IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

GALE COOPER, *pro se*

Plaintiff-Appellant,

vs.

CT. APPEAL NO. 33,876

RICK VIRDEN, LINCOLN COUNTY SHERIFF and CUSTODIAN OF THE RECORDS OF THE LINCOLN COUNTY SHERIFF'S OFFICE; and STEVEN M. SEDERWALL, FORMER LINCOLN COUNTY DEPUTY SHERIFF

Defendants-Appellees.

APPEAL FROM THE THIRTEENTH JUDICIAL DISTRICT COURT,
SANDOVAL COUNTY, NEW MEXICO
CAUSE NO. D-1329-CV-2007-01364
HON. GEORGE P. EICHWALD, PRESIDING

PLAINTIFF-APPELLANT GALE COOPER'S REPLY BRIEF TO DEFENDANTS-APPELLEES' ANSWER BRIEF

Gale Cooper
P.O. Box 328
Sandia Park, NM 87047
(505) 286-8483
Pro se Plaintiff-Appellant

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In accordance with NMRA Rule 12-213(F)(1)(3), the body of this Reply Brief contains 4,359 words as counted by Microsoft Word and Times New Roman typeface in 14 point font, exclusive of parts excepted by Rule 12-13(F)(1).

TABLE OF AUTHORITIES

STANDARD OF REVIEW: The meaning of the language used in a statute is a question of law that the appellate court reviews de novo. *Cooper v. Chevron U.S.A., Inc,* 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61.

DEFENDANTS-APPELLEES' CITED CASES

PLAINTIFF-APPELLANT'S CITED CASES (SEE COOPER BRIEF IN CHIEF FOR FULL CITATIONS)

NEW MEXICO STATUTES AND RULES

CASES FROM OTHER JURISDICTIONS

OTHER AUTHORITIES

Whistleblower Plaintiff-Appellant Gale Cooper (**"Cooper"**) files this *Reply Brief* (**"Cooper RB"**) to Defendants-Appellees (**"Defendants"**) *Joint Answer Brief* (**"Defendants AB"**) to her *Brief in Chief* (**"Cooper BIC"**).

REPLY OVERVIEW

To penalize or not to penalize, that is the question. District Court (**"Court"**) found Defendants to be total, "willful, wanton, and in bad faith" violators of Inspection of Public Records Act (NMSA 1978, §§ 14-2-1 to -12) **("IPRA"**). (**RP 2285 COL 26**) Appealed are IPRA's $966,000 damages reduced to $1,000, and costs to almost half. Will Defendants escape penalty?

POINT I:
REPLY OF RELEVANT FACTS AND PROCEEDINGS

A. <u>Overview:</u> The law enforcement Defendants violated IPRA to hide DNA records from Cooper's exposé of their Case 2003-274 as DNA hoaxing with illegal exhumations. (**Cooper BIC 2-3**) From 2003, records were hidden by IPRA's law enforcement exception. Since this current case's 2007 beginning, Defendants hid all records by pretending they were private hobby products, neither in the Sheriff's possession nor available. Court-ordered turn-overs, yielded Defendants' non-IPRA contempt and records forgeries. Now, to avoid penalties, they repeat their deceptions for the Court of Appeals. So Cooper's RB begins with the truth.

B. Defining Case 2003-274

1. The Court found:

> "Case 2003-274 is a murder case, filed in 2003 in the Lincoln County Sheriff's Department by Sheriff Tom Sullivan (**hereinafter Sullivan**) and his commissioned Deputy Steve Sederwall (**hereinafter Sederwall**) to be solved by forensic DNA acquisitions and matching, and accusing suspect Pat Garrett [**"Garrett"**] of murdering an innocent victim instead of Billy the Kid; with sub-investigation of Billy the Kid's [**"the Kid"**] double homicide of Deputies James Bell and Robert Olinger [**"sub-investigation"**].
>
> "From 2003 to 2004, Case 2003-274's New Mexico exhumation attempts on Billy the Kid and his mother for matching DNA were legally blocked so no DNA was obtained.
>
> "In 2004 Billy the Kid's DNA was allegedly obtained for Case 2003-274 by Dr. Henry Lee (**hereinafter Lee**) from an old carpenter's bench [**"bench"**] on which Billy the Kid laid after being shot. Lee's specimens were sent for DNA processing to Orchid Cellmark Lab (**hereinafter Orchid Cellmark**) in Texas.
>
> "In 2005 newly elected Lincoln County Sheriff Rick Virden (**hereinafter Virden**) deputized Sullivan and Sederwall to continue Case 2003-274 by exhuming Billy the Kid's identity claimants John Miller and "Brushy Bill" Roberts [**"Arizona exhumations"**] for DNA match with Lee's bench DNA to solve the Garrett murder.
>
> "On May 19, 2005, for Case 2003-274, John Miller and William Hudspeth were exhumed in Arizona and their bones were taken to Orchid Cellmark for DNA extractions and for DNA matching to the carpenter's bench DNA." (**RP 2278 FOF 5-9**)

C. Public Status of Case 2003-274

1. Records had law enforcement titles and official letterhead:

a. December 31, 2003's *Probable Cause Statement* was signed by Sederwall as "Deputy Sheriff, Lincoln County" and Sullivan as "Sheriff, Lincoln County." (**RP 162**)

b. April 30, 2003's Sheriff Sullivan letter to a Charles Ryan, stated: "On April 28, 2003, I along with Deputy Sederwall pulled case number 2003-274." (**RP 1218-1219**)

c. October 8, 2003's Sheriff Sullivan IPRA denial used § 14-2-1(A)(4) for "law enforcement records." (**RP 1234**)

d. All exhumation petitions listed Sullivan as "Sheriff of Lincoln County" and Sederwall as "Deputy Sheriff of Lincoln County": (1) October 10, 2003's exhumation of [the Kid's mother] Catherine Antrim (**RP 166-168**); (2) February 26, 2004's exhumation of the Kid (**RP 169-173**); (3) July 29, 2004's petitioner's response for the Kid's exhumation stated: "Sullivan, Sederwall … acting in their capacity as law enforcement officers initiated Investigation No. 2003-274 filed in Lincoln County." (**RP 174-178**); and (4) May 19, 2005 "Supplemental Report for Case 2003-274" for the "Exhumation of John Miller" was signed by Sederwall as "Lincoln County Sheriff's Deputy." (**RP 164-165**).

2. From 2003 to 2007 Sullivan and Sederwall were Sheriff or Deputy:

a. On May 19, 2004, Lincoln County Attorney Alan Morel (**"Morel"**) confirmed Sederwall's Deputy Commission:

> "Sheriff Sullivan advised me that he did issue a deputy sheriff's card to Mayor Sederwall … which is identified on a list as number 147." (**RP 179**)

b. In 2005, Virden, becoming Sheriff, issued Sederwall and Sullivan Commissioned Deputy Cards (**Tr. 12/18/12, Plaintiff Cooper Ex's. 6, 7**); as he confirmed by November 28, 2005 and May, 2007 letters. (**RP 1220, 1221**).

c. Sederwall's and Sullivan's June 21, 2007 resignation "Memorandum" confirmed deputy tenures till that day. (**RP 20-37**)

3. In 2003, Sederwall, authoring Case 2003-274's "Probable Cause Statement" (**RP 243 at page 9**), confirmed finding the bench as a Deputy:

> "Deputy Sederwall of the Lincoln County Sheriff's Department located the carpenter's bench where the Kid's body was placed on July 14, 1881." (**Tr. 1/21/11, Plaintiff Ex 10 at page 8**)

4. Lee's report was for Case 2003-274. (**Cooper RB 8**)

5. Orchid Cellmark's records were Case 2003-274's. (**Cooper RB 9**)

D. <u>Requested Records</u>

1. Cooper's April 24, 2004 request had four (4) records categories:

> "From April 24, 2007 to June 26, 2007 Plaintiff Cooper made IPRA record requests from Sheriff Virden for Case 2003-274 through her then attorney Mickey Barnett ("request phase"). Requested records were for:
>
> A. Lee's DNA recoveries from the carpenter's bench;
> B. Orchid Cellmark's DNA extractions from Lee's specimens;
> C. Orchid Cellmark's DNA extractions for the two Arizona bodies; and
> D. Orchid Cellmark's DNA matchings for the carpenter's bench to the bodies." (**RP 2278 FOF 10**)

E. Relevant IPRA Law

1. RESPONSIBILITY: Custodian Virden's responsibility included records not in "actual physical custody and control" for public records held "on behalf of" him under § 14-2-6(A) and (F). Sederwall and Sullivan were additional "person[s] responsible for denial" under § 14-2-11(B).

2. DENIAL DAMAGES: Per day penalty-damages are under §§ 14-2-8(A) and 14-2-11(A)(B)(C). Enforcement is under § 14-2-12(A)(D).

F. Relevant Proceedings

1. The Court found:

> "An Evidentiary Hearing was held on January 21, 2011 and Virden argued that he could not turn over records that were not in his direct possession and which he did not know existed. Sederwall's Lee courthouse floorboard report was entered as Exhibit "F," and the carpenter's bench report was entered as Exhibit "E." [later found to be forged] … [T]he Court reminded the parties that the Partial Summary Judgment previously entered on November 20, 2009 found that the Defendants and the investigation were official and connected to the Lincoln County Sheriff and that all evidence was public record and that all information should be turned over to Plaintiffs.
>
> "In his June 27, 2012 deposition Virden admitted to: waiting three (3) years into litigation to write record requests to Lee and Orchid Cellmark; not requesting from Lee the report when Lee wrote back that he had one; and not trying to find out the client's name after Orchid Cellmark wrote back that it was required to send Virden the requested records.
>
> "At an Evidentiary Hearing … on December 21 [sic-18], 2012 and February 4, 2013 Virden admitted: that the [Co-Plaintiff's April 20, 2012] subpoenaed Orchid Cellmark DNA records were from Case 2003-274 but gave no valid explanation for waiting three (3) years to begin records recovery." (**RP 2280-2281 FOF 20, 27, 29**)

2. The non-IPRA contempt and forgery proceedings (**Cooper BIC 8**) are in Cooper's *Answer Brief* to Defendants' *Joint Brief in Chief.*

G. Court-Ordered Turn-Overs

1. March 12, 2010 's *Summary Judgment* Order stated:

> "1. Defendants Sullivan and Sederwall were acting either as employees or agents of Defendant Lincoln County Sheriff at all times pertinent to this cause of action.
> "2. Defendant Lincoln County Sheriff opened the investigation and continued with the investigation which is the subject of this cause of action.
> "3. All evidence, documentary or otherwise, resulting from this investigation is public record …"
> "[ORDERED] … Defendants are ordered to turn over to plaintiffs all information that has been collected as result of the investigation this cause of action." (**RP 299-300**)

2. September 28, 2011's Order on January 21, 2011's Evidentiary Hearing stated:

> "1. The investigations of the homicide of Billy the Kid and of the double homicide of James Bell and Robert Olinger are related.
> "2. Both investigations were conducted under the auspices of the Lincoln County Sheriff's Department.
> "3. All reports, lab results, and documents and items which were made, generated, received, or obtained during the course of these investigations are public documents under [IPRA] … (**RP 470**)

H. Total Wrongful Records Withholding

1. Request and Enforcement phases had total IPRA violation:

> "In the request phase, no records were given and their denials were improper; without valid IPRA exceptions (**RP 2282 COL 8**); with Sullivan and Sederwall after having resigned their deputyship on June 21, 2007 admitting to records possession, but calling them

private hobby "trade secrets;" with Virden denying having any Case 2003-274 records; and with Virden not attempting to recover records from Sullivan, Sederwall, Lee, or Orchid Cellmark.

"On October 26, 2010 Virden first made records requests to Lee and Orchid Cellmark but never followed up to recover the records after Lee responded that he had one report, and Orchid Cellmark responded that it would send the records if released by their client." (**RP 2278 FOF 11, 18**)

"In his June 26, 2012 deposition Sederwall admitted to … knowing that the Orchid Cellmark client [to release records] was [Lee's partner] Calvin Ostler." (**RP 2281 FOF 26**)

2. The Court concluded:

"Without statutory justification, no requested records were produced by the Defendants.

"As public officials, under Section 14-2-5 NMSA 1978, Sullivan and Sederwall had to provide records as, "an integral part of the routine duties of public officers and employees.

"As commissioned deputies, under Section 13[sic - 14]-2-11(B)(2) NMSA 1978, along with Virden, they were "responsible for the denial of records." As Virden's deputies, they were his agents.

"Defendants' conduct in not providing the requested records … is willful, wanton, and in bad faith." (**RP 2282 COL 4, 13-14, 26**)

I. <u>Case 2003-274 DNA Records' Existence</u>

1. Court found: "The requested records exist, and have been recoverable from the time of the request phase." (**RP 2282 COL 5**)

2. LEE'S RECORDS:

a. In a May 1, 2006 letter, Lee wrote:

"To set the record straight, *the Lincoln County Sheriff's Department contacted me* ... We examined a wooden bench, and floorboards at the courthouse. I completed my examination of the evidence and *submitted my report to the Lincoln County Sheriff's Department*." (emphasis added) (**RP 54**)

b. On November 12, 2010, Lee wrote to Virden:

> "My only report issued in regards to the death of Billy the Kid was issued on February 25, 2005." (**RP 366**)

c. On January 31, 2012, court-ordered Sederwall turned over an allegedly "original" Lee bench and floorboards report having header for Case 2003-274. **(RP 2280 FOF 23**)

2. ORCHID CELLMARK'S RECORDS:

a. On April 20, 2012, Co-Plaintiff's non-IPRA subpoena got one hundred thirty-three (133) pages on DNA extractions for Lee's bench specimens and Arizona exhumed remains. (**RP 2280 FOF 24**)

J. <u>Bad-Faith Records Concealment Revealed</u>

1. Though records were "recoverable from … request phase," Defendants' bad-faith concealment was revealed by a September of 2010 communication to Cooper by Virden's lawyer, Henry Narvaez [**"Narvaez"**], offering the supposedly inaccessible records *if she dismissed Virden*! (**Cooper BIC 8, Tr. 1/17/12, 28-29, Plaintiffs Ex's. 3, 3A**). Narvaez's February 9, 2012 affidavit confirmed:

> "I [Narvaez] told Mr. Threet [Cooper's attorney] the Sheriff [Virden] did not have possession of any documents from the [Orchid Cellmark] Labs or from Dr. Lee. *I did agree to have the Sheriff request that any documents be turned over by Dr. Lee and the Labs in return for Mr. Threet's agreement to dismiss the lawsuit*." (emphasis added) (**RP 757**)

K. Concluding Hearing

1. Cooper stated in December 18, 2013's Hearing on *Damages, Costs, and Sanctions*:

> "This is what it looks like when corruption is out of control … The only thing … to stop these wildly out of control Defendants is a penalty that won't be forgotten in Lincoln County … (**Tr. 12/18/13, 54**) Lincoln County got caught with their pants down by permitting this hoax to be conducted through the Sheriff's Department … (***Id.,* 56-57**) I should now get the recompense that the [IPRA] law has established." (***Id.,* 72**)

L. Court Found For Cooper on May 15 and June 4, 2014

1. Cooper prevailed (**RP 2306 Judgment 2**), getting now appealed IPRA damages of "one thousand dollars ($1,000.00)." (**RP 2285 COL 24**)

POINT II:
REPLY DEMONSTRATING IMPROPER CHALLENGE TO THE COURT'S *FINDINGS*

A. Summary: Forgoing Interloculatory Appeal in 2009 after losing *Summary Judgment* (**RP 300, 303**), Defendants defy *Findings of Fact* (**"Findings"**) to argue by their rejected *Proposed Findings and Conclusions*.

B. The Court Rejected Defendants' *Proposed Findings and Conclusions*

1. The Court denied "[a]ll proposed findings of fact and conclusions of law … except those incorporated by the Court in its May 15, 2014 [*Findings and Conclusions*]." (**RP 2306 Judgment 1**)

C. The Court's *Findings* Are Binding

1. *Findings* are binding "unless they are demonstrated to be clearly erroneous or not supported by substantial evidence." *Roybal v. Morris*, 1983-NMCA-101, ¶ 30, 100 N.M. 305, 311, 669 P.2d 1100, 1106.

> "Substantial evidence [is defined as] such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Landavazo v. Sanchez,* 1990-NMSC-114, ¶ 7, 111 N.M. 137, 802 P.2d 1283.
>
> "The evidence must be viewed by [the appellate court] in its most favorable light in support of the findings. If the evidence when so viewed, including the reasonable inferences therefrom, supports the findings, then all contrary evidence must be disregarded." *Martinez v. Trujillo*, 1970-NMSC-056, ¶ 6, 81 N.M. 382, 467 P.2d 398.
>
> "Findings not validly challenged must be accepted as true by the appellate court and are controlling for purposes of the appeal." *Trinidad Indus. Bank v. Romero*, 1970-NMSC-038, ¶ 7, 81 N.M. 291, 466 P.2d 568 (citing *Case v. Henry*, 1951-NMSC-15, 55 N.M. 154, 228 P.2d 433).
>
> "The function of an appellate court is to review the evidence presented … not to reweigh conflicting evidence." *Maloof v. San Juan Cnty. Valuation Protests Bd.*, 1992-NMCA-127, ¶ 17, 114 N.M. 755, 845 P.2d 849.

D. Defendants Preserved No Valid Challenge

1. Defendants' case record preserves no valid argument or evidence countering *Findings.*

> "[A contested] finding of fact … not supported by substantial evidence shall be deemed waived unless the argument *identifies with particularity the fact or facts that are not supported by substantial evidence*." (emphasis added) NMRA Rule 12-213(A)(4).

2. Defendants AB relies on their rejected *Findings*:

> "[On appeal, a party] should properly present this court with the issues, arguments, and proper authority. *Mere reference in a conclusory statement will not suffice and is in violation of our rules of appellate procedure.*" *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 (noting that the Court is "*not required to do [counsel's] research" for them*). (emphasis added)

E. Virden Used Rejected April 24, 2013 *Proposed Findings and Conclusions*

1. MISSTATING RECORDS RESPONSIBILITY: Alleged is with Virden as custodian, Sederwall and Sullivan, as non-custodians, have no records responsibility. (**Defendants AB 7**) In truth, they do, as "public officers" and responsible records deniers under §§ 14-2-5 and 14-2-11(B). (**RP 2283-2284 COL 13-16**)

2. MISSTATING LEE'S RECORDS AS NOT ON DNA: Preposterously asserted is that if Lee *did not extract DNA himself*, his report was not about DNA; thus, not a requested record! This ignores that Lee's bench DNA specimen recoveries began the chain of custody for "reference DNA" (**Tr. 1/21/11, 52-53**) from Billy the Kid's "blood;" as reflected in Orchid Cellmark's records. (**RP 2074-2078**) But Defendants obfuscate:

> "Dr. Lee 'never undertook to analyze the blood-like samples for DNA, and never made or prepared any findings with regarding to DNA samples." (**Defendants AB 7**)

3. MISSTATING IPRA LAW AS POSSESSION: Ignored is §§ 14-2-6(A)(F) for records "held on behalf of" a public entity. The Court had stated:

"In both the request and enforcement phases, Virden's records recovery refusal[s] have been misplaced and *ignored IPRA by arguing that recovery pertains only to records in direct physical possession*. (emphasis added) (**RP 2292 COL 9**)

a. Nevertheless, Defendants fabricate:

"Sheriff Virden … did not violate IPRA because he never used, created, received, possessed, maintained, held, or even had knowledge of any documents [of] Dr. Henry Lee or Orchid Cellmark." (**Defendants AB 7**)

b. Deceptively, Defendants quote September 28, 2011's Order for January 21, 2011's Evidentiary Hearing referencing Virden's file, *but not excusing him from records recovery* (**RP 300; Tr. 12/18/13, 54**):

"Sheriff Virden has produced everything which he has in his possession concerning his two investigations." (**Defendants AB 5**)

c. Ignored is *Toomey v. Truth or Consequences*, 2012-NMCA-104, 287 P.3d 364, as Cooper presented in her December 18, 2013 Hearing on *Costs and Damages and Sanctions* for "on behalf of" factors:

"[Factors include] [w]hether services are an integral part of the public agency's decision-making process [and] … [f]or whose benefit the private entity is functioning' … [In Case 2003-274] … this DNA [from Lee and Orchid Cellmark] was the … integral part of the sheriff's department solving the murder of Pat Garrett and the innocent victim, and for [benefit of] the sheriff's department … [I]mportantly, both Dr. Lee and Orchid Cellmark identified their work as going to case 2003-274." (**Tr. 12/18/13, 12-13**)

F. Sederwall Used Rejected April 25, 2013 *Proposed Findings and Conclusions*

1. GIBBERISH ABOUT REQUESTED RECORDS:

> "[Sederwall] stated that all existing public records requested by Plaintiff-Appellant which had been produced to Dr. Cooper were not responsive to the original public records requests." (**Defendants AB 8**)

2. In truth, requested records were declared public. (**Cooper RB 6**).

POINT III:
REPLY DEBUNKING "FACTS AND COURSE OF PROCEEDINGS"

A. Concealing Records' Public Nature

1. Requested records are called "alleged public records" (**Defendants AB 1**), though already declared public. (**Cooper RB 6**)

2. Requested public records are misstated as: "became a private endeavor as progressed." (**Defendants AB 1**)

B. Concealing Defendants' Official Capacities

1. Alleged is if Sederwall or Sullivan was a "reserve deputy" they were not public officials. Ignored are their Commissioned Deputy cards (**Cooper RB 3-4**); and Court's finding them "public officials," "commissioned deputies" (**Cooper RB 7**), and rejecting that argument:

> "Sullivan's and Sederwall's argument of being "unsalaried "reserve deputies" is irrelevant to the records responsibility." (**RP 2284 COL 15**)

2. Obfuscating continuous law enforcement tenures, Sheriff Virden's tenure is dated from "2004," not correct 2005. (**Defendants AB 1**)

C. <u>Misstating Requested Records</u>

1. Cooper's request is called "two categories" (***Id.* 2**), ignoring four (4) categories found by the Court; and the request's adding:

> "Each category of documents requested in the numbered paragraphs [1 and 2] … is to be deemed a separate request to inspect the records identified in the category, to the same extent as if … separate requests had been delivered instead of this single letter." (**Tr. 1/21/11, Plaintiffs Ex 3 at page 2**)

D. <u>Feigning IPRA Compliance as by "Original" Lee Report and Co-Plaintiff's Subpoenaed Orchid Cellmark Records</u>

1. Omitting that forged Lee reports triggered court-ordered turn-over of an "original" on January 31, 2012, pretended is compliance.

2. Omitting Co-Plaintiff proved Orchid Cellmark records' existence by non-IPRA subpoena, Defendants pretend this met compliance.

3. Defendants obfuscate:

> "The district court admitted the 'Original Report' from Dr. Henry Lee and the one hundred thirty-three (133) pages received from Orchid Cellmark into evidence." (**Defendants AB 6**)

E. <u>Unintelligible Claim About § 14-2-11 IPRA Damages</u>

1. "Course of Proceedings" concludes indecipherably:

> "Because Plaintiff [Cooper] was latter successful in enforcing the request in judicial proceeding, statutory per diem damages were not awarded under § 14-2-11. (***Id.* 9**)

2. Cooper's *Brief in Chief* arguments for § 14-2-11 penalty-damages are not refuted. (**Cooper BIC 9, 18-21**)

POINT IV:
REPLY DEBUNKING "ARGUMENT AND AUTHORITIES"

A. Erroneous Arguments Against Damages Award of $966,000

1. Misstated are § 14-2-11 per day damages as for request phase only:

> "Plaintiff's request for $966,000 in statutory per diem damages is contrary to the IPRA statutory provisions and should be rejected *as per diem damages can only be awarded in the request phase of an IPRA case*." (emphasis added) (**Defendants AB 9, 11**)

a. In truth, per day damages apply to request and enforcement phases. Wrongful denials *are determined by* request phase non-compliance:

> "[A] written request for inspection of public records that has not been permitted within fifteen days of receipt by the office of the custodian may be deemed denied." § 14-2-11(A)(B).

Wrongful denials trigger enforcement phase "remedies," one being per day § 14-2-11(C)(3) damages that "accrue from the day the public body is in noncompliance." In Cooper's case, compliance never occurred.

b. Defendants' "request phase only" fabrication ridiculously leaves zero (0) days for damages, since request phase has fifteen (15) grace days; and day sixteen (16) begins *enforcement phase's* accruing penalty.

c. Defendants even quote *Faber v. King*, 2013-NMCA-080, 306 P.3d 519, *overruled by Faber v. King*, 2015-NMSC-015, 348 P.3d 172 (**"Opinion"**) confirming § 14-2-11's per day damages for which Cooper argued (**Defendants AB 10**) (**Cooper BIC 18-21, 24-29**):

> "It is when the custodian fails to respond to a request or deliver a written explanation of the denial that the public entity is subject to Section 14-2-11 damages. In that case, the court shall award the injured party damages not to exceed $100 per day that 'accrue from the day the public body is in noncompliance until a written denial is issued' and are 'payable from the funds of the public body.' Section 14-2-11(C)(2)-(4)." (**Opinion ¶ 16**)

d. Defendants ignore the Opinion's using per day damages to calculate extreme noncompliance through enforcement phase:

> "While the exact date of [King's] compliance cannot be known because the litigation is ongoing, we can be certain that on the day of this writing over 1,000 days have passed, thus tipping Faber's damages over the $100,000 mark." (**Opinion ¶ 34**)

2. Ignored are wrongful denials meriting maximal per day damages:

a. No Proper Letter: Defendants ignore: a) Court's affirming no proper denial letter under § 14-2-11(B) (**RP 2282 COL 8; Cooper BIC 4, 9, 13, 15**); and b) Cooper's cross-examination of letter-writer Morel about that. (**Tr. 2/4/13, 149-154, Plaintiff Cooper Exhibit 22; Tr. 12/18/13, 67-69**) Defendants merely irrelevantly claim Virden's responses were "timely." (**Defendants AB 11**)

b. No Requested Records Turn-Over: is ignored. (**RP 2278-2279, 2281 FOF 11, 18, 29; RP 2282 COL 4-5**)

3. Calculation of $966,000 damages is obfuscated:

a. Calling Cooper's sum "unclear" (**Defendants AB 10**), Defendants ignore her documented calculation for "§ 14-2-11's maximal …

violations of improper denial letter and wrongful withholding (**Tr. 12/18/13, 6-7, 27-34, 53-56, 58, 61, 70-72**) of all four (4), requested, DNA, records categories (***Id.*, 10; RP 2278 FOF 10; Cooper BIC 9**) … for two thousand four hundred fifteen days (2,415), at the maximum $100.00 per day as the maximum under § 14-2-11(C)(2). That equals $966,000." (**Cooper BIC 10, 13, 18-21**)

B. Erroneous Assertion that Cooper Sought Court of Appeals Overturning of *Faber v. King's* Opinion

1. Defendants fabricate that Plaintiff "[requests] that the Court of Appeals overrule a Supreme Court decision" (**Defendants AB 9**); then argue irrelevantly with irrelevant case law. (***See* Table of Authorities iii**).

2. In fact, Cooper presented *Faber v. King's* Opinion as inapplicable to her case and fatally flawed (**Cooper BIC 33-35, 42**), and *properly requested certification to the Supreme Court for overruling*:

> "[I]f the Court of Appeals decides that *Faber v. King's* Opinion is … applicable, Cooper requests certification to the Supreme Court under Rule 12-606 NMRA and Section 34-5-14(C) NMSA 1978 on the grounds that her arguments refute that Opinion's § 14-2-12(D) 'actual damages' … and that its overruling is of great public value for protecting civil rights, IPRA, and taxpayers." (**Cooper BIC 43**)

C. Erroneous Assertion That Cooper Seeks Attorneys' Fees

1. Defendants repeat the Court's appealed error confusing costs and attorney fees (**RP 2286 COL 30**; **Cooper BIC 41-42**) to argue irrelevantly

against fees with irrelevant case law. (**Defendants AB 9, 12-13**) (***See* Table of Authorities iii**).

2. In fact, Cooper was awarded IPRA costs. (**RP 2286 COL 31**):

> "Cost [is] the amount paid … for something … the expenses of litigation: those allowed in favor of one party against another …." *Black's Law Dictionary* 349-350 (7th ed. 1999).
>
> "An expenditure of money [as] out-of-pocket expense … paid from one's own funds." *Id. 599.*

3. Among Cooper's cost payments were attorneys' costs. (**Cooper BIC 41-42, RP 2218-2219, 2237, 2287-2291**)

4. Costs are defined by out-of-pocket expenditure, not by source:

> "Certainly an important purpose of [42 U.S.C. § 1988] is to encourage private enforcement and vindication of civil rights by providing recovery of *all costs*." *Witherspoon v. Sielaff*, 507 F. Supp. 667, 669 (N.D. Ill. 1981). (emphasis added)

5. There exist no "attorney's fees … not been previously paid" (**RP 2286 COL 30**) after settlement. (**Tr. 9/21/12, 3; Cooper BIC 9**)

6. Cooper should be awarded her full costs of $19,594.56. (***Id.* 10**)

D. <u>Erroneous Assertion of No Bias or Abuse of Discretion</u>

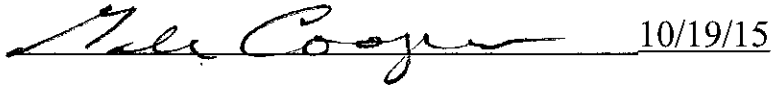
1. Contrary to Defendants' assertion and irrelevant case law (**Defendants AB 12-13; *See* Table of Authorities iii**), bias and discretion abuse apply when damages of $966,000 - supported by *Findings* of maximal

IPRA violations (**RP 2277-2281 FOF 1-29**) - are capriciously reduced to $1,000 (**RP 2285 COL 24**), sparing egregious violators. (**Cooper BIC 42**):

> "An abuse of discretion is defined ... as a judicial action which is arbitrary, capricious, or whimsical." *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990) (citing *United States v. Wright,* 826 F.2d 938, 943 (10th Cir.1987)).
>
> "[T]he test ... that a judge is biased ... is whether the conduct of the judge deprived the defendant [here plaintiff] of a fair trial." *State v. Fernandez*, 1994-NMCA-056, ¶ 6, 117 N.M. 673, 875 P.2d 1104 (quoting *State v. Muise,* 103 N.M. 382, 389, 707 P.2d 1192, 1199 (Ct.App.), cert. denied, 103 N.M. 287, 705 P.2d 1138 (1985)).

CONCLUSION

As a matter of fact and law, Defendants' *Answer Brief* should be rejected as invalid rebuttal to Cooper's *Brief in Chief* for maximal IPRA damages and full IPRA costs. And if *Faber v. King's* Opinion is deemed relevant, Cooper repeats her request for certification to the Supreme Court, since her case against her defiant and tax profiteering violators justifies IPRA's penalty-damages as intended compliance goads and deterrents. The alternative is eclipsing of sunshine law into dark lawlessness of unrestrained concealment of incriminating public records.



10/19/15

Gale Cooper
P.O. Box 328
Sandia Park, NM 87047
(505) 286-8483 (telephone)
(505) 281-5402 (facsimile)
Pro Se Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, Gale Cooper, hereby certify that an original plus five (5) copies of the foregoing document were hand delivered by me to the New Mexico Court of Appeals on October 19, 2015; and copies were sent by USPS mail to the following:

District Court Clerk
Thirteenth Judicial District Court, County of Sandoval
P.O. Box 600
Bernalillo, NM 87004
Sent via Certified Mail No. 7015-0640-0006-5160-1758

Honorable George P. Eichwald
Thirteenth Judicial District Court, County of Sandoval
P.O. Box 600
Bernalillo, NM 87004

Attorney Henry Narvaez *for Defendant-Appellee Rick Virden*
P.O. Box 25967
Albuquerque, NM 87125-5967
Sent via Certified Mail No. 7015-0640-0006-5160-1741

A**ttorney Desiree Gurulé**, *for Defendant-Appellee Steven M. Sederwall*
Brown Law Firm
3777 The American Road. NW, Suite 100
Albuquerque, NM 87114
Sent via Certified Mail No. 7015-0640-0006-5160-1734