiff's argument, essentially ignores the import of the legislative re-imposition of the sovereign immunity abrogated in *Hicks*. While *dicta* in two cases cited by Amici and Plaintiff may seem to imply a greater abrogation of sovereign immunity than was actually accomplished in *Hicks*, *Hick's*

"progeny" clearly do not support Plaintiff's new position that the State may be sued for money damages under the FPWA despite its total lack of any waiver of immunity. This interpretation is unsupported by any controlling authority and runs counter to the law of sovereign immunity, as actually applied since the Tort Claims Act and NMSA 1978 § 37-1-23 reinstated the sovereign immunity abrogated by *Hicks*. *See e.g., Smith v. Village of Corrales*, 1985-NMCA-121, ¶ 5, 103 N.M. 734; *Hydro Conduit Corp. v. Kemble*, 1990-NMSC-061, ¶¶ 16, 17, 110 N.M. 173.

Plaintiff's and Amici's extremely truncated analysis of the impact of *Hicks* both overstates the breadth of its abrogation and understates the Legislature's crucial reinstatement of sovereign immunity in the TCA and Section 37-1-23, one year after the *Hicks* decision. Plaintiff and Amici want it both ways -- *Hicks* abolished all sovereign immunity except as legislatively re-imposed -- but the TCA, only restored sovereign immunity, "under certain [undefined] circumstance," [AB 11], or "partially" "for tort liability and contract liability" [SWLC 7]. And then, the argument goes, Section 41-4-21 expressly barred the State from asserting sovereign immunity for statutorily created employment actions [AB 21] [SWLC 7].

The TCA was enacted in response to the judicial abrogation of sovereign immunity and its intent was to reestablish whatever governmental immunity had been abrogated in *Hicks v. Bd. of Cnty. Cmmrs. v. Risk Management Division*, 1995-NMSC-046, ¶ 11, 120 N.M. 178 ("The Tort Claims Act was enacted in response to

the judicial abrogation of sovereign immunity in *Hicks*...The *basic intent of the Act was to reestablish governmental immunity*, while creating specific exemptions for which the government could be sued for tort liability") (emphasis added); *Methola v. Cnty. of Eddy*, 1980-NMSC-145, ¶ 24, 95 N.M. 329 (stating "the *basic concept in the original Act was to create sovereign immunity* which had been abolished in *Hicks*..."); *Luboyeski*, 1994-NMSC-079, ¶ 8 ("As is well known in this state, the Tort Claims Act was enacted in 1976... in response to this Court's abrogation of sovereign immunity in *Hicks*...").

In the same year the Legislature enacted the TCA, it also enacted NMSA 1978, Section 37-1-23 (1976), which re-imposed governmental immunity for actions based on contract and expressly provided that only claims based on "written contracts" could be brought against the State. *See* § 37-1-23; *see also Hydro Conduit* (discussing the State's limited waiver of its existing sovereign immunity under Section 37-1-23); *Trujillo v. Gonzales,* 1987-NMSC-119, ¶ 9, 106 N.M. 620 (same).

After the Legislature's statutory response to *Hicks*, the State, its agencies, and its employees are immune to suit absent a legislative waiver. In addition to the TCA and the contract statute, the Legislature has also made it clear when, and under what circumstances, the State may be sued under the New Mexico Human Rights Act ("NMHRA"), NMSA 1978, Sections 28-1-2 to -14 (2000), the New Mexico Minimum Wage Act ("MWA"), NMSA 1978, Sections 50-4-21, -22 (2007), the

Whistleblower Protection Act ("WPA"),[10] NMSA 1978, Sections 10-16-1 to -6 (2010), and the Antitrust Act, NMSA 1978 Sections 57-1-1.2, -6, -7.[11]

In enacting the NMHRA, the Legislature clearly expressed its intent to waive the State's sovereign immunity when it declared that "*the state shall be liable the same as a private person*" and included "the state and all of its political subdivisions" within its definition of "person." *See* NMSA 1978, § 28-1-13(D) (2005); NMSA 1978, § 28-1-2(A) (2007); s*ee Luboyeski*, 1994-NMSC-079, ¶¶ 10, 14-15, 17 (distinguishing the NMHRA from other state statutes not providing an express waiver of sovereign immunity and holding "that sovereign immunity has been waived by the Human Rights Act *to the extent needed to permit recovery under the Act against the state* and its political subdivisions") (emphasis added).

In *Luboyeski*, the Supreme Court rejected the Santa Fe Public School's argument that the exclusive remedy provision of the TCA[12] and the lack of an express waiver of immunity for discrimination claims *in the TCA*, precluded plaintiff's claims for sexual harassment against the school district. In its ruling, the

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[10] The WPA defines "employer" to include any department, agency, office, political subdivision of the state, or entity of the state as well as an "officer" of such entities. *See* NMSA 1978 § 10-16C-2(C).
[11] NMSA §§ 57-1-1 to -15 (1978).
[12] The Court believed the exclusive remedy provision could be read to mean that Sections 41-4-5 to -12 "provide a complete list of exceptions to an otherwise blanket sovereign immunity" but that the NMHRA's express statutory waiver of immunity necessarily trumped such a "blanket" waiver.

Supreme Court, noted that the NMHRA's express waiver of sovereign immunity ("... the state shall be liable the same as a private person") had been added to the NMHRA in 1983, *after* passage of the TCA and after the amendments to the TCA.

> We note that the language of the exclusive remedy provision of the Tort Claims Act, which states that the Act provides the exclusive remedy *"for any tort for which immunity has been waived under the Tort Claims Act"* (emphasis in original) *does not foreclose the possibility that the legislature also waived immunity under another act, and we conclude that this is exactly what happened. Section 28-1-13(D) constituted and constitutes a waiver of sovereign immunity* for liability imposed on public entities by the Human Rights Commission, or by a district court... for violations of the Human Rights Act.

Id. ¶ 9. (emphasis added).

In its decision, the *Luboyeski* court distinguished *Begay v. State of N.M.,* 1985-NMCA-117, 104 N.M. 483. *Begay* involved an attempted suit against the state medical examiner for wrongful performance of an autopsy in violation of Section 24-12-4 of the Public Health Act. *See Luboyeski*, 1994-NMSC-079, ¶ 10. In ruling[13] that the medical examiner could not be sued for damages under the bar of the TCA, the *Begay* court noted the crucial difference between the NMHRA and Section 24-12-4:

> ...Section 24-12-4 did not provide an express—or for that matter—an implied – waiver of immunity...there was no language in the section that could be construed as a waiver of sovereign immunity.

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[13] "[E]ven if Section 24-12-4 does create a private cause of action, *it does not override the medical investigator's grant of immunity* under the Tort Claims Act." *Begay*, 1985-NMCA-117, ¶ 13 (emphasis added).

Begay, 1985-NMCA-117, ¶ 13.

The legislature and the courts of this state have long understood that the purpose of the TCA was to create, anew, any sovereign immunity abrogated in *Hicks*. Since the legislature re-imposed sovereign immunity "in all its forms" in the TCA and waived that immunity as to certain torts, it has been the law in New Mexico that in the absence of a statutory waiver of sovereign immunity, the State may not be sued for money damages. *See Id.*

Neither Plaintiff nor Amici address the *Luboyeski* court's holding that the statute on which plaintiff wishes to sue the state must contain a waiver of immunity for such action to go forward. Instead, both attempt to combine a misinterpretation of Section 41-4-21[14] of the TCA and *dicta* from cases concerning equitable relief, for the proposition that the legislature must include language re-imposing the State's governmental immunity each time it creates a new statutory cause of action [AB 13], [SWLC 6-7].

In *Hanosh v. State of N.M., ex rel., Gary K. King*, 2009-NMSC-047, 147 N.M. 87, various private plaintiffs filed a complaint in district court seeking declaratory judgement and injunctive relief against the New Mexico Environmental

[14] Amici's assertion that sovereign immunity must be re-imposed in each statute which might subject an "employer" to monetary damages also relies on this wholly unsupported interpretation of Section 41-4-21 [SWLC 7].

Improvement Board ("EIB"). Plaintiffs argued that the EIB lacked statutory authority under New Mexico law to promulgate certain regulations relating to auto emissions. The Court of Appeals reversed the trial court's dismissal of the action and held that plaintiffs could raise a purely legal challenge to EIB's statutory authority by way of a declaratory judgement action against EIB. *Id.* ¶ 3. The Supreme Court granted certiorari, affirmed the court of appeals' determination[15] and remanded the case. Having done so, the Supreme Court wrote to address the issue of common law sovereign immunity and its impact on declaratory actions. The Court stated that the EIB "is not immune from this *declaratory judgment action*, with or without its consent." *Id.* ¶ 5. The Court then embarked upon a discussion of the differences between constitutional sovereign immunity and common law sovereign immunity, largely in the context of equitable relief. *Id.* ¶¶ 6-10. Citing to *NARAL v. Johnson,* 1999-NMSC-005, 126 N.M. 788, the Court noted the long established rule that common law sovereign immunity did not prevent the state from being sued for declaratory relief for its alleged failure to comply with state law because declaratory judgment actions are permitted, with or without the state's consent, "where mandamus would otherwise lie." *Id.* ¶ 11; *see also Bd. of Cnty. Commrs.*, 1995-NMSC-046, ¶ 11 (noting that traditionally, mandamus actions could

[15] "We agree that *Smith* authorizes the use of declaratory judgment in this instance to raise a purely legal challenge to EIB's statutory authority..." *Id.* ¶ 4.

be brought against governmental officials requiring them to perform their duties "regardless of whether the government enjoyed sovereign immunity because such actions are not actions against the state."). The *Hanosh* court cited to *Torrance Cnty. Mental Health Program, Inc. v. N.M. Health and Env't Dep't* for the proposition that *Hicks* "generally abolished the common law doctrine of sovereign immunity in all of its ramifications *whether in tort or in contract or otherwise*, except as implemented by statute or as might be otherwise interposed by judicial decision for sound policy reasons." *Hanosh*, 2009-NMSC-047, ¶ 10 (emphasis added). *Torrance*, a contract case, held that legislative silence on the state's liability for punitive damages in the statute (Section 37-1-23) "reinstat[ing] sovereign immunity" for contract claims against the state could not be read to make the state liable for punitive damages, particularly, in light of the express re-imposition of immunity[16] for such damages in the TCA. *Torrance*, 1992-NMSC-026, ¶ 16. The *Torrance* court rejected Plaintiff's and Amici's argument herein, that the state could be sued for any cause of action or damages unless the Legislature acted to expressly bar the claims or damages in the statute creating the course of action. *Id.* ¶ 17. Neither *Torrance* nor *Hanosh* support Amici's argument that legislative silence

[16] In this case, of course, the trial court correctly determined that, after *Torrance*, the plaintiff's punitive damages claim, though expressly included in the FPWA, must be dismissed, in the absence of an express waiver of the state's immunity to punitive damages [RP 12]. Plaintiff has not challenged this decision.

equals a waiver of immunity or that in the absence of a declaration of intent to impose sovereign immunity, the state may be sued the same as any private party. Certainly, the legislature did not believe post-*Hicks* and post- the re-imposition of sovereign immunity in the TCA and Section 37-1-23, that the state would be subject to suit in the absence of a legislative assertion of sovereign immunity. Such a theory is wholly at odds with the routine inclusion of legislative waivers of immunity in statutes creating new causes of action, such as the NMHRA and the Minimum Wage Act.[17]

B. Neither Plaintiff nor Amici identify any expression of a legislative intent to create a new cause of action against the State in the language of the FPWA.

The FPWA's lack of any expression of intent to include the State in its definition of "person" or "employer" is a related but separate ground for overturning the trial court's determination. The absence of any reference to the State, state agencies, or public employees as potentially liable parties within a statute's definitional or jurisdictional sections has been interpreted by New Mexico's appellate courts and the United States Supreme Court as an indication that the Legislature did not intend to subject the State to suit under a particular statute. *See, e.g., Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780

[17] NMSA 1978, §§ 50-4-19 to -30.

(2000) (recognizing the "longstanding interpretive presumption that 'person' does not include the sovereign"); *Stansell*, 2009-NMCA-062, ¶¶ 11-12 (dismissing an Unfair Practices Act claim against the New Mexico Lottery on immunity grounds because government entities are not expressly included within the UPA's definition of a "person" subject to suit); *Cedrins v. Santa Fe Community College,* No. 30,543, mem. op., 2010 WL 4923952 (N.M. Ct. App. 2010) (affirming dismissal of plaintiff's claim against Santa Fe Community College under the Unfair Practices Act,[18] because state entities are not defined as "persons" under the Act); *Lucero v. Richardson & Richardson, Inc.*, 2002-NMCA-013, ¶ 11, 131 N.M. 522 ("[A]bsent express words to the contrary, neither the state nor its subdivisions" should be "included within general words of a statute."); *Flores v. Herrera,* No. S-1-SC-35286, 2016 WL 4409940, ¶ 11 (N.M. Aug. 18, 2016) (holding that where the text of a statute, including its definition of "person," provides no indication that the Legislature intended to create a personal-capacity suit against a public officer, defendant was entitled to dismissal pursuant to Rule 12(B)(6)).

[18] NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009) ("UPA").

In *Stansell*, the New Mexico Court of Appeals examined whether the New Mexico Lottery[19] was a "person"[20] subject to suit under the UPA.[21] Despite the UPA's expansive definition of "person," the Court of Appeals held that the absence of any reference to the State, its agencies, or political subdivisions coupled with the New Mexico Lottery's status as a governmental instrumentality under NMSA 1978, Section 6–24–5(A), mandated the conclusion that the Legislature *did not* intend for the UPA to apply to governmental entities. *Stansell*, 2009-NMCA-062, ¶¶ 11-12. The *Cedrins* court noted that had the Legislature wanted to subject government entities to suit under the UPA it could have done so and, thus, the absence of any reference to the State or governmental entities within the UPA precluded the court from allowing such claims. *Id.* ¶ 15; s*ee also Union Gas Co. v N.M. Pub. Serv. Comm'n*, 1971-NMSC-035, ¶ 7, 82 N.M. 405 ("When the Legislature has wanted

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[19] The New Mexico Lottery is a public body that is authorized to function like a corporate entity but is still considered a governmental entity. *Stansell*, 2009-NMCA-062, ¶¶ 11-12; *see also* NMSA 1978, § 6–24–5(A) ("There is created a public body, politic and corporate, separate and apart from the state, constituting a governmental instrumentality to be known as the 'New Mexico lottery authority'".).
[20] S*ee* NMSA 1978, § 57-12-2 (A) (2009) (defining a "person" as "natural persons, corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures or syndicates").
[21] The Unfair Practices Act, Section 57-12-1 *et. seq*. does not, of course, include any words or phrases re-imposing the state's sovereign immunity or that of any other governmental actors.

to include...governmental bodies in its statutes, it has known how to do so")[22] (cited in *Stansell*, 2009-NMCA-062, ¶ 12), *overruled on other grounds by De Vargas Sav. and Loan Ass'n v. Campbell*, 1975-NMSC-026, 87 N.M. 469.

The Minimum Wage Act[23] ("MWA") is another example of an express and evolving legislative determination on whether and under what circumstances the state and its political subdivisions are within the statutory definition of "employer" and, thereby, subject to suit. The MWA, as originally enacted, defined an "employer" as:

> ...any individual, partnership, association, corporation, business trust, legal representative or any organized group of persons employing one or more employees at any one time, acting directly or indirectly in the interest of an employer in relation to any employee, but shall not include the United States, *the state or any political subdivision thereof*[.][24]

The Legislature amended this definition in 2007,[25] and "employer" is now defined to include the *state or any political subdivision of the state"*[26] only when an employee is suing for minimum wage violations under Section 50-4-22(A). *See* NMSA 1978, § 50-4-21(B)(3) (2008).

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[22] NMSA 1978, § 57-1-1.2 (defining "person" to include "governmental or other legal entity").
[23] NMSA 1978, §§ 50-4-19 to -30 (1955, as amended through 2007).
[24] Section 50-4-20 (B) (1955) (emphasis added).
[25] The amendment became effective in 2008.
[26] Section 50-4-21(B) (2008) (emphasis added).

The MWA also expressly includes within its universe of plaintiff-employees, "an individual employed by the state or any political subdivision of the state", suing the governmental employer for minimum wage violations. *See* NMSA 1978, § 50-4-21(C)(3) (2008).

The Legislature's enactment of amendments to the MWA clearly spell out when the State or its agencies qualify as "employers" and when "employees" include state employees able to sue their state employers for certain violations of the Act. This legislative creation of a limited action against the state stands in sharp contrast to the legislative silence regarding the state as "employer" subject to suit under the Fair Pay for Women Act.

The Legislature's choice of language in the FPWA compels the conclusion that the Legislature did not intend to include the State or its agencies in the universe of potential defendants under the FPWA and that the Act, unlike the NMHRA, the Antitrust Act and the federal Equal Pay Act ("EPA")[27] was only intended to encompass private "employers" within its universe of potential defendants.

Plaintiff argues that the FPWA can be read to include the state as a "person" "employing four or more employees" because the NMHRA, which clearly includes

[27] 29 U.S.C. § 203(d), (c) (defining "employer" for the purposes of the EPA as "any person acting directly or indirectly in the interest of an employer to an employee include[ing] a public agency" and an "employee" as "any individual employed by a state, "or political subdivision of a state").

the "the state and all of its political subdivisions" in its definition of "person" also contains the word "person" and the phrase, "employing four or more employees" [AB 18-22].

Plaintiff cites to *Akins v. United Steel Workers of America*, 2010-NMSC-031, 148 N.M. 442, in support of her assertion that, "it is not unusual for legislature to consider non-human beings to be within its definition of person" and states that in *Akins*, the Supreme Court "found that the legislature considered a union to be a person within the definition of "employer" [AB 19]. There is no such "finding" by the Supreme Court or the legislature addressed in *Akins* which concerned the remedies available for failure of representation claims against a union.[28] NMCD agrees that the legislature has expressed its intent, on many occasions, to include non-humans within its various definitions of "person." It did so in the NMHRA. However, the issue here is whether the legislature indicated in any manner an intent to include *the state or any other governmental entity* in its definition of "person" as it has expressly done in statutes other than the FPWA. As in the trial court, Plaintiff wishes the Court to treat the NMHRA's express inclusion of the state in the

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[28] Indeed, "labor organizations" are expressly prohibited from engaging in certain specific discriminatory practices in the NMHRA, NMSA 1978, § 28-1-7 (B), (C), (D), giving further support to the well-established law that the Legislature is well able to and does indicate when it wishes to include certain entities, including the state, as potential defendants within the ambit of a statutory claim.

definition of "person" as surplusage and cannot explain away the obvious legislative choice to include the state as an "employee" in the NMHRA but not the FPWA.

Plaintiff and Amici cite to the inclusion of "legal entities" in the list of definitions for "person" [29] in the Statutory Construction Act[30] as support for their apparent argument that the Legislature chose, in the case of the FPWA only, to include governmental entities as "employers" while eschewing the clear definitional language of the NMHRA and all other New Mexico statutes located, that provide for suit against governmental entities. *See, e.g., Stansell*, 2009-NMCA-062 ¶ 12 (since the Legislature did not include any governmental body or the Lottery within the UPA's definition of "person" the Lottery is not subject to the UPA). By defining "state" and "person" independently, the Construction Act demonstrates that the terms are not synonymous, and that the term "person" cannot be read to include the "State" or its agencies. Tacking on "any legal or commercial entity" to the definition of "person" cannot change the legislature's clear decision to leave the State out of the potential "employers" subject to suit under the FPWA.

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[29] The Construction Act, of course, defines "state" separately from "person" to encompass "a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States." *See* NMSA 1978, § 12-2A-3(M) (1997).
[30] NMSA 1978, § 12-2A-3(E) (1997).

C. Amici's arguments are not properly before the Court and does not support the departure from the rules of statutory construction sought by Amici.

In large part, Amici argues that this Court should affirm the trial court's denial of NMCD's Motion to Dismiss because "inclusion of governmental entities among the employers subject to the . . . [FPWA] is required by the . . . New Mexico's Equal Rights Amendment (the constitutional guarantee that the FPWA implements)" **[SWLC 1]**. There is, of course no support for this statement in the FPWA or anywhere else. Amici's Brief also cites to numerous "other authorities" generally discussing gender discrimination in compensation. Beyond the fact that the "good" of equal pay for equal work is not at issue in this appeal, there are a number of problems with this approach. First, Amici are required to "accept the case on issues as raised by the parties." *State ex rel. Castillo Corp. v. N.M. State Commission*, 1968-NMSC-117, 79 N.M. 357, ¶ 18, 443 P.2d 850 (refusing to consider Amici's arguments because its contention "is not within the issues raised by the alternative writ and the response . . ."). *Id.*

In this case, Amici is far afield of "accept[ing] the case on the issues as raised by the parties . . ." *Id.* The petition for writ of error, granted by the appellate court, reflects the issues actually raised by the court's denial of NMCD's Motion encompassed within the appeal. These include, whether the legislature created a cause of action against state employers when it enacted the FPWA and whether the

legislature waived the State's sovereign immunity to FPWA claims in the statute itself or otherwise. While public policy considerations may be element of statutory construction in some instances, none of the "other authorities" or public policy arguments now raised by Amici were raised to the trial court. Moreover, in its appellate briefing, Amici argued, contrary to Plaintiff's position below and in this appeal and contrary to the trial court's decision, that there is no need for a waiver of sovereign immunity and that the FPWA was enacted to advance the EPA – arguments not made by any party below.

Amici's references to "other authorities" violates Rule 12-213 NMRA by referencing articles and reports which were not before the trial court. *See Southern Union Gas Co. v. Taylor*, 1971-NMSC-067, 82 N.M. 670. Nor should the hearsay articles and "other authorities, if considered exhibits, be considered by the appellate courts where they were neither identified nor tendered to the trial court. *State of N.M. v. Lucero*, 1977-NMCA-021, ¶ 18, 90 N.M. 342. Finally, if Amici's appendices are considered, there is no support therein for statements in Amici's briefing, most notably, "[t]he Fair Pay for Women Act implements New Mexico's Equal Rights Amendment" **[SWLC 4-5],** or that the Legislature intended for the FPWA to create a cause of action against the State as an employer or to waive the state's immunity to unconsented suite.

D. Amici concedes that the state is a model of pay equity.

Amici admits that the various "task force" and other reports cited find the state is a model of wage equality **[SWLC 4]**.

> The task forces findings . . . established that, for the most part, the state has been acting as a model for private sector employers and making progress in reducing gender based wage gaps . . .
> **[SWLC 4]**.
>
> . . . .
>
> Those gender wage gaps found in the New Mexico classified workforce are much lower than national averages
> **[SWLC 10]**.
>
> . . . .
>
> Of the 396 pay bands analyzed for gender pay disparities, only fifteen had gaps exceeding 20% effecting a mere seventy-six individuals of 19,811 in the classified workforce (0.003 percent)
> **[SWLC 10]**.
>
> . . . .
>
> Many [state] agencies are complying with the Fair Pay for Women Act and have virtually eliminated pay and equity and job segregation, making New Mexico a model leader in supporting families and New Mexico's economy
> **[SWLC 12]**.

If the Court is willing to consider Amici's statements as to the status of pay equity in State employment, at all, it should consider them as providing ample support for the legislative decision to neither include the state within its definition of "employer" or to waive the state's sovereign immunity in the statute. Indeed,

there is ample precedent for this sort of historical immunity analysis in the Supreme Court's decision in *Bd. of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 360 (2001). In *Garrett*, the United States Supreme Court held that the Eleventh Amendment immunizes states against suits for money damages brought by state employees for violations of Title I of the ADA. *See Id.* 360. In its ruling, the Court relied on the "congruence and proportionality reasoning" of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), to hold that the states were immune from ADA employment claims. The *Garrett* Court addressed the question of whether Congress intended to abrogate the States' Eleventh Amendment immunity to ADA claims. The Court determined that because there was no significant history of disability discrimination in state employment, subjecting the states to liability for ADA claims was neither congruent with employment in the public sector, nor proportional to any identified history of discrimination. *See Tennessee v. Lane*, 541 U.S. 509, 521 (2004) ("Congress' exercise of its prophylactic § 5 power [to abrogate the states' immunity] was unsupported by a relevant history and pattern of constitutional violations"). Amici's proposed interpretation of the FPWA to include the state as an employer, is unsupported by any identified historical or currently existing issues of gender inequity in state employment and should be rejected.

III. RULE 12-214 (B) (1) REQUEST FOR ORAL ARGUMENT

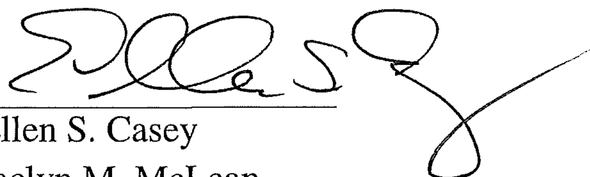
Defendant-Appellant believes that oral argument will assist the Court in resolution of the Rule 12(B)(1) and 12(B)(6) issues relevant to this Court's interpretation of the recently enacted FPWA. Oral argument may also assist in clarifying the confusion engendered by Plaintiff-Appellee's new and alternative arguments not raised in the trial court.

IV. CONCLUSION

For the reasons stated herein and in NMCD's Brief in Chief, Defendant/Appellant requests this Court reverse the trial court's denial of Defendant's Motion to Dismiss.

Respectfully submitted,

HINKLE SHANOR LLP



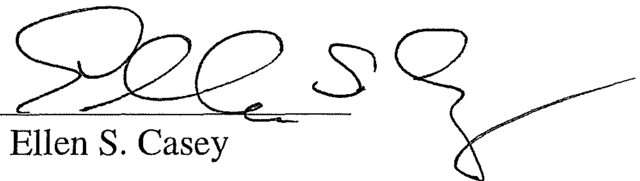
Ellen S. Casey
Jaclyn M. McLean
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
Telephone: (505) 982-4554
Facsimile: (505) 982-8623
Attorneys for Defendant New Mexico Corrections Department

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Reply Brief* was served via electronic mail this 7th day of October, 2016, to:

Daniel M. Faber
4630C Jefferson Lane NE
Albuquerque, NM 87109
dan@danielfaber.com
(505) 830-0405
Attorney for Plaintiff

Alice Tomlinson Lorenz
Lorenz Law
2501 Rio Grande Blvd. NW, Suite A
Albuquerque, NM 87104-3233
alice@alorenzlaw.com
Attorney for Amicus Curiae,
Southwest Women's Law Center



Ellen S. Casey