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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO DEPARTMENT**
3 **OF INFORMATION TECHNOLOGY,**

Court of Appeals of New Mexico
Filed 2/1/2023 8:56 AM

4 Plaintiff-Appellee,



Mark Reynolds

5 v.

No. A-1-CA-40694

6 **WESTERN AGRICULTURE, RESOURCE**
7 **AND BUSINESS ADVOCATES, LLP and**
8 **A. BLAIR DUNN,**

9 Defendants-Appellants,

10 v.

11 **JOHN SALAZAR and RENEE ROYBAL,**

12 Third-Party Defendants-Appellees.

13 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**
14 **Matthew J. Wilson, District Court Judge**

15 NM Department of Information Technology
16 Todd S. Baran
17 Santa Fe, NM

18 for Appellees

19 Western Agriculture, Resource and Business Advocates, LLP
20 Jared R. Vander Dussen
21 Albuquerque, NM

22 for Appellant A. Blair Dunn

1 Law Office of Marshall J. Ray
2 Marshall J. Ray
3 Albuquerque, NM

4 for Appellant Western Agriculture, Resource and Business Advocates, LLP

5 **MEMORANDUM OPINION**

6 **BOGARDUS, Judge.**

7 {1} Defendants appeal two summary judgments resolving both Plaintiff’s
8 complaint seeking declaratory relief and a third-party complaint filed by Defendants.

9 [DS 4, 7] This Court issued a notice of proposed disposition proposing to affirm the
10 judgments below. Defendants have filed a memorandum in opposition to that
11 proposed disposition, and Plaintiff and Third-Party Defendants have filed a
12 memorandum in support, both of which we have duly considered. Remaining
13 unpersuaded that the district court committed error, we now affirm.

14 {2} With regard to the relief sought in Plaintiff’s complaint, this Court proposed
15 to conclude that because Plaintiff does not have any legal authority or responsibility
16 for the “maintenance, care or keeping[,]” *see* NMSA 1978, § 14-2-6(A) (2018), of
17 the public records at issue in this case, it is not a custodian of those records for
18 purposes of the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1
19 to -12 (1947, as amended through 2019). [CN 4] In response to that proposal,
20 Defendants continue to assert that Plaintiff “holds” the public records at issue on
21 behalf of other state agencies. [MIO 4] In doing so, Defendants direct our attention

1 to the statutory definition of the term “public records,” which includes documents
2 “held by or on behalf of any public body.” Section 14-2-6(G). [Id.] There is no
3 dispute that the documents at issue in this case are public records.

4 {3} Instead, the dispositive issue—largely unaddressed by Defendants—is
5 whether Plaintiff is a custodian of those records. For purposes of IPRA, a
6 “custodian” is “any person responsible for the maintenance, care or keeping of a
7 public body’s public records, regardless of whether the records are in that person’s
8 actual physical custody and control.” Section 14-2-6(A). We note that the final
9 clause of this definition makes clear that mere physical custody of a public record
10 does not determine custodianship.

11 {4} Defendants’ memorandum addresses custodianship by suggesting that this
12 Court’s proposed disposition would “ignore the plain language definition of who is
13 a custodian responsible for providing records to arrive at a distorted concept that.”
14 (sic.) [MIO 4] Defendants continue,

15 There is no statutory support for the notion that a particular custodian
16 is free from any obligation under IPRA because that custodian does not
17 have legal custody (a concept that is specifically disavowed by the
18 language from Section 14-2-6(G)).[] The law is that public records are
19 available for inspection “whether or not the records are required by law
20 to be created or maintained.” *Id.* Legal custody, otherwise known as the
21 legal right to hold something, is directly related to whether or not the
22 records are required by law to be created or maintained.

23 [MIO 4-5]

1 {5} We reiterate that the statutory definition of “custodian” makes clear that mere
2 physical custody of a public record does not determine custodianship. Section 14-2-
3 6(A). Defendants’ repeated and ambiguous use of the word “hold” to suggest
4 something more than mere physical custody does not address the question of whether
5 Plaintiff was “responsible for the maintenance, care or keeping” of any of the public
6 records requested by Defendants. *Id.* That question was addressed, however, both
7 below and in our notice of proposed disposition, in which we suggested that Plaintiff,

8 in its role as the provider of an email system . . . is responsible for
9 maintaining servers and software that facilitate that email system, but
10 it has neither legal authority nor any responsibility for the
11 “maintenance, care or keeping” of public records transmitted to and
12 from other agencies by way of that email system.

13 [CN 4]

14 {6} On appeal, an appellant bears the burden of establishing error below. *See*
15 *Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6,
16 800 P.2d 1063 (stating that the burden is on the appellant to clearly demonstrate that
17 the district court erred). When responding to this Court’s proposed appellate
18 disposition, the responding party “must come forward and specifically point out
19 errors of law and fact” in the proposed disposition. *State v. Mondragon*, 1988-
20 NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003, *superseded by statute on other*
21 *grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374.
22 Defendants’ memorandum does not address the district court’s conclusion, mirrored

1 by this Court’s proposed conclusion, that Plaintiff was not responsible for the
2 maintenance, care or keeping of the records at issue in this case. We conclude
3 Defendants’ memorandum does not address the basis of this Court’s proposed
4 disposition, and we are unpersuaded that either our notice or the district court’s
5 judgment contains error.

6 {7} Finally, with regard to Defendants’ third-party complaint asserting retaliation,
7 this Court proposed two independent grounds for affirming the district court. We
8 noted that, as the prevailing party below, Third-Party Defendants were entitled to
9 the “absolute defense . . . of a favorable termination in the original proceeding.”
10 *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 25, 124 N.M. 512, 953 P.2d
11 277, *overruled on other grounds by Durham v. Guest*, 2009-NMSC-007, ¶ 25, 145
12 N.M. 694, 204 P.3d 19; *see Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-
13 NMSC-047, ¶ 21, 142 N.M. 150, 164 P.3d 31 (noting that a plaintiff’s success in the
14 underlying suit serves as “conclusive evidence of probable cause”). [CN 5] In the
15 alternative, we also proposed that—Defendants’ contrary factual assertions
16 notwithstanding—the district court properly relied upon “the fact that Plaintiff’s
17 complaint for declaratory judgment sought no damages.” [CN 6] *See State v.*
18 *Calanche*, 1978-NMCA-007, ¶ 10, 91 N.M. 390, 574 P.2d 1018 (explaining that
19 when the record proper demonstrates “that ‘facts’ recited in the docketing statement

1 were not the facts of the case presented to the trial court, we will not utilize those
2 non-facts in our review of the trial court’s ruling”).

3 {8} Although Defendants’ memorandum continues to protest the denial of its
4 retaliation claim and to assert that this Court’s proposed affirmance is “contrary to
5 our notions of justice,” [MIO 6] that memorandum makes no attempt at all to address
6 either of the alternative grounds for affirmance proposed in our notice. Defendants
7 also make no attempt to explain the apparent misrepresentation of facts contained in
8 their docketing statement. *See In re Chavez*, 2013-NMSC-008, ¶ 26, 299 P.3d 403
9 (noting that courts “rely on attorneys to fulfill their duty of candor to the tribunal”).

10 {9} As a result, Defendants have not persuaded us that our proposed summary
11 disposition was in error. “Our courts have repeatedly held that, in summary calendar
12 cases, the burden is on the party opposing the proposed disposition to clearly point
13 out errors in fact or law.” *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M.
14 754, 955 P.2d 683. Defendants have failed to do so. Thus, for the reasons stated here
15 and in our notice of proposed summary disposition, we affirm the judgments entered
16 below.

17 {10} **IT IS SO ORDERED.**

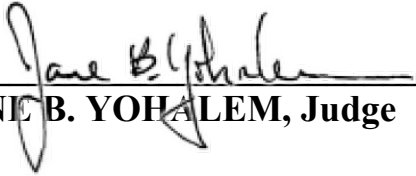
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KRISTINA BOGARDUS, Judge

1 **WE CONCUR:**

2 

3 **JENNIFER L. ATTREP, Chief Judge**

4 

5 **JANE B. YOHALEM, Judge**