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.

DEFENDANT/APPELLANT NEW MEXICO CORRECTIONS DEPARTMENT'S BRIEF IN CHIEF

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

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

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Defendant-Appellant, New Mexico Corrections Department ("NMCD" or "Appellant"), respectfully submits its Brief-in-Chief pursuant to Rules 12-210(B)(2) and 12-503(I) NMRA 2015. On May 2, 2016, the Court informed the parties that the transcript of proceedings was received. The Court granted an extension of time to file on June 10, 2016. This Brief-in-Chief is timely filed.

REFERENCES TO THE RECORD

References to the record will be to the record proper "RP."

SUMMARY OF PROCEEDINGS

Plaintiff-Appellee Alisha Tafoya Lucero ("Appellee") filed suit against the NMCD in state district court under New Mexico's Fair Pay for Women Act, NMSA 1978, §§ 28-23-1 to -6 (2013) ("FPWA" or "the Act"). RP 1-3. NMCD filed a Motion and Memorandum in Support of Defendant's Motion to Dismiss under Rules 12(b)(1) and (6), arguing that the State was immune from suit under FPWA and that the Legislature had neither waived that immunity nor expressed an intent to include the State or its agencies within the Act's universe of possible defendant employers. RP 98-109. Appellee filed her Reply on November 24, 2014. RP 120-27. The district court heard oral argument on Appellant's motion on April 23, 2015. RP 184.

On February 22, 2016, the court issued its Order Denying Defendant's Motion to Dismiss on Tort Claim Immunity and Granting Immunity Protection to

Punitive Damages Claim ("Order"). RP 210-22. NMCD timely filed its Petition for Writ of Error ("Petition") on March 23, 2016, seeking review of this Order. RP 250-280. Appellee responded to NMCD's Petition on April 19, 2016. RP 296-301. This Court granted NMCD's Petition for Writ of Error on April 20, 2016. RP 303. The Court's Order granting the Petition instructed the parties to specifically address "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.

STATEMENT OF FACTS

On December 19, 2013, Ms. Lucero, who is employed by the NMCD as a Deputy Warden, filed suit against the State alleging that she was paid less than one particular Deputy Warden due to her gender, in violation of the FPWA. RP 1-3. Based on this pay disparity with one other male employee, Ms. Lucero claimed that she suffered damages including loss of earnings and that she was entitled to attorney fees and costs of suit. Plaintiff requested relief from the trial court in the form of increased pay, general damages, treble damages and punitive damages as provided in the FPWA. RP 3.

Ms. Lucero's Complaint asserts only a violation of the FPWA and does not allege any claims under the New Mexico Human Rights Act ("NMHRA"), NMSA

1978, §§ 28-1-1 through -1-15, or any other statute. RP 2-3. Ms. Lucero did not file an administrative complaint of gender discrimination as permitted by the NMHRA, NMSA 1978, § 28-1-10, nor did she exhaust any other prerequisites to NMHRA suit.

STANDARD OF REVIEW

This case presents an issue of statutory interpretation regarding NMCD's assertion of immunity to FPWA claims, which is reviewed de novo. *See Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 ("The meaning of language used in a statute is a question of law that we review de novo."); *see also Quynh Truong v. Allstate Ins. Co.,* 2010-NMCA-009, ¶ 22, 147 N.M. 583, 227 P.3d 73 ("That standard of review requires no extended discussion. There is no question that the 'meaning of language used in a statute is a question of law that we review de novo.'")(internal citation omitted).

This Court also conducts a de novo review of the trial court's subject matter jurisdiction where NMCD argues that the State has not waived its sovereign immunity to suit under the FPWA. *See State Human Rights Com'n v. Accurate Machine & Tool Co., Inc.*, 2010-NMCA-107, ¶ 4, 149 N.M. 119, 245 P.3d 63. ("The question of subject matter jurisdiction does not require preservation. *See* Rule 12-216(B) NMRA. This Court determines de novo whether an agency has subject matter jurisdiction ...").

SUMMARY OF ARGUMENT

The district court erred when it misinterpreted the reference to the NMHRA within the body of FPWA to import language appearing in the NMHRA, but not the FPWA, in order to create a FPWA cause of action against a state agency and a waiver of the State's sovereign immunity. The trial court was obligated to apply well-established principles of statutory construction and immunity analysis to the question of the State's liability to suit under the FPWA. Instead it ignored the plain language of the statute, concluded that the waiver missing from the FPWA could be "borrowed" from the NMHRA and that the clarity of the legislative intent to allow suit against the State in the NMHRA could stand in for the total legislative silence on such an action in the FPWA. The legislative decision not to duplicate the protections of the NMHRA and the federal Equal Pay Act[1] which expressly require the State to submit to gender based equal pay claims brought by state employees, is binding on courts interpreting the FPWA. When the FPWA provides no indica of immunity waiver or intent to include the State as an employer for FPWA claims, the trial court lacked subject matter jurisdiction over Plaintiff's claims against an executive agency of the State of New Mexico.

[1] 29 U.S.C. § 206(d)(1).

ARGUMENT

Subject matter jurisdiction is "the power to adjudicate the general questions involved in the claim and is not dependent upon the state of facts which may appear in a particular case, or the ultimate existence of a valid cause of action." *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 12, 120 N.M. 133, 138 (explaining that whether a court has subject matter jurisdiction depends upon whether the claim the plaintiff "advances falls within the general scope of authority conferred upon such court by the constitution or statute."). The issue of governmental immunity is jurisdictional in nature. *See Handmaker v. Henney,* 1999-NMSC-043, ¶ 14, 128 N.M. 328. Thus, a dismissal for lack of subject matter jurisdiction, pursuant to Rule 1-012(B)(1), is appropriate where a plaintiff's claim is barred by the State's immunity to unconsented claims. *Ping Lu v. Educ. Trust Bd.,* 2013-NMCA-010, ¶ 10 (internal quotation marks and citation omitted) (noting that the Rule 12(B)(1) motion to dismiss is appropriate "when the plaintiff's claim is barred by one of the various aspects of the doctrine of sovereign immunity.").

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT IT COULD RE-WRITE THE FPWA TO INCLUDE THE EXPLICIT WAIVER OF IMMUNITY AND EXPRESSION OF LEGISLATIVE INTENT TO CREATE A CAUSE OF ACTION AGAINST THE STATE CONTAINED IN THE NMHRA.

The New Mexico Legislature passed the FPWA in 2013 to prohibit wage discrimination based on gender for equal work on jobs that required equal skill,

effort, responsibility, and performance under similar working conditions, except where payment is made pursuant to a seniority system, merit system, or system that measures earnings by quantity or quality of production. *See* NMSA 1978, §28-23-3. The FPWA addresses a small subset of the potential discrimination claims that may be raised against employers and others in the NMHRA. It is much narrower than the NMHRA in that it pertains solely to pay disparity based on sex[2] rather than the wide range of discriminatory conduct prohibited by the NMHRA.[3]

NMCD is an executive agency of the State of New Mexico, organized under the laws of the State and tasked with the oversight and management of state-operated prison facilities. *See* NMSA 1978, § 9-3-3 (1977, amended 2005). NMCD is considered to be "the State" for purposes of an immunity analysis. *See Dunn v. State ex rel. Taxation & Revenue Dep't Motor Vehicle Div.,* 1993-NMCA-059, ¶20, 116 N.M. 1. In its Motion and Memorandum in Support of Defendant's Motion to Dismiss ("Motion to Dismiss") NMCD demonstrated that the

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[2] The federal Equal Pay Act is a much closer comparator statute to the FPWA than the NMHRA as it also subjects employers to liability for unequal pay based on gender and contains a similar structure to the FPWA with regard to bases for permitted pay disparity. *See* 29 U.S.C. § 206(d)(1). However, unlike the FPWA, the Fair Labor Standards Act, 29 U.S.C. §§ 201, et. seq., under which the Equal Pay Act falls, clearly defines an "employer" to include "a public agency". 29 U.S.C.§ 203(d).

[3] The NMHRA creates an administrative cause of action to address discrimination based on race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition in employment, housing, and financial assistance, in a variety of contexts. *See* NMSA 1978, § 28-1-7 (1969, as amended through 2008).

Legislature, in enacting the FPWA, neither waived the State's immunity to suit nor created a new cause of action against the State as an "employer." RP 98-109. NMCD pointed out that the State is not included as a defendant-employer under the Act, and there is no other indicia of a legislative intent to include the state or its agencies as "employers" subject to suit under the FPWA. *Id.* Indeed, the statute contains remedies that have long been interpreted as precluding suit against the State, including a provision for punitive damages, that the trial court recognized are not available against a public entity without an express statement in the statute. RP 221.

In her Response to NMCD'S Motion to Dismiss, Ms. Lucero argued first that the New Mexico Tort Claims Act ("TCA"), NMSA 1978, §§ 41-4-1 through -4-30, did not immunize the State from FPWA claims against state employers nor otherwise bar Ms. Lucero's cause of action.[4] RP 115-16. Appellee also argued that the State was subject to FPWA suit because, in the definition of "employer" in both the NMHRA and the FPWA, the Legislature used the same number of employees required to define "employer". RP 116-17. In making this argument,

[4] Appellee's contention that the Tort Claims Act ("TCA") did not bar her case is puzzling. The TCA has no discernible effect on the FPWA, and NMCD never argued that the TCA precluded suit against the State under the FPWA. The trial court, too, felt the need to argue that the TCA would not preclude the legislature from waiving sovereign immunity in the FPWA. The problem with this analysis, of course, is that the legislature did not choose to include such a waiver in the FPWA.

Ms. Lucero ignored the other definitions provided for in the NMHRA,[5] and provided no authority for her apparent contention that identifying the same number of employees an employer must have to be considered an "employer" under each Act bolstered the conclusion of a legislative intent to create a new cause of action against the State in the FPWA. RP 117.

In its Reply, RP 120-27, NMCD pointed out that Ms. Lucero's reliance on similarities in the definitions of "employer" under the FPWA and the NMHRA disregards: (1) the legislative decision to include the "state and all of its political subdivisions" in the definition of "persons" who may be "employers" in the NMHRA but *not* the FPWA; and (2) the legislative decision to include express language waiving the State's immunity to suit in the NMHRA but not in the FPWA. RP 120-27. *See* NMSA 1978, § 28-1-13(D), "In any action or proceeding under this section ... the state shall be liable the same as a private person."

The court, determined that the FPWA's reference to the NMHRA as an alternative avenue of relief, evidenced a legislative intent to import the waiver contained in the much broader anti-discrimination statute, to the FPWA. RP 215-17. This "interpretation" is fatally flawed and cannot be squared with the rules of statutory construction or New Mexico law on governmental immunity.

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[5] The NMHRA - but not the FPWA - defines the "persons" who may be "employers" to include the State. NMSA 1978, § 28-1-2(A), "'person' means ... the state and all of its political subdivisions."

A. The Language of the FPWA Does Not Evidence a Legislative Intent to Allow Suit Against the State.

The Fair Pay for Women Act provides:

> *[n]o employer* shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in the establishment at a rate less than the rate that the employer pays wages to employees of the opposite sex in the establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility and that are performed under similar working conditions, except where the payment is made pursuant to a:
>
> (1) seniority system;
>
> (2) merit system; or
>
> (3) system that measures earnings by quantity or quality of production.

NMSA 1978, § 28-23-3(A) (2013). The Act defines an "employer," subject to the Act's prohibitions, as:

> "a *person* employing four or more employees and any *person* acting for an employer."

NMSA 1978, § 28-23-2(E) (2013) (emphasis added). An "employee" entitled to sue an "employer" is defined within the Act as:

> "any *individual* employed by an employer."

NMSA 1978, § 28-23-2 (D) (2013) (emphasis added).

The NMHRA similarly defines "employer" as "any *person* employing four or more persons," NMSA 1978, § 28-1-2(B)(emphasis added), but goes on to define "person" under the statute as "one or more individuals ... *or the state and all of its political subdivisions.*" NMSA 1978, § 28-1-2(A)(emphasis added). Additionally, the NMHRA makes clear that "[i]n any action or proceeding under [the NMHRA] ... the state shall be liable the same as a private person." NMSA 1978, § 28-1-13(D). In sharp contract to the NMHRA[6] neither the term "person" nor the term "individual" is defined within the Fair Pay for Women Act.

The common meaning of "person" is "a human being,"[7] while the broader statutory meaning of "person" is defined within New Mexico's Uniform Statute and Rule Construction Act ("Construction Act"), NMSA 1978, §§ 12-2A-1 to -2A-20 (1997), to include "*individual[s]*, corporation[s], business trust[s], estate[s], trust[s], partnership[s], limited liability compan[ies], association[s], joint venture[s] or any legal or commercial entit[ies]." NMSA 1978, § 12-2A-3(E). The Construction Act's definition of "person" makes no reference to governmental entities, the State, or its agencies. *Id.* Instead, the Construction Act separately defines the term "state" to mean, "a state of the United States, the District of

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[6] The New Mexico Minimum Wage Act also expressly defines those public "employees" who may and may not bring suit against their governmental employer for certain practices prohibited by the Act. *See* NMSA 1978, § 50-4-21(C)(4), *supra.*

[7] "person." *Merriam-Webster.com.* 2015. http://www.merriam-webster.com (9 July 2016).

Columbia, the Commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States." NMSA 1978, § 12-2A-3(M). By defining "state" and "person" independently, the Construction Act demonstrates that the terms are not synonymous, and that the term "person" cannot, without some expression of legislative intent to do so, be interpreted to include the "State" or its agencies.[8] *See* NMSA 1978, § 12-2A-2 ("[u]nless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage.") In no sections of the FPWA is there any indication that the Legislature chose to include the State within the definition of "persons" who may be sued as "employers" under the Act.

Conversely, in enacting the NMHRA, NMSA 1978, §§ 28-1-1 to -1-15, the Legislature clearly expressed its intent to create a cause of action against the State as an "employer" by including "the state and all of its political subdivisions" within its definition of "persons" subject to suit as "employers." NMSA 1978, § 28-1-2 (A) (2007). The Legislature went beyond the definitional sections, as it knew it must, to effectuate an unmistakable intent to subject the State to NMHRA

[8] The New Mexico Whistleblower Protection Act also makes the inclusion of the State as a liable "public employer" abundantly clear. "Public employer" is defined as: " (1) any department, agency, office, institution, board, commission, committee, branch or district of state government; (2) any political subdivision of the state, ...; (3) any entity or instrumentality of the state ...; and (4) every office or officer of any entity listed in Paragraphs (1) through (3) of this subsection." NMSA 1978, § 10-16C-2(C)(2010).

claims, and expressly waived the State's sovereign immunity when it declared in the NMHRA that "*the state shall be liable the same as a private person.*" NMSA 1978, § 28-1-13(D); *see also Luboyeski v. Hill*, 1994 -NMSC- 032, ¶ 14, 17 N.M. 380, 384-85 (distinguishing the NMHRA from other state statutes *not providing express waivers 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); *and see Luboyeski* at ¶ 10 ("... the legislature, presumptively aware of the Tort Claims Act and its exclusive- remedy provision, clearly and unequivocally stated that, with regard to appeals of decisions of the Human Rights Commission to the district court, "the state shall be liable the same as a private person.").

B. There is No Authority for the Trial Court's "Incorporation" of NMHRA Provisions to Re-write the FPWA.

The trial court's conclusion that the FPWA creates a cause of action against the State and waives the State's immunity to suit, is based solely on the language of the NMHRA, an entirely separate statute, that is neither "incorporated"[9] into the FPWA nor legitimately used to subject the State to FPWA suit.

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[9] The trial court never explains what it means by its assertion that the entire NMHRA is "incorporated" into the FPWA nor cites to any authority for its apparent theory that mentioning an entirely distinct statute as an alternative route to recovery in the FPWA, somehow allows the courts to ignore the *actual language* of the FPWA, which is entirely silent on a cause of action against the State.

> "The plain language of a statute is the primary indicator of legislative intent. Courts are to give the words used in the statute their ordinary meaning unless the legislature indicates a different intent. The court will not read into the statute or ordinance language which is not there, particularly if it makes sense as written."

Public Service Company of New Mexico v. New Mexico Public Utility Commission, et.al., 1999-NMSC-40, ¶ 18, 128 N.M. 309, 992 P.2d 860, *citing High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal citations omitted). Despite the FPWA's total silence on waiver and the lack of language evidencing a legislative decision to include the State as an "employer" subject to FPWA claims, the trial court rewrote the FPWA to add the express language of another statute. The trial court's discovery of a waiver of immunity in FPWA's reference[10] to the NMHRA as an "alternative"[11] means to "seek relief" for gender based pay disparity, RP 213-15, is unprecedented and goes far beyond the legitimate "interpretation" of statutes

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[10] *See* NMSA 1978, § 28-23-4(A), allowing a person claim to be aggrieved by violation of the FPWA to: (1) maintain an action to establish liability and recover damages and injunctive relief in any court of competent jurisdiction …; or (2) seek relief under the Human Rights Act [Chapter 28, Article 1 NMSA 1978] pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978; *see also* NMSA 1978, § 28-23-4(F): "The initiation of an administration process under the Human Rights Act pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978 shall toll the statute of limitations for initiating a claim under the Fair Pay for Women Act."

[11] The use of the disjunctive "or" is generally interpreted to mean "a function word [used] to indicate an alternative." "or." *Merriam-Webster.com.* 2015. http://www.merriam-webster.com (9 July 2016). This would seem to indicate that plaintiffs may pursue one, but not both actions.

engaged in by the judiciary. *See id.*, ("The first rule [of statutory construction] is that the plain language of a statute is the primary indicator of legislative intent."(internal citation omitted).) There is no rational basis for this judicial usurpation of the legislative function and the rules of statutory construction militate against it. *See Burroughs v. Board of County Com'rs of Bernalillo County*, 1975-NMSC-051, ¶ 14, 88 N.M. 303, 540 P.2d 233 ("Another rule of statutory construction ...is that the court will not read into a statute or ordinance language which is not there, particularly if it makes sense as written."(internal citation omitted)).

Indeed, in noting the availability of the NMHRA as an alternative remedy, the FPWA expressly rejects the NMHRA's requirement of pre-litigation exhaustion of administrative remedies as a prelude to asserting a FPWA claim. *See* NMSA 1978, § 28-23-4. The only linkage between the two statutes – allowing exhaustion of NMHRA administrative proceedings to toll the FPWA statute of limitations -- does not approach an expression of legislative intent to import the distinctly different definitions and waivers of the NMHRA into the FPWA.

To bolster its conclusion that the State is an "employer" subjected to suit by the FPWA, the trial court created a list of "Material Facts"[12] which included Ms.

[12] As an initial matter, there are no undisputed material facts in motions brought under Rule 12(B) (1) and (6). Rather the court is to accept as true all non-conclusory factual allegations. The court should not accept as true all legal

Lucero's *contention* that the "[d]efendant is an employer as defined by NMSA 1978, § 28-23-2(D)(2013).(Compl. ¶ 8)." RP 211. After concluding that this "fact" was "undisputed," the trial court rejected NMCD's argument that the explicit differences in the definitions of "employer" and the FPWA's non-inclusion of the NMHRA's definition of "person" are clear indications of a legislative intent to allow the State to be sued for the universe of gender discrimination under the NMHRA but *not* for pay inequity under the FPWA. RP 218-19. The court's reasoning that "when the definition of 'employer' in the [FPWA] is compared with the definition of 'employer' in the Human Rights Act... The Human Rights Act unquestionably applies to government[,]" is perplexing. *Id.* Yes, the NMHRA "unquestionably" includes the State within its definition of "persons" who may be employers, *see* NMSA 1978, § 28-1-2(A) and (B). Yet a comparison of the definitions of potential defendant-employers in the two statutes leads to the undeniable conclusion that the State is expressly *included* in the person/employers who may be sued under the NMHRA and expressly *not included* in the individuals/employers who may be sued under the FPWA. *See id.*; *and see* NMSA 1978, § 28-23-2(D) and (E). That the FPWA's definition of "employer" does not include a state agency cannot be disputed. The court's decision to ignore the plain

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conclusion as to the State's status as an "employer" under the FPWA, particularly as this is the very jurisdictional question before the court on NMCD's motion. *See* RP 211; *and see* RP 99-101.

language of the FPWA and supplant it with the plain language of the NMHRA concerning the definitions of "employer"/"person" as well as the NMHRA's express waiver of sovereign immunity, flies in the face of every applicable rule of statutory construction. *See Perea v. Baca,* 1980-NMSC-079, ¶ 22, 94 N.M. 624, 614 P.2d 541, ("A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written ... Courts must take the act as they find it and construe it according to the plain meaning of the language employed." (internal citations omitted).)

The trial court cites to *State ex rel Helman v. Gallegos*, 1994-NMSC-023, 117 N.M. 346, 347, 871 P.2d 1352, 1353, for the proposition that "[s]tate statutes are to be given effect as written and, where there is no ambiguity, there is no room for construction[,]" RP 213, while refusing to give effect to the FPWA as written and giving effect to the provisions of the NMHRA *as if* the legislature had chosen to include that statue's definitions and waivers in the FPWA. RP 214-15. It did not.

After re-engineering the FPWA to add the provisions of the NMHRA, the trial court concluded that the State is an "employer" and that its sovereign immunity to unconsented suit is waived by "incorporation." RP 213-14. In this alternate universe, the trial court could easily rely on *Luboyeski v. Hill*, 1994-NMSC-032, the seminal case interpreting the *NMHRA's* express waiver of

immunity, to "interpret" the *FPWA's* brand new waiver of State immunity. RP 215-17. The court relied exclusively on the *Luboyeski* court's analysis of the language *of the NMHRA* to find that *the FPWA* expressly waived governmental immunity, opining that "when § 28-23-1, et seq. [FPWA] was enacted, the Legislature was aware of the explicit waiver that existed in the Human Rights Act," RP 218. From this "legislative awareness" of the NMHRA, the court, citing to no authority, concluded: "It is well settled then that the Legislature waived immunity under § 28-1-13(d) [the NMHRA] *and therefore under § 28-23-4 [the FPWA].*" RP 218 (emphasis added). How it is "well settled" that a legislative waiver of sovereign immunity in the NMHRA, enacted some thirty (30) years before the FPWA, equates to a waiver in the latter statute, despite the complete lack of any language from which such an intent could be gleaned, is unknown.

1. While the trial court correctly found that punitive damages provided for in the FPWA are not recoverable against the State, the court's reliance on the language of the NMHRA further demonstrates error.

Relying, at least in part, on its theory that the plain language of the NMHRA could be substituted for the actual language of the FPWA, the court granted NMCD's motion to dismiss Ms. Lucero's FPWA claim for punitive damages.[13] RP 219-21. The court reasoned that although the FPWA contains

[13] In its Motion, NMCD argued that "punitive damages are not recoverable against a governmental entity absent an express legislative provision." RP 107. Thus,

express language *allowing for punitive damages* against an employer, the NMHRA does not. *Id.* As with the governmental waiver and cause of action creation questions reviewed by the court, the plain language of the NMHRA *not* the FPWA, offered to support the analysis. "The Fair Pay for Women Act as outlined above waives immunity by the public entities as the relief is described in the Human Rights Act. That said the Human Rights Act makes no mention of punitive damages but only actual damages." RP 219. Under this reasoning, if the NMHRA contained a punitive damages provision and the FPWA did not (the exact reversal of the existing statutory language), the State could be sued for punitive damages. The court's interpretation is unsupported by the applicable rules of statutory construction.

In dismissing Ms. Lucero's punitive damages claim, the court also relied on *Torrance Cty. Mental Health Program, Inc., v. New Mexico Health & Env't Dep't,* 1992-NMSC-026, 113 N.M. 593, 830 P.2d 145, for the Supreme Court's determination that punitive damages are not available against the State *where not expressly provided for in the legislation under examination.* RP 220-21. *See Torrance,* 1992-NMSC-026, ¶ 31. The trial court did not explain how *Torrance* negates the plain language of the FPWA expressly *allowing punitive damages*

NMCD reasoned, the FPWA's "provision of punitive damages is one more basis for the inescapable conclusion that the Legislature did not intend to make the State liable for any alleged violations of the Act." *Id.*

against a liable "employer" or how the inclusion of punitive damages in the FPWA without an express waiver of governmental immunity squares with the court's finding that the State is a liable "employer." *Torrance* ultimately supports the NMCD's position that the inclusion of punitive damages in a statute, without any express waiver of sovereign immunity nor any legislative expression of intent to create a new cause of action against the State, is a prime indicator that the statute may not be enforced against the State.

2. The State is immune from suit under the FPWA in the absence of an express waiver.

The trial court's conclusion that a reference to NMHRA in the text of the FPWA "incorporates" the NMHRA's waiver of sovereign immunity into the FPWA, without any legislative expression of such intent, is error. The legislative intent to waive governmental immunity and create a cause of action against the State must be clear in the language of the statute under consideration. *See Stansell v. New Mexico Lottery,* , 2009-NMCA-062, ¶¶11-12, 146 N.M. 417, 420-21. The absence of any reference to the State, political subdivisions, or state agencies as potentially liable parties within a statute's definitional, jurisdictional, or enforcement sections has been repeatedly interpreted by New Mexico's appellate courts as an indication that the Legislature did not intend to waive the State's sovereign immunity or subject the State to suit under a particular statute. *See, e.g., Cedrins v. Santa Fe Cmty. Coll.,* 2010 WL 4923952 (N.M. Ct. App. Oct. 13,

2010)(affirming dismissal of plaintiff's claim against Santa Fe Community College under the Unfair Practices Act,[14] because state entities are not defined as "persons" who may be sued under the UPA); *see also Stansell v. New Mexico Lottery* at ¶¶ 11-12 (dismissing a UPA 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); *and see Torrance Cnty. Mental Health Program, Inc.,* 1992-NMSC-026, ¶19, (noting that legislative silence cannot be read as expressing an intent to waive the State's immunity to punitive damages.)

The FPWA contains no language from which this Court could conclude that the Legislature intended: (1) to waive the State's sovereign immunity and allow suits against the State by a private party, or (2) to create a cause of action against the State as an "employer" for an alleged violation of the Act. "[W]hen the Legislature has wanted to include ... governmental bodies in its statutes, it has known how to do so." *Stansell v. New Mexico Lottery*, 2009-NMCA-062, ¶ 12, 145 N.M. 140, 194 P.3d 755 (internal citations omitted). The court's conclusion that the FPWA's silence can be construed to provide a cause of action against the State is without basis and upends the well-established principles of statutory construction and immunity waiver analyses, by reading into the FPWA language that simply is not there.

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

In *Hicks v. State*, the New Mexico Supreme Court abolished common-law sovereign immunity for tort actions brought against the State and its agencies. *Hicks v. State*, 1975-NMSC-056, 88 N.M. 588. In 1976, following the New Mexico Supreme Court's decision in *Hicks*, the Legislature enacted the Tort Claims Act ("TCA"), NMSA 1978, Section 41-4-1 to -29 (1976), and declared it to be the "the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act and in accordance with the principles established in that act." NMSA 1978, § 41-4-2(A)(1976); *see Marrujo v. New Mexico State Highway Transp. Dept.,* 1994-NMSC-116, ¶24, 118 N.M. 753, 755 ("The right to sue the government is a statutory right and the [L]egislature can reasonably restrict that right."). In the same year, the Legislature enacted NMSA 1978, Section 37-1-23 (1976), which recognized and re-imposed governmental immunity for actions based on contract and expressly provided that only claims based on "written contracts" that are brought within two years of the time of accrual may be brought against the State. *See* § 37-1-23; *see also Hydro Conduit Corp. v. Kemble*, 1990-NMSC-061, ¶ 18, 110 N.M. 173, 178 (discussing the State's limited waiver of its existing sovereign immunity under § 37-1-23); *Trujillo v. Gonzales*, 1987-NMSC-119, ¶ 9, 106 N.M. 620, 621 (same). It has been clear since the legislature enacted the TCA, that the State and its agencies are immune to suit absent an express legislative directive.

In addition to the TCA and the contract waiver in § 37-1-23, the Legislature has made it expressly clear when, and under what circumstances, the State may be sued under the NMHRA; under the New Mexico Minimum Wage Act ("MWA"), NMSA 1978, § 50-4-19 to -4-30 (1955, as amended through 2007) and under the Whistleblower Protection Act ("WPA"), NMSA 1978, § 10-16C-1 to -6 (2010). Indeed, the Legislature expressly included the State as a potentially liable party under these statutes using language that is notably absent from the FPWA.

In enacting the NMHRA, the Legislature 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,*" NMSA 1978, § 28-1-13(D)(2005); and to create a new cause of action against the State when it included "the state and all of its political subdivisions" within its definition of "person." NMSA 1978, § 28-1-2(A)(2007). By expressly including the State in the statute's definitional section as well as explicitly waiving its sovereign immunity, the Legislature left no room for interpretation as to whether the State was an appropriate defendant.

Similarly, in the WPA, the Legislature made "public employers" subject to suit and defined the term with precision. NMSA 1978, § 10-16C-2(C)(2010). By including in its thorough description of what it intended by the term "public employer" several variations of the State and its agencies, the Legislature very

clearly expressed its intent to create a cause of action against state actors and waive the State's sovereign immunity.

In enacting the MWA, the Legislature again made explicit its intent when it defined "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 an employee, *but shall not include the United States, the state or any political subdivision of the state; provided, however, that for the purposes of Subsection A of Section 50-4-22 NMSA 1978, [enforcement of minimum wage portion of MWA] "employer" includes the state or any political subdivision of the state[.]*

NMSA 1978, § 50-4-21(B)(2008)(emphasis added).

The MWA's definition of "employee" also expressly specifies which employees may sue their public employer for what statutory claim. The definition specifically excludes "an individual employed by the United States, the state or any political subdivision of the state;" provided, however, that for the purposes of Section 50-4-22(A), an "employee" includes an "*individual employed by the state or any political subdivision of the state.*" NMSA 1978, § 50-4-21(C)(3)(2008)(emphasis added). The Legislature's amendments to the MWA, set out herein, dictate when the State or its agencies may be sued for which acts prohibited by the MWA and when state employees may, and may not, qualify as "employees" who may sue their state employer. The MWA's clear expression

stands in sharp contrast to the legislative silence regarding the State's susceptibility to suit by a state employee under the FPWA.

When it enacted the FPWA, the Legislature had before it the NMHRA, the TCA, the MWA, and the WPA as clear examples of when it had carefully and expressly carved out areas where the Legislature had consented to subject the State to common law and statutory claims. It cannot be considered an accident or oversight that the FPWA contains no such expression of intent to allow a cause of action against the State of New Mexico. The absence of a clear waiver or creation of a claim against the State, particularly when coupled with the FPWA's imposition of punitive damages, indicates that the State may not be sued for relief under the FPWA.

3. The rules of statutory construction do not allow the court to rewrite the FPWA.

Within the section of FPWA laying out the Act's enforcement procedure, the Legislature makes distinguishing reference to the NMHRA and its unique strictures. NMSA 1978, § 28-23-4 (2013)(emphasis added).

From this reference to the NMHRA as an alternative remedy, the trial court opted to "incorporate" the language of the NMHRA waiving sovereign immunity as if the legislature had actually included the NMHRA's waiver language in the FPWA. Once "incorporated," the court used the *Luboyeski case* to interpret the scope of the *FPWA* waiver. RP 215. ("Having established that the Legislature

incorporated the Human Rights Act in drafting the Fair Pay for Women Act, the next question for the Court is the proper application of ... *Luboyeski v. Hill* ... which confirmed that the Human Rights Act *and its mirrored provisions in the Fair Pay for Women Act* waive liability against public entities, stating that 'the State shall be liable the same as a private person.'" *Id.* (emphasis added)).

There are no provisions in the FPWA that "mirror" *any* of the provisions of the NMHRA, much less the very express and unambiguous waivers of the state's sovereign immunity that are contained in the NMHRA and not in the FPWA. *See* NMSA 1978, § 28-1-2(A) and § 28-1-13(D).

Indeed, *Luboyeski* actually supports NMCD's argument that the FPWA does not provide for a cause of action against the State. *See Luboyeski*, at ¶¶ 12-14. The *Luboyeski* court, faced with the question of whether the New Mexico TCA trumped the express statutory waiver of immunity provided for in the NMHRA, reasoned that the NMHRA's *explicit* language indicating a legislative intent to subject the State to suit, added to the NMHRA *after* the passage of the TCA, indicated a clear legislative intent to subject the State to suit under the NMHRA. "Section 28-1-13(D) [stating that "the state shall be liable the same as a private person"] constituted and constitutes a waiver of sovereign immunity for liability imposed on public entities ... *for violations of the Human Rights Act.*" *Id.*, at ¶ 11 (emphasis added). The lack of such explicit language in the FPWA is fatal to the

court's view that the provisions of the NMHRA may be interpreted to find waiver in the FPWA.

The trial court's mistaken conclusion regarding the applicability of *Luboyeski* to the FPWA, emanates from the Court's misapplication of the fundamental tenets of statutory construction. *See United Rentals Northwest, Inc., v. Yearout Mechanical, Inc.,* 2010-NMSC-030, ¶ 9, 2010-NMSC-030, ¶ 22, 148 N.M. 426, 237 P.3d 728 ("The first guiding principle in statutory construction dictates that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that 'when the statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation."). The FPWA language, touching on the NMHRA, signals the Legislature's determination that an employee plaintiff may possess a cause of action under *either* the FPWA *or* the NMHRA, depending on the conduct alleged to have violated a plaintiff's statutory rights and the identity of potential defendants. *See* Construction Act, NMSA 1978, § 12-2A-19, "The text of a statute or rule is the primary, essential source of its meaning."

The trial court does not cite to any authority nor logical explanation for its determination that the FPWA's provision that an individual may bring a claim under the FWPA *or* "seek relief under the NMHRA ...", indicates a legislative intent to waive the State's immunity to a FPWA claim. This is particularly true

where the FPWA notes that any NMHRA claim must be brought "pursuant to the [administrative] process set out in Sections 28-1-10 through 28-1-13," NMSA 1978, § 28-23-4(A)(2), a "process" the FPWA expressly eschews for claims brought under FPWA. *See* NMSA 1978, § 28-23-4(E).

With little explanation, the trial court casually references the "in pari materia" statutory construction rule. RP 213. ("A fundamental rule of statutory construction is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent." *Id., citing Quintana*, 100 N.M. 224, 225, 668 P.2d 1101, 1102; *Roth v. Thompson*, 1992-NMSC-011, 113 N.M. 331, 334, 825 P.2d 1241, 1244). However, the rule of in pari materia pertaining to statutes that are "upon the same matter or subject" which should be "construed together,"[15] has never been applied to copy and paste a waiver of sovereign immunity or language creating a cause of action against the State from one statute to another. Moreover, even if in pari materia allowed the rewriting of a statute, in an instance where the two acts were passed more than thirty years apart, these statutes should not even be construed together under that rule. *See Erlenbaugh v. U.S.,* 409 U.S. 239, 93 S.Ct. 477 (explaining that application of the rule of in pari materia makes most sense when statutes were enacted by the same legislative body at the same time); *see also United Rentals*

[15] "in pari materia." *The Law Dictionary.* 2016. http://thelawdictionary.org (10 July 2016).

Northwest, Inc., 2010-NMSC-030, ¶ 22, ("The rule that statutes in pari materia should be construed together has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the legislature.")

II. THE GOVERNMENTAL IMMUNITY AT ISSUE SATISFIES THE COLLATERAL ORDER DOCTRINE RULE AND ENTITLES THE NMCD TO AN IMMEDIATE APPEAL.

The trial court's ruling is a collateral order that conclusively determines a disputed question surrounding the State's amenability to suit under a particular statute. The trial court's ruling resolved important issues completely separate from the merits of the action (sovereign immunity and the legislative creation of a cause of action against the State), and is effectively unreviewable on appeal if delayed until after a final adjudication of the matter. *See* generally, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

Appellant filed its Petition for Writ of Error on in order to protect NMCD from being required to participate in pre-trial proceedings or to face the expense of trial on a cause of action to which the agency is immune. RP 250-80. *See Campos de Suenos, Ltd. v. Cty. of Bernalillo,* 2001-NMCA-043, ¶9, 130 N.M. 563. ("[A] party losing its immunity from suit in an adverse summary judgment decision may file a writ of error seeking immediate review of that decision in order to protect its right not to stand trial.").

The United States Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.* firmly established what is now known as the "collateral order doctrine". The doctrine defined a "small class" of decisions by the district court that "finally determine claims of right separable from, and collateral to, rights asserted in the action," that are independent of the merits of the case but are "too important" for their appellate review to "be deferred until the whole case is adjudicated..." *See Carrillo v. Rostro*, 1992-NMSC-054, ¶15, 114 N.M. 607, *citing Cohen*, 337 U.S. at 546-7, 69 S.Ct. at 1225-26. The Court later clarified that the collateral order doctrine is a "narrow exception" that must meet at least three conditions: "It must conclusively determine the disputed questions, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from final judgment." *Carrillo*, 1992-NMSC-054, ¶16 (internal citations omitted).

In *Carrillo*, the New Mexico Supreme Court adopted the *Cohen* collateral order doctrine when faced with the issue of whether the denial of a motion for summary judgment based on qualified immunity involved the defendant's immunity from liability or immunity from suit. Because "denying the motion on the ground that the facts were in dispute subjected defendants to the very risks and burdens that the qualified immunity defense is intended to avoid," *Carrillo* at ¶22, the Court determined that the trial court's order was ripe for review prior to full

adjudication on the merits. Where the claim of immunity involved "defendant's claim of right not to stand trial ... [which] cannot be effectively vindicated after the trial has occurred." *Carrillo* at ¶20, *citing Mitchell v. Forsyth*, 472 U.S. 511, 525, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985), an immediate appeal by writ of error was allowed. *Id.*

An appeal from a collateral order, like the one issued against NMCD denying its immunity from suit on a statutory claim, is permitted on the theory that the right to be free from trial and the burdens of litigation are "rights that will be irretrievably lost, absent [an] immediate appeal and regardless of the outcome of an appeal from final judgment." *Carrillo* at ¶¶19-21. The trial court's order denying NMCD's motion to dismiss on the grounds of sovereign immunity meets all three of the requisite conditions of a collateral order: it conclusively determines a disputed question surround governmental immunity against the governmental entity; it resolves an important issue completely separate from the merits of the action; and it is effectively unreviewable on appeal from a final judgment as the rights to be free from trial and the burdens of litigation will be lost if the case is erroneously permitted to go to trial. *See Handmaker v. Henney*, 1999-NMSC-043, ¶ 15, 128 N.M. 328 (noting that the Court will "issue writs of error to review immunity from suit cases because we consider them 'collateral order[s] affecting interests that would be irretrievably lost if the case proceeded to trial.'").

Further, the immunity asserted by NMCD in its motion to dismiss is not simply immunity from liability, it is governmental immunity from suit. It involves a pure legal question of statutory interpretation as to whether the legislature intended to include the State and its agencies as defendant-employers rather than the mixed question of fact and law that is involved in interpreting whether a defendant is immune from liability. *See Campos de Suenos, Ltd.*, 2001-NMCA-043, ¶17 ("Our immediate review of immunity claims by writ of error is usually reserved for discrete legal issues that do not depend on extensive factual analysis for their resolution.") Like the question of qualified immunity addressed in *Carrillo*, this dispute requires little factual analysis but instead calls for a legal analysis of whether the FPWA's actual silence on the State as an "employer" and on waiver can be jettisoned for the expressions of intent to create a new cause of action against the State, in the NMHRA. *See Handmaker*, 1999-NMSC-043, ¶13 (noting that "qualified immunity under 42 U.S.C. § 1983 constitutes immunity from suit because it is an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question of whether the conduct of which the plaintiff complains violated clearly established law."); *and see id.* at ¶14 (the court will "rely on the reasoning of *Allen v. Board of Education*, 106 N.M. 673, 748 P.2d 516 (Ct. App. 1987) and *Carrillo* concerning the distinction between immunity from suit and immunity from liability and the

importance of legislative intent."). The State has been granted and is entitled to this appeal by writ of error.

CONCLUSION AND RELIEF REQUESTED

The district court erred when it concluded that the Legislature had expressed its intent to allow Plaintiff to enforce the requirements of the FPWA against the State. No such expression of intent exists in the statute and the trial court acknowledged the dearth of support for a FPWA claim against the State in the statutory language by rewriting the FPWA to include language not authored by the Legislature. The court's rewrite on its misapplication of fundamental rules of statutory construction cannot substitute for a waiver of sovereign immunity that the Legislature chose not to include in the FPWA.

NMCD requests that this Court overturn the trial court's decision from which it appeals and find that Appellant, and all agencies of the State of New Mexico, are immune from suit under the FPWA and, accordingly, direct the trial court to dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted,

HINKLE SHANOR LLP

/s/ Ellen S. Casey
Ellen S. Casey
Jaclyn M. McLean
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
Telephone: (505) 982-4554
Email: ecasey@hinklelawfirm.com
jmclean@hinklelawfirm.com
Attorneys for Defendant New Mexico Corrections Department

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2016, I caused a true and correct copy of the foregoing *Defendant-Appellant NMCD's Brief in Chief* to be served via first class-mail, postage prepaid, to the following:

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

/s/ Ellen S. Casey
Ellen S. Casey