IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

RIO GRANDE SUN and LOUIS MATTEI, individually and as a reporter for the Rio Grande Sun,

Plaintiffs/Appellants,

vs.

Ct. App. No. 30,698

Appeal from First Judicial District Court
Honorable Sheri A. Raphaelson
No. D-117-CV-2009-00473

JEMEZ MOUNTAIN PUBLIC SCHOOL DISTRICT and ADAN DELGADO, Superintendent and custodian of public records for the Jemez Mountain Public School District,

Defendants/Appellees.

PLAINTIFFS/APPELLANTS' BRIEF IN CHIEF

PEIFER, HANSON & MULLINS, P.A.

Charles R. Peifer
Matthew R. Hoyt
Lauren Keefe
Post Office Box 25245
Albuquerque, New Mexico 87125
Telephone: (505) 247-4800
Facsimile: (505) 243-6458

Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A), (F) & (G) NMRA, Plaintiffs/Appellants state that the total word count contained in the body of the brief is 9,037 words, using Microsoft Office Word 2007.

1/31/2011
Dated

Lauren Keefe

SUMMARY OF THE ARGUMENT

This case places at issue the enforcement and protection of the New Mexico Legislature's decision to include a fee-shifting provision within the Inspection of Public Records Act, NMSA 1978, § 14-2-1 to -14 (1993, as amended through 2005). This provision serves to encourage citizens who have been wrongfully denied access to public records to enforce their rights, while at the same time discouraging government agencies from denying requests without careful consideration. The district court in this case recognized that the Plaintiffs, after successfully establishing that they had been improperly denied access to records, were entitled to an award of attorney's fees and costs pursuant to § 14-2-12(D). Nonetheless, the district court awarded Plaintiffs only $5,000 in fees, even though the value of the work done to obtain a favorable ruling, at prevailing market rates, was far greater. The district court also failed to allow Plaintiffs to recover costs incurred in this action and failed to award Plaintiffs their gross receipts taxes or allow for post-judgment interest on their attorney fee award. The district court's decisions reflect an abuse of discretion on several levels.

First, the district court ignored well established guidelines in regard to the review of fee petitions and failed to make any determination as to the reasonable hours expended in pursuit of Plaintiffs' successful claim or the reasonable rate to

be charged by Plaintiffs' counsel, but instead used an arbitrary figure, pulled from inapplicable case law, to set the amount of fees to be awarded. ***Second***, the district court openly refused to consider the evidence submitted by Plaintiffs, including an affidavit establishing the reasonable rates charged for similar work and the detailed billing records of Plaintiffs' counsel. ***Third***, the district court relied on a misapprehension of the record and the issues decided in this case in declaring the hours actually spent to litigate this case unreasonable. Ultimately, however, the district court ignored the policy underlying the IPRA's fee-shifting statute and placed the cost of correcting the government's illegal denial of access on the citizen seeking access, contrary to the Legislature's mandate. Indeed the district court's decision, if uncorrected, will discourage citizens from seeking to enforce their rights under IPRA, for fear that, despite IPRA's plain language to the contrary, they will bear the cost of correcting the government's wrongful denial of access to information. Plaintiffs therefore ask this Court to reverse the district court's decision and remand this case with instructions to the district court to award fees and costs that reflect the actual time needed to litigate this case.

SUMMARY OF THE PROCEEDINGS

This dispute arises out of a request for public records made by a local newspaper, Plaintiff *Rio Grande Sun*, pursuant to the IPRA. [R.P. 000001-21] The *Sun*, through its reporter, Plaintiff Louis Mattei, submitted two requests for

public records related to the high-profile embezzlement of more than $3 million from Defendant Jemez Mountain Public School District ("the District") by one of its employees, Kathy Borrego. [R.P. 000004-5, 000011, 000019] Mr. Mattei's first request sought District checks paid to Ms. Borrego. *Id.* His second request sought payment documents and vouchers to others suspected of involvement in the embezzlement scandal. [*Id.*]

The School District's Response

The District responded to the request for checks through counsel,[1] denying the request and refusing to produce any responsive records. [*Id.*; R.P. 000012-15] With regard to the request for pay documents and vouchers, the District, again through counsel, promised a written response but never provided one. [*Id.*; R.P. 000020-21] Later, while Mr. Mattei was covering a school board meeting, District Superintendent Adan Delgado told him that the second request was also denied. [R.P. 000005] In both cases, the District claimed that the records sought were "evidence in an ongoing criminal investigation" and therefore exempt under IPRA's law enforcement records exception, NMSA 1978, § 14-2-1(A)(4) (1993, as

[1] The IPRA, NMSA 1978, §14-2-8(D) (1993 as amended through 2009), requires the records custodian, not his or her attorneys, to respond to public records requests.

amended through 2005), also know as the "law enforcement records" exemption. [R.P. 000058-59]

In an attempt to resolve the dispute and obtain the responsive records, Mr. Mattei wrote to Defendants' counsel. [R.P. 00016] Counsel wrote back, rebuffed Mr. Mattei's attempt at resolution, and invited the *Sun* to complain to the Attorney General. [R.P. 000017-18] Defendants' counsel predicted that such a complaint would be "rejected summarily." [R.P. 000018]

The *Sun* then retained counsel experienced in litigating IPRA matters. [R.P. 000246-264] Once retained, Plaintiffs' counsel attempted to negotiate a resolution by writing to Defendants' counsel. [R.P. 000234; CD, 7-20-10, 9:45:10-9:45:53] These efforts failed, thereby necessitating the filing of a complaint against the District and the initiation of these proceedings. [R.P. 000001-21]

The District Court Proceedings

In their Complaint, Plaintiffs asked the district court, pursuant to Sections 14-2-11(C) and 14-2-12 of the IPRA, to a) declare that Defendants had violated IPRA; b) compel production of the records at issue, and c) award attorney's fees, costs, expenses and damages pursuant to the statute. [R.P. 000009-10] Defendants answered the Complaint, denying that they had violated IPRA, and raising a series of novel affirmative defenses not addressed by New Mexico law. [R.P. 000034-

40] For example, Defendants pled an affirmative defense that because the First Judicial District Attorney had asked the District to withhold any records related to Kathy Borrego, she was an "indispensable party" to the case. [R.P. 000039]

Plaintiffs did not proceed with costly written discovery or depositions in order to prove their case. [CD, 7-20-10, 9:54:30-9:55:18] Instead, shortly after Defendants served their Answer, Plaintiffs moved for judgment on the pleadings that the District violated IPRA by withholding the checks and vouchers responsive to the two requests at issue, and filed a brief in support of the motion. [R.P. 00043-54] Plaintiffs' motion argued that IPRA's "law enforcement records" exemption invoked by Defendants was inapplicable to the records at issue because a) that exception did not protect public records merely because they might be evidence in a potential criminal prosecution; b) the District's checks and vouchers were not "law enforcement records[;]" and c) even if the documents were law enforcement records, they did not "reveal confidential sources, methods, information or individuals accused but not charged with a crime" such that they fell within the protection of the claimed exemption. [R.P. 00046-52] Plaintiffs requested a hearing on their motion. [R.P. 000097-99]

Defendants responded to the motion by filing a brief with 12 pages of argument and almost 10 pages of exhibits, disputing not only the merits of Plaintiffs' motion but seeking to convert it to a request for summary judgment

under Rule 1-056 NMRA. [R.P. 00055-77] Claiming that the IPRA issues could not be resolved short of "an evidentiary hearing or ... trial" [R.P. 000056, 000066], Defendants submitted an affidavit of Superintendent Delgado in support of their opposition to Plaintiffs' motion, and 18 days after the response deadline, an additional affidavit from First Judicial District Attorney Angela Pacheco. [R.P. 000075-77; 83-87]

The tardy submission of the Pacheco affidavit, combined with evidentiary problems with both the Pacheco and the Delgado affidavits, necessitated additional motions practice by Plaintiffs: a motion for an extension on the reply deadline [R.P. 000078-80] and a motion to strike the affidavits from the record and convince the district court to decide the matter on the pleadings, along with briefing related to the motion to strike, which Defendants opposed. [R.P. 00090-96; 200-202; 207-212] The district court granted both of these motions. [R.P. 000119-120; 221]

Even without these affidavits, the issues addressed in the motion for judgment on the pleadings were far from straightforward. In addition to raising a conversion issue (for which there is almost no reported New Mexico court decisions), Defendants' response, like their affirmative defenses to the Complaint, raised a number of unusual legal arguments, including a host of legal and public policy arguments not answered by IPRA or New Mexico case law. Defendants

contended that the District was not required to establish that the IPRA applied to the records, but were instead permitted to rely upon the unsupported conclusions of other state officials -- the State Auditor and the District Attorney -- that the records were important to an ongoing criminal investigation of Ms. Borrego and therefore needed to be kept from the public. [R.P. 00059-61] Defendants argued their affirmative defense that the District Attorney was an indispensable party. [R.P. 00061-62] And Defendants claimed that the "rule of reason" exception recognized in *Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977) and clarified by this Court in *City of Farmington v. Daily Times*, 2009-NMSC-057, 146 N.M. 349, 210 P.3d 246, but not invoked by Defendants at any point prior to their response brief, required proof of IPRA violations through evidence that precluded any judgment on the pleadings. [R.P. 00062-66]

Prior to filing their reply in support of their motion for judgment on the pleadings, Plaintiffs learned, through their counsels' investigation, that a) the District Attorney's office had filed a criminal information indicting Ms. Borrego for embezzlement and other crimes committed against the school district; and b) that the school district had filed a civil complaint against Ms. Borrego, as well as a motion for a temporary restraining order, seeking to claw back the funds that Ms. Borrego apparently embezzled from the school district. Both of these events tended to disprove that the public records sought by the Plaintiffs needed to

somehow remain confidential, and, indeed, suggested that they were, or soon would be, made public as part of these other court proceedings. After investigating these events, Plaintiffs filed a motion asking the district court to take judicial notice of some of the filings from these other cases and to consider them as supportive of Plaintiffs' motion for judgment on the pleadings. [R.P. 000123-179] Although unopposed, this motion required preparation of factual information in order to explain why the criminal proceedings were relevant to the court's ruling on the pending motions. [*Id.*]

After the completion of briefing on the 1-012(C) motion, the district court, without a hearing,[2] issued an order granting the 1-012(C) motion and corresponding motion to strike Defendants' affidavits, finding that because "[t]he requested checks and payment vouchers do not fall within the exception of NMSA 1978 section 14-2-1(A)(4)[,] ... [t]he Defendants failed to comply with the Inspection of Public Records Act when they refused to produce the information described in the two requests made by the Plaintiff that are the subject of the lawsuit." [R.P. 000221] The district court ordered Defendants to produce all of the records responsive to the two requests at issue within 10 days. [R.P. 000221]

[2] The district court's order denied Plaintiffs' request for a hearing on the motion. [R.P. 000218]

Plaintiffs' Fee Petition

Having prevailed on virtually all of the issues raised by the Complaint, and having won every motion that they had filed,[3] Plaintiffs moved the district court to award their attorney's fees in the amount of $30,676.50, expenses in the amount of $1,320.01, gross receipts taxes in the amount of $2,149.44, taxable costs in the amount of $132, and post-judgment interest on their attorney's fees and expenses, pursuant to sections 14-2-11 and 14-2-12 of the IPRA.[4] [R.P. 000223-280; 000283-296] In support of their fees, costs and expenses request, Plaintiffs submitted:

- Detailed and itemized time records setting forth the specific tasks, costs, expenses and time (in 1/10 an hour increments) necessary to achieve the

[3] The Plaintiffs' motion was one for partial judgment on the pleadings, but as explained in the order granting this motion, the district court found that Defendants had violated the IPRA and ordered the production of the records at issue. [R.P. 000221] Thus, there can be no dispute that, despite the fact that Plaintiffs obtained only partial judgment, Plaintiffs prevailed on the main issue in the case. *See Hedicke v. Gunville*, 2003-NMCA-032, ¶ 26, 133 N.M. 335, 62 P.3d 1217 ("[T]he prevailing party is the party who wins on the merits or on the main issue of the case."); *Mayeux v. Winder*, 2006-NMCA-028, ¶ 41, 139 N.M. 235, 131 P.3d 85.

[4] In their original petition, Plaintiffs sought fees in the amount of $22,899.50, expenses in the amount of $834.85, gross receipts taxes in the amount of $1602.07, and taxable costs in the amount of $132, but updated these amounts upon the completion of briefing in support of the petition. [R.P. 000232, 000292, 000294-97]

successful result reached in the case. [R.P. 000234-245, 000294-297][5] The billings showed that to obtain their successful result, Plaintiffs' counsel had billed a total of 176.5 hours on the case. *Id.*

- An affidavit executed by former New Mexico Attorney General Paul Bardacke explaining that Mr. Bardacke had analyzed the case file and billings and determined that the hours expended were both reasonable and necessary. [R.P. 000246-255] Mr. Bardacke noted that the matter "involved novel and difficult questions of law, notably the application of the law enforcement records exception under the IPRA, for which I understand there is little reported case law interpreting this provision." [R.P. 000249-50] Mr. Bardacke further noted that "the fee was reasonable in light of the fact that litigation became necessary only after Mr. Hoyt was engaged in reasonable efforts to seek Defendants' compliance with IPRA without the need to resort to litigation, and was able to prevail in the matter expeditiously and with a reasonable expenditure of Court and party resources." [R.P. 000250]
- A resume of their counsel's law firm, as well as individual resumes for each of the attorneys who worked on the case. [R.P. 000256-264]

[5] Note that the page following R.P. 000296 was not marked with a page number.

Plaintiffs requested that the district court award them fees of $350 an hour for the senior partner, $ 225 an hour for t he junior partner, $165 an hour for associates, and $100 an hour for paralegals. [R.P. 000228-229] The requested $350 an hour rate was for senior partner Charles Peifer only, who had only spent 1.1 hours on the case. [R.P. 000230, 000236, 000239-240.; CD 1, 7-20-10, 9:52:22-9:52:53:07] Plaintiffs' counsel had charged lower rates to their client (*e.g.*, $185 an hour for the junior partner), but only because the *Rio Grande Sun* was a small town newspaper with limited resources. [R.P. 000229, 000249] Thus, Plaintiffs requested that the fees be computed using prevailing market rates. [*Id.*] The Bardacke Affidavit supported the requested hourly rate, pointing out that his own hourly rate for such work would be $450 an hour. [R.P. 000249]

In response to the fee petition, Defendants' primary argument was essentially a rehash of their failed merits argument: that fees should not be awarded until the District Attorney was made a part of the case. [R.P. 000268-270] On the hourly rates, Defendants claimed, without citation to any authority or evidence, that Plaintiffs' counsel's rates should be reduced to the same rates charged by Defendants' counsel for "public interest work[,]" or $175 per hour for partners, $125 per hour for associates, and $75 for paralegals. [R.P. 000273-74] On the hours expended, Defendants claimed, again without citation to any evidence, that Plaintiffs' hours should be "significantly reduced" from 176.5 to 15

hours. [R.P. 00274-278, 000280] Defendants attached an "exhibit" to their response showing their calculations, but no evidence in support of their calculations. [R.P. 00280] Defendants' calculated a reduction in hours by:

- Eliminating ***all*** time expended by associate attorneys, even though Defendants themselves used an associate. [R.P. 00274-278, 000280]
- Eliminating all time expended by partners except that expended by Mr. Hoyt even though Defendants had employed two partners. [*Id.*]
- Lumping tasks into a single category for "client contacts, analyzing pleadings, draft[ing] miscellaneous motions, and office administration[,]" even though Plaintiffs' detailed billings contain no such category. [*Id.*]
- Contending that the 10-page Complaint, with exhibits and summonses, should have taken no more than two hours of attorney time. [*Id.*]
- Claiming that the time necessary to research and write the 25 pages of briefing related to the motion for judgment on the pleadings required only five hours of attorney time. [*Id.*]
- Asserting that the reply in support of the motion to strike Defendants' affidavits should have taken less than an hour to research and write. [*Id.*]

The District Court's Order

After briefing was completed, Plaintiffs requested a hearing on the fee petition. [R.P. 000297-299] The district court denied this request, and instead decided Plaintiffs' petition on the briefs. [R.P. 000302-307] The district court granted the petition for fees, costs and expenses, but reduced the award to $5000 in fees and $794.04 in costs and expenses. [R.P. 000307]

With regard to Plaintiffs' request for attorney's fees, the district court found that "[f]ees are appropriate to award in these circumstances since the Plaintiffs did prevail[,]" but rejected both the hourly rates requested by Plaintiffs, and the number of hours expended by counsel. [R.P. 000304-306] Regarding the requested hourly rates, the district court stated it had "no reason to doubt" the "level of high expertise and experience" of Plaintiffs' counsel with IPRA litigation. [R.P. 000304] Nevertheless, without citation to any evidence presented by the parties, the district court found that the requested rates were "strikingly high." *Id.* The district court found the evidence submitted by the Plaintiffs, including the affidavit of Paul Bardacke, "no help at all" in determining the hourly rate. [R.P. 000305] It commented that Mr. Bardacke:

> [H]imself charges the unreasonable fee of $450.00 per hour. At this rate an attorney could make a handsome living working only one hour a day. These type of hourly fees are exactly what the Rules of Professional Conduct are attempting to limit with Rule 16-105.

[R.P. 000305-06] The district court declined to determine an hourly rate in deciding what fees to award Plaintiffs. [*Id.*]

With regard to the hours expended by Plaintiffs' counsel, the district court again found Plaintiffs' evidence "no help at all." [R.P. 000305] Rather than examining all of the detailed billing records submitted by Plaintiffs, the district court relied on a single set of time entries -- the 48 minutes required by Plaintiffs' counsel and their paralegals to perform research related to and to prepare the summonses -- to determine that "the Plaintiffs are looking for a windfall in the award of attorney fees, which this Court must safeguard against." [R.P. 000305] The district court found that to prepare the summonses in this case, "the only work would be filling in the case caption, which took this Court less than a minute to accomplish at the top of this Order, and then filling in the name and address of the three people to be served."[6] [*Id.*] Relying on this single entry the district court held that "[t]he Plaintiff's [*sic*] bill is so unreasonable in ... the hours billed that it is no help at all to the Court in determining reasonable fees." [*Id.*] The district

[6] In an affidavit submitted after the district court's order in support of Plaintiffs' motion for reconsideration, Plaintiffs' counsel explained the 48 minutes expended included legal research by a paralegal regarding the law and methods by which to serve a school district as a party defendant in a civil action. [R.P. 000332] The affidavit explained that although counsel had IPRA experience, it had no experience serving a school district in such a case, thus necessitating legal research into the issue. [*Id.*]

court therefore declined to analyze Plaintiffs' billings to determine a fee award. [*Id.*]

In setting the fees, the district court also either failed to examine, or ignored, the full court record. The district court found, in error, that "Plaintiffs filed [only] a Complaint, a Motion, and a Reply." [R.P. 000304] In fact, in order to address Defendants' many legal arguments, Plaintiffs were required to file, in addition to the Complaint, the Motion for Partial Judgment on the Pleadings, a brief in support of that motion, and a reply brief in support of the motion for partial judgment, and several other motions and briefs, including a motion to strike affidavits and related briefing, a motion to take judicial notice and related briefing, and the motion for an award of fees, costs and expenses and related briefing. [R.P. 000324-25]

The district court also questioned Plaintiffs' successful litigation strategy. The district court found that although Plaintiffs prevailed on the major issues in the lawsuit in the face of Defendants' novel and multifaceted defenses, their counsel should have expended only a "minimal amount of time" on this case. [R.P. 000304] Relying on its erroneous assumption that only a complaint and a single motion were filed, and noting that "[t]he Rules of Civil Procedure do not even require that a Reply be filed[,]" the district court commented that the time expended by Plaintiffs' counsel "is more than would be expected from even a

novice in the area who would presumably have to look up and read the applicable statutes, case law, and rules of Civil Procedure." [R.P. 000304-05]

Instead of examining the evidence and applying the lodestar method,[7] the district court relied upon *In re Roberts-Hohl*, 116 N.M. 700, 866 P.2d 1167 (1994), a disciplinary action in which the disciplined attorney had charged a $5,000 retainer to his clients, prepared and filed a complaint, and then took no action in the case for the next two and a half years, resulting in a dismissal of his client's case for failure to prosecute. [R.P. 000306]; *Roberts-Hohl*, 116 N.M. at 701-02, 866 P.2d at 1168-69. Finding, incorrectly, that "[i]n the instant case we have the filing of a Complaint, and one fully briefed Motion[,]" the district court decided that $5000 was a "reasonable" fee, and awarded fees at that amount. [R.P. 000306]

With regard to the costs and expenses, the district court found that, with the exception of some professional courier charges, Plaintiffs' requested costs and expenses were "necessary and reasonable." [R.P. 000306] Yet the district court failed to award Plaintiffs their $132 in taxable costs, and also failed to award the additional $485.16 of costs Plaintiffs submitted with their reply brief. [*Id.*; R.P. 000265, 000296-97] The district court also failed to award Plaintiffs' gross

[7] Under the lodestar method, a district court calculates "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Kennedy v. Dexter Consol. Schools*, 2000-NMSC-025, ¶ 35, 129 N.M. 436, 10 P.3d 115.

receipts taxes and post-judgment interest on the attorney's fees and expenses. [*Id.*; R.P. 000232, 000245, 000292]

Plaintiffs moved the district court to reconsider its Order, pointing out many of the errors in the district court's decision. [R.P. 000318-329] The Motion for Reconsideration informed the district court that it had misapprehended the record regarding the number of motions filed, and that it should fully review the billings rather than rely on *Roberts-Hohl* to determine the fee award. [R.P. 00324-328] Plaintiffs also produced an additional affidavit in support of the fee request. [R.P. 000331-335] After receiving Plaintiffs' motion, brief, and Defendants' brief in opposition to the motion to reconsider, the district court heard oral argument on July 20, 2010. [CD, 7-20-10] The district court announced from the bench that it was denying the motion to reconsider, stating that even though Plaintiffs' motion to reconsider was "reasonable[,]" Plaintiffs had failed to demonstrate that the district court's fee, cost and expense decision was "arbitrary" or "unreasonable" [CD, 7-20-10, 10:12:09-10:12:52 AM] At no point during the district court's announcement did it state that it had considered Plaintiffs' billings, affidavits, resumes, or any of the evidence submitted by the parties. *Id.* It entered its order on this motion on July 30, 2010. [R.P. 000357-58]

STANDARD OF REVIEW

A district court's determination as to the reasonable amount of attorney's fees and costs to be awarded to a prevailing party is reviewed under an abuse-of-discretion standard. *See Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 24, 136 N.M. 647, 103 P.3d 571; *Key v. Chrysler Motors Corp.*, 2000-NMSC-010, ¶ 7, 128 N.M. 739, 998 P.2d 575. "[T]he trial court abuses discretion when it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *Aragon v. Brown*, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913. Additionally, "[a]n abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 75, 122 N.M. 618, 930 P.2d 153. "The issue of whether costs are mandatory in a particular case is an issue of rule interpretation, which is . . . reviewed de novo." *Montoya v. Pearson*, 2006-NMCA-097, ¶ 5, 140 N.M. 243, 142 P.3d 11.

ARGUMENT

In awarding Plaintiffs only a small percentage of their attorney's fees and to deny their costs, the district court abused its discretion and ignored the policies underlying the Inspection of Public Records Act. This Court should therefore reverse the district court's decision and remand for a determination of the

reasonable fees and costs to be awarded Plaintiffs for their successful challenge to Defendants' denial of their request under the IPRA.

I. THE TRIAL COURT ERRED IN DRASTICALLY AND ARBITRARILY REDUCING ATTORNEY FEE AWARD TO PLAINTIFFS.

The district court recognized that Plaintiffs, as the prevailing parties in this matter, are entitled to recover the attorney's fees they incurred in enforcing the provisions of IPRA. *See* NMSA 1978, § 14-2-12(D) (1993) ("The court shall award damages, costs and reasonable attorney's fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act."). Nonetheless, the court awarded Plaintiffs less than 20% of the fees they actually incurred in pursuing their successful claim, up through the date of the district court's decision with respect to Plaintiffs' fee petition. Because the district court's decision was contrary to both established principles governing the award of attorney fees and the legislative purpose of IPRA's prevailing party provision, it constitutes an abuse of discretion and should be reversed.

A. The District Court Abused Its Discretion by Arbitrarily Reducing the Amount of Fees Awarded.

When awarding Plaintiffs only a small percentage of the actual fees incurred in this litigation, the district court abused its discretion in three key ways. First, it failed to follow established guidelines for determining the amount of fees to be

awarded. Second, it refused to consider the evidence submitted by Plaintiffs showing the time spent on this case, their standard rates for similar litigation, and the customary rates for counsel of similar experience for this type of litigation. Third, it relied on unsupported factual assertions based on a fundamental misapprehension of the record and proceedings in this matter. Each of these errors require reversal to the district court for a determination as to the reasonable fees to be awarded Plaintiffs based on the proper standards.

1. The district court abused its discretion by failing to determine the reasonable amount of fees necessary to achieve a successful outcome in this matter.

When a prevailing party is entitled to an award of attorney's fees, it is the district court's job to determine the amount of fees reasonably incurred in prosecuting the party's claim. *See Lenz v. Chalamidas (Lenz II)*, 113 N.M. 17, 19, 821 P.2d 355, 357 (1991) ("[T]he job of determining what constitutes a reasonable fee belongs to the district court ... ."). While the determination as to amount to be awarded is discretionary, "the exercise of that discretion must be reasonable when measured against objective standards and criteria." *Smith v. FDC Corp.*, 109 N.M. 514, 522, 787 P.2d 433, 441 (1990) (internal citation and quotation marks omitted).

The normal starting point for setting a fee award in cases like this, where fees are to be awarded to a plaintiff prevailing under a statutory claim, is the calculation of the lodestar -- *i.e.*, "the number of hours reasonably expended on the

litigation multiplied by a reasonable hourly rate." *See Hensley*, 461 U.S. at 433. "The lodestar is ordinarily used in statutory fee-shifting cases because it provides adequate fees to attorneys who undertake litigation that is socially beneficial, irrespective of the pecuniary value to the classes." *In re N.M. Indirect Purchasers Microsoft Corp. Antitrust Litig. ("Microsoft")*, 2007-NMCA-007, ¶ 34, 140 N.M. 879, 149 P.3d 976. The fee arrived at by using this formula is presumed to be reasonable, and "a strong showing is required for variation." *Jordan v. Heckler*, 744 F.2d 1397, 1401-02 (10th Cir. 1984).

Whether employing the lodestar or choosing an alternative method for arriving at an amount that reflects the reasonable fee for a particular case, the district court must issue findings of fact to support the determination as to the reasonable fee to be awarded in a particular case. *See Lenz v. Chalamidas (Lenz I)*, 109 N.M. 113, 118, 782 P.2d 85, 90 (1989) ("In setting attorney fee awards, a district court must make findings of fact on those factors on which the parties have presented evidence. Without findings of fact and conclusions of law, this court cannot properly perform its reviewing function." (internal citations omitted)); *see also Hensley*, 461 U.S. at 437 ("It remains important ... for the district court to provide a concise but clear explanation of its reasons for the fee award."). In so doing, a district court may rely on its own knowledge and experience to "supplement the evidence regarding a reasonable hourly rate" and the hours

expended. *See Microsoft*, 2007-NMCA-007, ¶ 65. It cannot, however, simply disregard the evidence presented entirely and instead rely on a ballpark figure to determine the reasonable amount to be awarded. *See Economy Rentals, Inc. v. Garcia*, 112 N.M. 748, 765, 819 P.2d 1306, 1323 (1991) (district court erred in relying on an "'eyeball' estimate" to determine that only 50% of plaintiffs' fees were incurred in enforcing a promissory note containing a prevailing party clause).[8] Instead, the district court must review the record evidence submitted by the parties in making its determination. *See Junker v. Eddings*, 396 F.3d 1359, 1365-66 (Fed. Cir. 2005) ("The determination of a reasonable attorney fee requires the court to consider all the relevant circumstances in a particular case," including the "detailed billing records or client's actual bills showing tasks performed in connection with the litigation.").

The district court's decision in this case does not meet any of these standards. Although expressing generalized sentiments regarding both the hours expended and the rate charged by Plaintiffs' counsel [R.P. 000305] -- sentiments

---

[8] *See also Robinson v. City of Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998) ("[T]he record ought to assure us that the district court did not 'eyeball' the fee request and cut it down by an arbitrary percentage." (quoting *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1314 (7th Cir. 1996))); *Manzanares v. Lerner's, Inc.*, 102 N.M. 391, 394, 696 P.2d 479, 482 (1985) (district court erred by reducing fees without determining the amount necessary to prosecute claim); *Burnside v. Burnside*, 85 N.M. 517, 521, 514 P.2d 36, 40 (1973) (district court erred in reducing attorney fee award without allowing plaintiff to submit evidence to show why fees were necessary).

that were, as discussed below, based on a misapprehension of the record and the issues raised in the case -- the district court did not make any findings as to the reasonable number of hours or the reasonable rate to be charged for this case. Nor did the court indicate that it was employing an alternative method to calculate the reasonable amount of fees that should be awarded in this case and issue any findings that would support that decision. The district court also issued no findings that would support the decision to award only $5,000 to Plaintiffs, when they had incurred nearly five times that amount while successfully obtaining a judgment against Defendants. Indeed, the district court d id not rely on any objective standards when arriving at $5,000 as the amount to be awarded. Instead, the court pulled a figure from *In re Roberts-Hohl*, a 16-year-old disciplinary decision where an attorney had collected $5,000 in fees but had failed to do any work except to file a complaint. [R.P. 000306] The *Roberts-Hohl* case did not purport to establish the prevailing rates for any market in 1994, much less 2010, and in no way established the prevailing rate among attorneys who engage in IPRA litigation. Nor did it establish the reasonable hours for any task, much less the successful pursuit of an IPRA claim where the responding agency raises complex and novel defenses. Indeed, *Roberts-Hohl* merely applied the general principle that "[a]ny fee is excessive when absolutely no services are provided," *In re Jones*, 119 N.M. 229, 230, 889 P.2d 837, 838 (1995), a principle that provides little guidance in

determining the reasonable charge for a successful outcome. The district court's arbitrary reliance on the figure from *Roberts-Hohl* was a clear abuse of discretion mandating reversal of the decision to award Plaintiffs only $5,000 in attorney's fees.

2. The district court abused its discretion in refusing to consider the detailed billing records submitted by Plaintiffs' counsel as evidence of the reasonable hours necessary in this case.

The district court justified the decision to award an arbitrary lump sum, without any determination as to the reasonable hours expended or the reasonable rate to be charged, by asserting that the detailed billing records submitted by Plaintiffs provided "no help at all" in making those determinations, based on the conclusion that the rate requested and time billed for certain entries was too high. [R.P. 000305] These concerns, however, do not provide a basis to wholly ignore the time records. Indeed, it cannot, because a prevailing party is *required* to submit detailed time records when making a claim for attorney's fees, and the failure to submit such records is likely to result in the denial of a claim altogether. As the New Mexico Supreme Court has explained:

> The party seeking fees ... has the burden of proving the number of hours spent on the case by means of meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks. ...
>
> In the present case, neither of Plaintiffs' attorneys provided the district court with any time sheet or other time record. The attorneys instead submitted separate affidavits asserting that they had worked

> approximately 400 and 600 hours respectively, but failing to specify how those hours had been spent. The Court of Appeals held that this lack of specificity prevented the defense from contesting Plaintiffs' attorneys' claims and failed to provide the detailed evidence required to support a lodestar calculation. We agree. We hold that a lodestar figure cannot fairly or properly be ascertained unless the prevailing attorney supplies at least some evidence detailing the number of hours spent engaged in specific activities relating to the preparation and litigation of a Section 1983 claim.

Kennedy v. Dexter Consol. Schools, 2000-NMSC-025, ¶ 35, 129 N.M. 436, 10 P.3d 115 (internal citations and marks omitted).[9] Moreover, this is the very information that a district court should review when determining the reasonable amount of fees to be awarded. *See, e.g., Lenz I*, 109 N.M. at 118, 782 P.2d at 90 (indicating that a district court "must make findings of fact ***on those factors on which the parties have presented evidence***.") (citation omitted) (emphasis added); *see also Junker*, 396 F.3d at 1365-66.[10] As a result, the district court cannot properly disregard the submitted time records altogether based on the conclusion that some line items are too high. Instead, the proper course in such circumstances

---

[9] *See also Kelley v. City of Albuquerque*, No. CIV 03-507 JB/ACT, 2005 U.S. Dist. LEXIS 39001, at *17 (D.N.M. October 24, 2005) ("If attorneys seek fees, they must keep meticulous, contemporaneous time records to present to the court upon request. These records must reveal all hours for which the attorney seeks compensation and how the attorney allotted those hours to specific tasks." (internal citations omitted)).

[10] *See also Evans v. Port Authority of New York and New Jersey*, 273 F.3d 346, 362 (3d Cir. 2001) ("Contrary to the suggestion of the district court, it is necessary that the Court go line, by line, by line through the billing records supporting the fee request." (internal marks omitted)).

is to determine the reasonable hours for the particular line items and to calculate the award accordingly.

Here, Plaintiffs submitted their counsel's contemporaneous time records identifying all tasks performed in connection with this case. [R.P. 000234-46, 000294-97] Those records identified the person who performed and the amount of time spent on each task that was undertaken in connection with this litigation. [*Id.*] The district court was required to go through these records, along with the information provided regarding the rates charged by Plaintiffs' counsel and the customary rates charged in this area for this type of litigation, and to determine the reasonable fees that should be awarded in this case. The district court's refusal to do so, and its decision to instead award a lump sum amount, was an abuse of discretion.

3. The district court abused its discretion in relying on a misapprehension of the issues and proceedings in this case.

The district court also abused its discretion in relying on unsupported and inaccurate factual assertions as the basis for its decision to award a mere percentage of the fees actually incurred this case.

"An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims*, 1996-NMSC-078, ¶ 75. Moreover, a district court's award of attorney's fees must be supported by substantial evidence -- that is, "such relevant evidence that a

reasonable mind would find adequate to support a conclusion." *See Microsoft*, 2007-NMCA-007, ¶¶ 70, 78 (internal citation and quotation marks omitted). Here, although the district court expressly refused to make any findings establishing the reasonable hours expended or rates to be charged in this case, it did make many factual assertions to justify its decision. The court's statements, however, were based on a misapprehension of the record and the proceedings below, and the district court abused its discretion in relying on these factual assertions as a justification for reducing the fee award to Plaintiffs. Most notably, the district court based its view that the hours billed by Plaintiffs' counsel were excessive on its perception that the case was relatively straightforward and involved only the filing of the Complaint and a single motion. Neither "finding" is supported by the record. In fact, as discussed above, Defendants raised numerous novel legal issues at each stage of the proceedings, making the prosecution of the case complex and time consuming. Plaintiffs were therefore compelled to file more than a single motion in order obtain a positive ruling from the district court.

These findings are not only erroneous, but do not support the district court's decision to issue a lump sum award of $5,000 for Plaintiffs successful effort to challenge Defendants' denial of their IPRA request. To the extent that the district court could have reasonably found any of Plaintiffs' time excessive, the court could properly reduce or eliminate time for particular billing entries. *See*

Thompson Drilling, Inc. v. Romig, 105 N.M. 701, 706, 736 P.2d 979, 984 (1987) ("The allowance of a particular fee may be reduced if it is determined to be unreasonable or excessive."). But that is not what the court did here. The court instead chose to set an arbitrary amount to be awarded based on a misreading of inapplicable case law. Thus, even to the extent the district court's findings would support reducing any specific time entries from Plaintiffs' billing records, they would not support the district court's decision to award an arbitrary lump sum well below the amount incurred in litigating this case, and the district court's decision to reduce the amount of fees awarded without determining the reasonable hours expended and reasonable rate to be charged constitutes reversible error.

B. Arbitrary Reductions in Attorney Fee Awards Will Discourage Citizens From Protecting Their Rights Under IPRA.

The district court's decision to drastically reduce the fee award in this case was not only arbitrary, but directly contrary to the public policy underlying the IPRA.

The United States Supreme Court has recognized that when a federal statute contains a fee-shifting provision, "the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)); *cf. Purdue v. Kenny A.*, 130 S.Ct. 1662, 1671 (2010) ("Congress enacted 42 U.S.C. § 1988 in order to

ensure that federal rights are adequately enforced."). Moreover, "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Christainsburg,* 434 U.S. at 418. Accordingly, a plaintiff bringing a statutory claim "acts as a private attorney general to vindicate the precious rights secured by that statute. ... Even the smallest victory advances that interest." *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1080-81 (10th Cir. 1998) (quoting H.R. Rep. No. 102-40(I) at 46-47, 1991 U.S.C.C.A.N. at 584-85) (internal marks omitted). The same is true of fee-shifting provisions within New Mexico statutes. *Lucero v. Aladdin Beauty Colleges, Inc.*, 117 N.M. 269, 271, 871 P.2d 365, 367 (1994) (attorney's fee provision of New Mexico Human Rights Act exists to "encourage lawyers to take cases involving alleged violations of the Act.").

These same policies apply equally in the public records context. A fee shifting provision within a public records statute serves to

> encourage public agencies to voluntarily comply with the requirements ..., thereby ensuring that the state's general policy is followed. If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents. Additionally, persons seeking access to such records are more likely to pursue their right to access beyond an initial refusal by a reluctant public agency.

New York Times Co. v. PHH Mental Health Services, Inc., 616 So. 2d 27, 29 (Fl. 1993). Accordingly,

> the proper implementation of the fee-shifting provisions [in public record statutes] is necessary to the Legislature's determination that ... government records should be readily accessible to the public. Successful litigation of a case brought under this act vindicates this important public interest. The Legislature in its wisdom has recognized the practical fact that the right to obtain unprivileged public documents will often be empty without the promise of recompense contingent on success in court. For the ordinary person, it is the fee-shifting provision that opens the courthouse door.

New Jerseyans for a Death Penalty Moratorium v. New Jersey Dep't of Corrections, 850 A.2d 530, 533 (N.J. Super. Ct. 2004) (internal citation omitted).

The rights created and protected by IPRA include the right of "access to public information . . . thereby encouraging accountability in public officials." *Cox v. New Mexico Dept. of Public Safety*, 2010-NMCA-096, ¶ 6, ___ N.M. ___, 242 P.3d 501, *cert. granted*, No. 32,604 (October 18, 2010) (internal citation and quotation marks omitted). "Under IPRA's 'enforcement' provision, an award of attorney fees is mandatory when (1) the request has been denied, and (2) the requester is successful in a court action to enforce the Act." *Board of Commissioners of Dona Ana County v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 37, 134 N.M. 283, 76 P.3d 36. These provisions provide an incentive to challenge the wrongful denial of an IPRA request and a government's effort to keep hidden information that rightfully belongs to the public. A decision denying attorney's fees, in whole or in part, will put the cost of an IPRA violation on the citizen instead of the government, and will discourage private parties from taking action to

rectify a wrongful denial, as few citizens will have the resources to bear the cost of litigating an IPRA claim. *See* Katrina G. Hull, *Disappearing Fee Awards and Civil Enforcement of Public Records Laws*, 52 Kan. L. Rev. 721, 725 (2004) ("The unlikelihood or uncertainty of recovering attorney fees fosters both selective and limited enforcement [of state and federal public records laws] because only those with adequate finances can afford to litigate openness."). The ruling here, where the district court awarded Plaintiffs less than 20% of the amount incurred in obtaining a successful judgment, and refused to award any amount for Plaintiffs' fee petition, will lead to just that result.

Of particular concern was the district court's suggestion that Plaintiffs should not be allowed to recover for the time incurred preparing a reply brief in support of their motion for judgment on the pleadings, on the grounds that "[t]he Rules of Civil Procedure do not require that a Reply be filed." [R.P. 000304] The district court's comment runs contrary to the longstanding rule that the court's function is not to "second guess a party's sound litigation strategy[.]" *Melissa G. v. Sch. Dist. of Phila.*, No. 06-5527, 2008 U.S. Dist. LEXIS 2871, at *11 (E.D. Pa. Jan. 14, 2008); *cf. Harris v. Superior Court of Ariz. in & for Maricopa,* No. CV 02-0494, 2009 U.S. Dist. LEXIS 28809, at *48 (D. Ariz. Mar. 20, 2009) ("The Court will not second-guess what evidence Defendants felt was necessary to obtain during discovery to prove their case."). The district court's contention that a

prevailing party should not be able to recover for reply briefs will discourage claimants from taking the actions necessary to fully present their claims and impose the risk that they will be unable to succeed on a meritorious claim. Indeed, in this particular case, Plaintiffs may not have been able to fully articulate the basis for their claims if they had not chosen to file a reply brief. In suggesting otherwise, the district court failed to recognize that Defendants had raised numerous issues in their response. Plaintiffs' counsel, exercising their judgment, determined that it was necessary to address those issues in order to explain why Defendants arguments did not provide a basis to allow them to deny Plaintiffs' IPRA request. The district court then ruled on the motion without a hearing. It may well be that the district court would have denied Plaintiffs' motions if they had not responded to and addressed those issues. Because a party should be allowed to exercise judgment to determine what steps are necessary in litigation, this Court should make clear that a district court should award all reasonable fees to a successful IPRA claimant in order to further the public policy behind the statute and not try to second guess that claimant's litigation decisions.

C. None of Defendants' Arguments Provide a Basis to Reduce Plaintiffs' Attorney Fee Award.

In responding to Plaintiffs' fee petition, Defendants raised a number of additional arguments, not expressly relied on by the district court, in arguing that Plaintiffs should recover only a small portion of the fees actually incurred in this

case. None of Defendants additional arguments provide a basis to affirm the district court's arbitrary reduction in the fees to be awarded.

Defendants argued that District Attorney Angela Pacheco instructed them to withhold the records at issue, and was therefore an indispensable party who should be held liable for half, if not more, of Plaintiffs fees. [R.P. 000208-70] The district court appeared to reject this argument, and this Court should as well. Plaintiffs issued a request for public records to Defendants. [R.P. 000004-05, 000011, 000019] Defendants, as the custodians of the requested records, refused the request, forcing Plaintiffs to bring this action in order to vindicate their rights. Under the plain language of the IPRA, Plaintiffs are now entitled to recover the reasonable attorney's fees incurred in prosecuting their claim against Defendants, *see* § 14-2-12(D), regardless of the role of any third party in the wrongful decision to deny Plaintiffs' request.

Defendants also argued that the Court should award Plaintiffs no more than the "public interest" rate charged by their lawyers. [R.P. 000273-74] Numerous courts, however, have rejected the contention that government attorney rates provide a benchmark for the determination of the proper rate for plaintiffs' counsel pursuing statutory claims. *See, e.g., Malloy v. Monahan*, 73 F.3d 1012, 1018 (10th Cir. 1996) (rejecting argument that court should use defendant's rate as a measure for fee award to successful plaintiffs in an excessive force action, explaining that

"Plaintiffs' and defendants' civil rights work ... are markedly dissimilar."); *Mirabal v. Gen. Motors Acceptance Corp.*, 576 F.2d 729, 731 (7th Cir. 1978) ("The amount of fees which one side is paid by its client is a matter involving various motivations in an on-going attorney-client relationship and may, therefore, have little relevance to the value which petitioner has provided to his clients in a given case."). Instead, a district court must determine "a reasonable hourly rate that reflects the prevailing market rates in the relevant community." *Microsoft*, 2007-NMCA-007, ¶ 65 (internal citation and quotation marks omitted). The use of a market rate is especially important in public records cases, where the use of lower-than-market rates would likely serve as a disincentive to citizens employing competent counsel to enforce their IPRA rights. *See State ex rel. Hodge v. Town of Turtle Lake*, 526 N.W.2d 784, 787 (Wis. App. 1994) (holding that under Wisconsin public records statute "the district court is required to apply reasonable private sector rates."); *see also* Hull, *supra*, at 749 ("Attorney fee awards are often the only financial incentive to bring a lawsuit seeking access to information. Without this incentive, many lawsuits that clarify and enforce public records laws would not be brought."). Here, Plaintiffs submitted evidence of their standard rates, and additional evidence to show that those rates are comparable to those charged by other private attorneys of similar skill and experience. These rates

should be used when determining the reasonable amount of fees to be awarded to Plaintiffs.

Defendants also offered their own estimates for the time they believe that Plaintiffs should have spent in order to obtain the ruling in their favor. [R.P. 000280] Defendants provide no evidence, however, to support their contention that their proposed hours -- which would include only two hours of attorney time for the preparation of the Complaint, five hours of attorney time to research and brief all of the issues raised by Defendants and no time for many of Plaintiffs successful motions -- reflect the reasonable time required to litigate this case successfully. This Court should not accept Defendants arbitrary and unsupported limits on the time needed to fully prepare the pleadings and fully brief the issues raised for this case.

Finally, Defendants argued that Plaintiffs are not entitled to recover any fees incurred in pursuing their fee claim. [R.P. 000277] The law is to the contrary; a party that is entitled to a fee award is also entitled to expenses and costs incurred in preparing their motions for attorney's fees. *See Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1205 (10th Cir. 1986) ("An award of reasonable attorneys' fees may include compensation for work performed in preparing and presenting the fee application.").

Because none of these arguments have merit, the Court should instruct the district court to disregard them on remand, and to determine the reasonable fees to be awarded based on a review of the evidence submitted by Plaintiffs.

D. Plaintiffs Are Entitled to the Fees Incurred on Appeal.

Plaintiffs are not only entitled to recovery of reasonable attorney's fees for the work done in obtaining a successful ruling from the district court, but those incurred in pursuing this appeal in order to vindicate their right to recover the proper amount under § 14-2-12(D). *See* Rule 12-403(B)(3) NMRA (allowable costs to be recovered by a prevailing party on appeal include "reasonable attorneys fees for services rendered on appeal in cases where the award of attorney fees is permitted by law"); *Hale v. Basin Motor Co.*, 110 N.M. 314, 321 (1990) (plaintiff who prevailed after winning successful appeal entitled to recover attorney's fees incurred in pursuing appeal; "We do not read the statute to limit specifically the award of attorney fees to those fees incurred at the trial level."); *Chavez v. Bd. of County Comm'rs*, 2001-NMCA-065, ¶ 47, 130 N.M. 753, 31 P.3d 1027 (prevailing plaintiff in claim brought under 42 U.S.C. § 1988(b) entitled to recover fees spent on appeal). Accordingly, the district court should be instructed to award Plaintiffs their reasonable attorney's fees for their work on this appeal.

II. THE TRIAL COURT ERRED IN FAILING TO AWARD PLAINTIFFS THEIR COSTS, GROSS RECEIPTS TAXES AND POST-JUDGMENT INTEREST.

The district court also erred in deciding the amount of costs to be awarded to Plaintiffs, in failing to award Plaintiffs their gross receipts taxes, and in failing to award post-judgment interest on the award for attorney's fees.

A prevailing party is entitled to recover the taxable costs identified in Rule 1-054(D) NMRA. In addition, those costs not taxable under court rules can nonetheless be awarded as attorney fees if: "(1) the expenses are not absorbed as part of firm overhead but are normally billed to a private client; and (2) the expenses are reasonable." *Jane L. v. Bangerter*, 61 F.3d 1505, 1517 (10th Cir. 1995). These awardable costs include legal research, long-distance telephone calls, postage, and other out-of-pocket expenses. *See Homans v. City of Albuquerque*, 264 F. Supp. 2d 972, 979-80 (D.N.M. 2003); *Libertad v. Sanchez*, 134 F. Supp. 2d 218, 235-36 (D.P.R. 2001). Under a straightforward application of these principles, Plaintiffs were entitled to recover for all costs incurred in litigating this action. The district court appeared to agree, and indeed found that, with the exception of some professional courier charges, Plaintiffs' requested costs and expenses were "necessary and reasonable." [R.P. 000304] Nonetheless, the district court failed to award Plaintiffs their $132 in taxable costs, and failed to award the additional $485.16 of costs Plaintiffs submitted with the reply brief

supporting Plaintiffs' fee petition. Because the district court found that the costs incurred were reasonable and necessary, it was error to refuse to award those costs to Plaintiffs.

A prevailing plaintiff who is entitled to a fee award is also entitled to recover the gross receipts taxes paid on attorney's fees. *See Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶¶ 34-36, 129 N.M. 586, 11 P.3d 550 (affirming award of attorneys fees "plus gross receipts tax and costs" to plaintiff who prevailed on claim brought under the New Mexico Human Rights Act). In addition, a party who has been awarded attorney's fees and costs is entitled to post-judgment interest. *See Sunwest Bank of Albuquerque, N.A. v. Colucci*, 117 N.M. 373, 379, 872 P.2d 346, 352 (1994) (holding post-judgment interest is mandatory); *see also, e.g., Artis v. United States Indus. & Int'l Ass'n of Machinists and Aerospace Workers*, 822 F. Supp. 510, 512 (N.D. Ill. 1993) (plaintiff who prevailed in a Title VII action entitled to statutory interest on the attorney's fees and costs portion of the judgment); *Fleet Inv. Co., Inc. v. Rogers*, 505 F. Supp. 522, 524 (W.D. Okla. 1980) ("Attorney fees awards are considered part of the judgment, and under 28 U.S.C. § 1961, interest should be allowed on such fees."). In their motion to recover fees and costs, Plaintiffs asked the district court to award gross receipts taxes and post-judgment interest. [R.P. 000223-80, 000283-96] The district court,

without explanation, failed to award either. Because Plaintiffs are entitled to both, this decision was error and should be reversed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the decision of the district court.

Respectfully submitted,

PEIFER, HANSON & MULLINS, P.A.

By: _____
Charles R. Peifer
Matthew R. Hoyt
Lauren Keefe
Post Office Box 25245
Albuquerque, New Mexico 87125-5245
Telephone: (505) 247-4800

We hereby certify that a copy of the
foregoing was served by first class mail to the following:

Mr. Aaron J. Wolf
Mr. Y. Jun Roh
Cuddy & McCarthy
P.O. Box 4160
Santa Fe, NM 87502-4160
Telephone: (505) 988-4476
Facsimile: (505) 954-7373

on this 31st day of January, 2011.

PEIFER, HANSON & MULLINS, P.A.

By: _____
Lauren Keefe