IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

SARAH QUINTERO,

Plaintiff/Appellant,

v.

STATE OF NEW MEXICO DEPARTMENT OF TRANSPORATION and DOES 1 through 5, inclusive,

Defendants/Appellees.

Docket No. 28,875
On Appeal from Santa Fe County
Case No. D-0101-CV-2007-01927

ANSWER BRIEF OF DEFENDANTS/APPELLEES

Appeal from the First Judicial District, County of Santa Fe
The Honorable James A. Hall, District Court Judge

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1. Nature of the Case

This is a personal injury incident arising from a slip and fall accident that occurred in a Park and Ride parking lot in Albuquerque, New Mexico on October 19, 2006. Sarah Quintero, a State employee, seeks damages from a State entity, the Department of Transportation, contending that the DOT was negligent in maintenance of the parking lot.

Quintero was going to work when the injury occurred. Because Quintero is a State employee who was going to work and seeks damages from a State agency based on alleged negligence, the claim is expressly barred by the provisions of the New Mexico Workers Compensation Act, NMSA 1978, § 52-1-19. *See Espinosa v. Albuquerque Publ. Co.*, 1997-NMCA-072, 123 N.M. 605.

2. Course of Proceedings and Disposition Below

On August 6, 2007, Sarah Quintero, along with her husband Jim, filed a complaint for personal injury against the State of New Mexico Department of Transportation, All Aboard America! Park & Ride and Does 1 through 5. [**RP 2-7**] Quintero's complaint asserted a cause of action for negligence against the State of New Mexico Department of Transportation under the Tort Claims Act, NMSA 1978, § 41-4-5. **[RP 2-7]** Quintero alleged that she was traveling to Santa Fe and using the State's Park and Ride facility when she fell into a hole in the parking lot fracturing her left leg. **[RP 2-7]**

Significantly, there is no allegation in the complaint that Ms. Quintero was an employee with the New Mexico State Department of Public Safety. **[*See* RP 2-7]** There is also no allegation in the complaint that she was going to work when the incident occurred. (*Id.*)

Ms. Quintero was deposed on December 10, 2007. **[RP 64]** During this deposition, details of the incident emerged concerning her employment with the Department of Public Safety and the fact that she was going to work. **[*See* RP 65-69]** Further discovery was conducted in early 2008, including interrogatories and requests for production to Ms. Quintero. **[*See* RP 41]** Based on the discovery and case materials, the DOT filed a motion to dismiss for lack of subject matter jurisdiction, invoking provisions of the Workers Compensation Act. **[RP 59-69]** The DOT filed this motion in advance of trial and before the deadlines for the pretrial conference or submission of the pretrial order. **[*See* RP 31-32]**

The DOT's motion raised two key points. **[RP 59-69]** First, under this Court's decision in *Singhras v. New Mexico State Hwy. Dept.*, 120 N.M. 474, 902 P.2d 1077 (Ct. App. 1995), for the purposes of the Workers Compensation Act, "all state agencies and departments are synonymous with the State of New Mexico." **[RP 61]** Consequently, the exclusivity provisions of the Workers Compensation Act apply to Quintero's claim against the DOT by virtue of her employment with the State, provided, of course, the injury is compensable under

the Act. *Singhras*, 120 N.M. at 477, 902 P.2d at 1080 (citing NMSA 1978, § 52-1-6(E)). Second, because Quintero's alleged injuries occurred while going to work, and were allegedly caused by the negligence of the State, the claim falls within the exclusivity provisions of the New Mexico Workers Compensation Act based on well-established case law, particularly this Court's decision in *Espinosa*. **[RP 61-63]**

In response to the DOT's motion to dismiss, Quintero claimed that the DOT had waived a defense of lack of subject matter jurisdiction by failing to assert it in the original answer to the complaint. **[RP 71-75]** She also claimed briefly that the Workers Compensation Act does not apply because her injury did not arise as "an inherent part of the service for which plaintiff was compensated, nor was her travel made at the direction of the employer." **[RP 75-76]**

In reply, the DOT pointed out that the defense of lack of subject matter jurisdiction may be raised at any time, including on appeal. **[RP 81]** The DOT also argued that the complaint asserted no facts concerning Ms. Quintero's employment with the DOT or the fact that she was going to work when the incident occurred. **[RP 81-82]** Therefore, there was no basis for the DOT to be aware of the applicability of the Workers Compensation Act when it responded to the allegations of the complaint. The State pointed out that those facts became known during discovery and the DOT proceeded appropriately by raising the issue

while the case was still in the pretrial stage. **[RP 81-82]** In its reply, the DOT also requested, to the extent necessary, leave to amend its answer to assert the facts that had become evident during discovery. **[RP 81-82]**

After a hearing on May 19, 2008, the District Judge, James A. Hall, determined that the plaintiff's complaint for negligence is subject to the exclusivity provisions of the New Mexico Workers Compensation Act based on the going to and coming from rule, NMSA 1978, § 52-1-19, and that the District Court therefore lacked subject matter jurisdiction. **[RP 84]** The court then dismissed the complaint, with prejudice **[RP 84]**, and this appeal followed. **[RP 85]**

3. Summary of Facts of Relevant to the Issues Presented for Review

As described generally in the deposition testimony, Sarah Quintero was an employee of the New Mexico Department of Public Safety on October 19, 2006, the date of the incident alleged in the complaint. **[*See* RP 64-69]** Ms. Quintero was involved in her ordinary commute, going to work with the Department of Public Safety, when the injury occurred. **[RP 64-69]** Quintero regularly took the Park and Ride bus to her employment. *Id.* She was on the Park and Ride premises about to get on the bus when the injury occurred. *Id.* She alleged in her complaint that the DOT owned and operated the Park and Ride parking lot. *Id.* Quintero specifically alleged that her injury occurred due to lack of maintenance of the lot

by the State. *Id.* In summary, Quintero, a State employee, was injured on the State's premises while going to work, allegedly due to negligence of the State. *Id.*

4. Argument

The issues that Quintero raises in her appeal are well-settled under New Mexico law. The experienced District Court Judge did not err in applying the law to the undisputed facts of the case and determining that the exclusivity provisions of the Workers Compensation Act apply. The Judge correctly dismissed the case due to lack of subject matter jurisdiction. As explained in more detail below, the District Court Judge did not err in misapplying a summary judgment standard while considering the motion (*see infra.* at 5-8), correctly applied the law (*see infra.* at 8-12), and did not err or otherwise abuse his discretion in response to Quintero's waiver argument. (*See infra.* at 12-16)

A. Quintero has not Established any Error in the District Court's Handling of the Motion to Dismiss

Quintero's first argument on appeal is that the District Court erred in granting the motion to dismiss because the court considered excerpts from Quintero's deposition testimony. **[BIC 5-7]** She contends that the court's use of materials outside the pleadings triggered applicability of the standards under NMRA 1-056 for motions for summary judgment. **[BIC 6]** Quintero then asserts, with little explanation, that the complaint did not allege facts supporting the going and coming rule of the Workers Compensation Act and the additional evidence did

not suggest that she was injured in the course and scope of her employment. **[BIC 7]** Therefore, she argues dismissal was inappropriate. *Id.* Quintero urges the court to review this decision *de novo*[1] and reverse the District Court.

As a threshold issue, Quintero cannot raise this argument here because she did not preserve it in the District Court below. *E.g., Barreras v. New Mexico Corrections Dep't*, 114 N.M. 366, 371 838 P.2d 983, 988 (1992). She raised no issue concerning the District Court's consideration of her deposition testimony or application of Rule 56 standards.[2] **[*See* RP 70-77]**

Furthermore, the District Court's handling of the motion to dismiss was correct. In deciding the motion, the court relied on the allegations of the plaintiff's complaint. In addition, the court relied on portions of Ms. Quintero's undisputed deposition testimony. The purpose of submitting this testimony was to show that when the incident occurred, Quintero was a State employee, on the State's premises and going to work. These facts are absent from her complaint. She did

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[1] The DOT agrees that the standard of review here is *de novo*. Appeals from a lower court's dismissal for lack of subject matter jurisdiction are reviewed *de novo*. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207, 211, 46 P.3d 668, 672 ("In reviewing an appeal from an order granting or denying a motion to dismiss for lack of jurisdiction, the determination of whether jurisdiction exists is a question of law which an appellate court reviews *de novo*.").

[2] Quintero also did not include the issues related to acceptance of the deposition testimony in her Docketing Statement.

not controvert those facts with any evidence in the District Court, and she continues to accept them as true in her appellate brief. **[*See, e.g.*, BIC 8]**

As will be explained below, the existence of these undisputed facts is sufficient to establish applicability of the Workers Compensation Act to the present circumstances as a matter of law. Although the existence of undisputed facts is consistent with standards applicable to a motion for summary judgment under Rule 56, for the sake of accuracy, it should be pointed out that the Rule 56 standards are not necessarily identical to those applicable to a motion to dismiss for lack of subject matter jurisdiction under NMRA 1-012(b)(1).

The reason for lack of jurisdiction in the District Court is the applicability of the Workers Compensation Act to Ms. Quintero's claim. Once the Workers Compensation Act provides a remedy, the Act is exclusive, and a claimant has no right to bring an action in common law negligence against the worker's employer. *Galles Chevrolet Co. v. Chaney*, 92 N.M. 618, 620, 593 P.2d 59, 61 (1979). The New Mexico Supreme Court has characterized a motion raising the exclusivity provisions of the New Mexico Workers Compensation Act to a tort claim as one that invokes the legal question of whether the court possesses subject matter jurisdiction. *Cruz v. Liberty Mutual Ins. Co.*, 119 N.M. 301, 303-304, 889 P.2d 1223, 1225-26 (1995).

A motion to dismiss for lack of jurisdiction falls within Rule 12(b)(1). The standards under Rule 12(b)(1) are different than those under NMRA 1-012(b)(6), which tests the legal sufficiency of a complaint, or those under Rule 56, which pertains to summary judgment. In the Rule 12(b)(1) context, the court may consider matters outside the pleadings, such as the undisputed deposition testimony in the present case. *See Prot. Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 17, (*citing* 2 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 12.30[3], at 12-42 to -43 (3d ed. 2008) (indicating the potential procedural postures raised by a motion to dismiss for lack of subject matter jurisdiction). The acceptance of this testimony does not transform the motion into a Rule 56 motion for summary judgment. *Id.* (*quoting Gonzalez v. United States,* 284 F.3d 281, 288 (1st Cir. 2002) ("The attachment of exhibits to a [Fed. R. Civ. P.] Rule 12(b)(1) motion does not convert it to a Rule 56 motion.").

Accordingly, the District Court was free to consider the undisputed testimony of Ms. Quintero's deposition in determining whether her claim falls within the parameters of the Workers Compensation Act. This is true regardless of whether Rule 56 or Rule 12(b)(1) applies. At the time, Ms. Quintero did not argue otherwise. The court correctly determined that the going and coming rule applies as explained below.

B. The Going and Coming Rule Applies Under the Facts of the Case

The core fallacy in Quintero's principal argument on appeal is probably best illustrated by the title of the second principal argument in her brief. That title states that "[b]ecause appellant was on her way to work at the time she was injured, the 'going and coming' rule does not apply. . . ." **[BIC 8]** This statement is logically inconsistent. The going and coming rule comes into play precisely because Ms. Quintero was going to work when the incident occurred. And it is the application of this rule which triggers the applicability of the exclusivity provisions of the New Mexico Workers Compensation Act to the present case.

The going and coming rule is part of the statutory provision in the Act that defines the phrase "injury by accident arising out of and in the course of employment." The Act states:

> . . . injury by accident arising out of and in the course of employment shall include accidental injuries to workers and death resulting from accidental injury as a result of their employment and while at work in any place where their employer's business requires their presence but shall not include injuries to any worker occurring while on his way to assume the duties of employment or after leaving such duties, ***the proximate cause of which is not the employer's negligence.***

NMSA 1978, § 52-1-19 (emphasis added).

As this Court explained in *Espinosa*, "New Mexico has a 'peculiar' statutory version of the going-and-coming rule that appears to base its coverage for injuries

sustained while going to and from work on the employer's negligence rather than the fact that the injury occurred on the employer's premises." *Espinosa*, 1997-NMCA-072 at ¶ 10, 123 N.M. at 608; *see also Galles Chevrolet Co.*, 92 N.M. at 620, 593 P.2d at 61 (*quoting Mountain States Tel. & Tel. Co. v. Montoya*, 91 N.M. 788, 790, 581 P.2d 1283, 1285 (1978)). Based on the Act and prior case law, this Court held in *Espinosa* that the Act is "a worker's exclusive remedy in any going-and-coming situation, regardless of time, place or circumstances, as long as the injury was caused by the employer's negligence." *Id.* at ¶ 13, 123 N.M. at 609. This Court explained that, under this approach, "a worker's injury which occurs while going to or coming from work falls within 'the course of employment' solely because it was caused by his or her employer's negligence." *Id.* "By the statute, in this class of cases, the injury is ***deemed*** to have arisen out of and in the course of employment ***if*** proximately caused by the employer's negligence." *Cueller v. Am. Employers' Ins. Co.*, 36 N.M. 141, 147, 9 P.2d 685, 688 (Watson, J., concurring).

The facts in *Espinosa* are not materially different from those in the present case:

> On October 22, 1991, Larry Espinosa was struck by a vehicle as he walked across an Albuquerque, New Mexico street while in a designated crosswalk. The vehicle that struck Espinosa was owned by Albuquerque Publishing Company, and its driver was returning to his place of work after a "mail run." It is undisputed that the accident was caused solely by the negligence of the driver. The accident

> occurred some two miles from the Albuquerque Publishing Company offices. When the accident occurred, Espinosa was walking to work; his shift was to begin some thirty minutes later. He too worked for the company.

Espinosa, 1997-NMCA-072 at ¶ 1, 123 N.M. at 606. Based on these facts, this Court determined that "we are compelled to hold the *Espinosa* injuries arose 'out of and in the course and scope of employment' under the terms of § 52-1-19." *Id.* at ¶ 14, 123 N.M. at 609.

Although *Espinosa* is the basis for the District Court's decision here, Ms. Quintero avoids any discussion about that decision and fails to distinguish it in any way. Indeed, her brief does not even refer to *Espinosa*. **[*See* BIC, Table of Authorities at ii]** Rather than addressing *Espinosa*, Quintero's brief dwells on a superficial discussion about whether Quintero's injuries arose out of and were in the course and scope of her employment. **[*See* BIC 8-13]** But Quintero's argument fails to address the pertinent statutory definition and corresponding case law defining "arising out of" and "in the course and scope of employment" to include injuries sustained while going and coming to work due to an employer's alleged negligence.

The other issues that Quintero briefly raises, such as the nature of her job duties, whether other individuals used the parking lot, whether employees were required to park there, whether the travel was made at the direction of her employer, are all beside the point. **[*See* BIC 8-12]** The fact that Quintero was

going to work and that the accident was allegedly caused by her employer's negligence triggers the exclusivity provisions of the Act. *See Espinosa*, 1997-NMCA-072 at ¶ 13, 123 N.M. at 609.

Quintero also argues that the Department Transportation's Park and Ride lot has no relation to the Department of Public Safety. **[BIC 12]** Here again, this argument is immaterial. The case is controlled by the holding in *Espinosa* which has to do with Ms. Quintero going to work and the allegation of employer negligence. The District Court did not base its decision on the location of Ms. Quintero's injuries.

The fact that different State agencies are involved is also of no import. Under this Court's decision in *Singhras*, for the purposes of the Workers Compensation Act, "all State agencies and departments are synonymous with the State of New Mexico." *Singhras*, 120 N.M. at 477, 902 P.2d at 1080. Thus, the exclusivity provisions of the Workers Compensation Act may apply to Quintero's claim against the DOT by virtue of her employment with another State agency, provided the injury is compensable under the Act. *See* NMSA 1978, § 52-1-6(E). Again, Quintero does not discuss *Singhras* in her brief. **[BIC iii-iv]**

In sum, the District Court correctly applied the law and determined that it lacked subject matter jurisdiction over Quintero's claims due to the New Mexico Workers Compensation Act.

C. The DOT did not Waive Lack of Subject Matter Jurisdiction

Quintero contends that the DOT waived its right to assert the defense of subject matter jurisdiction. This is incorrect for at least two reasons.

First, lack of subject matter jurisdiction cannot be waived. "An attack on subject matter jurisdiction may be made at any time in the proceedings, including for the first time on appeal." *E.g. Lasley v. Baca*, 95 N.M.791, 794, 626 P.2d 1288, 1291 (1991) (citations omitted). The Rules of Civil Procedure provide that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." NMRA 1-012(H)(3).

Second, the Department of Transportation did not waive the defense in District Court; the DOT raised it in a motion that the District Court granted. Quintero's argument seems to be that the defense is lost forever if it is not brought in an answer to the complaint or in a motion within the deadline for motions for summary judgment in a district court's Rule 16(b) scheduling order. But this is simply not the law.

Here, the defense was not raised initially in response to the complaint because the complaint did not assert facts constituting the basis of the defense, *i.e.* the identity of Ms. Quintero's employer and the fact that she was going to work. **[*See* RP 2-7]** These facts were determined later in discovery. In such situations,

Rule 15 provides for liberal amendment of the pleadings and allows a defendant to raise an affirmative defense before trial through an amendment. *E.g., Montano v. House of Carpets*, 84 N.M. 129, 130, 500 P.2d 414, 415 (1972) (trial court did not err in allowing defendant to amend answers at commencement of trial to assert an affirmative defense). Out of an excess of caution, the DOT suggested just such an amendment here. **[RP 81-82]** The trial court did not go through the formality of directing the filing of an amended answer most likely because it was unnecessary.[3] In any event, Quintero has identified no abuse of discretion in the trial court's consideration of this defense before trial. *E.g., Rivera v. King*, 108 N.M. 5, 9, 765 P.2d 1187, 1191 (Ct. App. 1988) (Motions to amend are addressed in sound discretion of the trial court and will be reviewed on appeal only for abuse of discretion. An abuse of discretion occurs when the court exceeds the bounds of reason, considering all circumstances before it.).

Similarly, the deadline for a motion for summary judgment has little to do with the present situation, which concerns a motion to dismiss for lack of subject matter jurisdiction. Here again, the Court has discretion under Rule 16 for modifying pretrial scheduling orders, including a motions deadline. *See, e.g.*, NMRA 1-016(B) (permitting the trial court to modify the scheduling order for

[3] The DOT raised the issue by motion, which triggers the district court's obligation under Rule 12(H)(3).

good cause). At the time the court took up the motion to dismiss, the parties had not yet appeared for a pretrial conference or submitted the pretrial order. Again, Quintero has identified no abuse of discretion in the District Courts' considering this issue before trial.

Finally, the cases that Ms. Quintero cites are not applicable to the present situation. *Taylor v. VanWinkle's IGA Farmer's Market*, 1996-NMCA-111, 122 N.M. 486, 927 P.2d 41 involved an appeal from a trial court's order denying a motion under NMRA 1-060(B) to set aside a default judgment in a personal injury action. The defendant contended that the default judgment was void due to lack of subject matter jurisdiction based on exclusivity of the Workers Compensation Act. However, in failing to file an answer to the complaint, the defendant had never raised these issues prior to entry of the judgment, and therefore, this Court considered them waived. Because the trial court otherwise had subject matter jurisdiction over an ordinary personal injury action, this Court declined to permit the defendant to litigate the facts supporting application of the exclusivity provisions of the WCA as a basis of establishing that the judgment was void. *Id.* Notably, this Court framed the issue as "whether a default judgment in favor of an employee and against an employer is necessarily void for lack of subject matter jurisdiction because the claim might have been brought before the WCA." *Id.* at ¶ 8, 122 N.M. at 488-489, 927 P.2d at 43-44.

The present case is obviously distinguishable from *Taylor* because this case does not involve a post-judgment, collateral attack seeking to void a default judgment. The present case involves an ordinary pretrial development, arising from facts adduced during discovery. Under such circumstances, the District Court, as well as this court, are bound to follow established precedent from the New Mexico Supreme Court, which holds that "an attack on subject matter jurisdiction may be made at any time in the proceedings, including for the first time on appeal." *E.g. Lasley*, 95 N.M. at 794, 626 P.2d at 1291 (1991) (citations omitted).

Doyle v. Rhodes, 101 Ill. 2d 1, 461 N.E.2d 382 (Ill. 1984) dealt with the right of contribution between a third-party tortfeasor and the employer. A majority of the Illinois Supreme Court concluded that the employer was "subject to liability in tort" within the meaning of the Illinois Act providing for contribution among joint tortfeasors, unless the employer asserted the defense of the Workers Compensation Act in the third party action. *Id.* at 14-19, 461 N.E. 2d at 388-91. The decision has been subject to strong criticism. *E.g., Wilson v. Hoffman*, 131 Ill. 2d 308, 546 N.E.2d 524 (1989). In any event, it does not apply here because this is not a third party action for contribution based on Illinois' Workers Compensation statute.

The other cases that Quintero cites are similarly inopposite. *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220 (10th Cir. 2004), did not concern waiver of the Colorado Workers Compensation Act; rather, that decision determined that there were disputed issues of fact about whether the employee's injuries arose in the course of employment and remanded the case for determination of that issue. *Papovich v. Irlando*, 811 P.2d 379 (Colo.1991) involved the issue of co-employee immunity under the Colorado Workers Compensation Act. The remaining cases Quintero cites in her brief **[BIC 16]** have to do with situations where the defendant never raised the issue of the exclusivity remedy of the Workers Compensation Act until after trial or for the first time on appeal. This case is distinguishable because the DOT raised the defense before trial, the entry of any pretrial order and the pretrial conference.

5. Conclusion

For all these reasons, the District Court correctly determined that Ms. Quintero's complaint falls within the exclusivity provisions of the New Mexico Workers Compensation Act and properly dismissed this matter. The Court of Appeals should affirm this decision.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2009, I mailed the foregoing **Answer Brief of Defendants/Appellees** via first class mail, postage prepaid addressed as follows:

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