

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

Court of Appeals of New Mexico
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2 **Opinion Number:** _____

3 **Filing Date: MARCH 1, 2021**



Mark Reynolds

4 **No. A-1-CA-37786**

5 **ARSENIO CORDOVA,**

6 Plaintiff-Appellee,

7 **v.**

8 **JILL CLINE, LORETTA DELONG,**
9 **JEANELLE LIVINGSTON, CATHERINE**
10 **COLLINS, ROSE MARTINEZ, ESTHER**
11 **WINTER, ELIZABETH TRUJILLO, and**
12 **Jane Does 1 through 10,**

13 Defendants-Appellants.

14 **APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY**

15 **Abigail Aragon, District Judge**

16 Alan Maestas Law Office, P.C.

17 Alan H. Maestas

18 Kathryn J. Hardy

19 Taos, NM

20 for Appellee

21 Steven K. Sanders & Associates, L.L.C.

22 Steven K. Sanders

23 Albuquerque, NM

24 for Appellants DeLong, Livingston, Collins, Martinez, Winter, and Trujillo

- 1 Armstrong & Armstrong P.C.
- 2 Julia Lacy Armstrong
- 3 Taos, NM

- 4 for Appellant Cline

1 **OPINION**

2 **B. ZAMORA, Judge.**

3 {1} Defendants¹ appeal the district court’s orders denying, in part, their request
4 for attorney fees. Specifically, Defendants challenge the district court’s orders
5 denying Defendants’ request for attorney fees incurred while this case was
6 previously on appeal. We reverse the district court’s orders denying attorney fees for
7 Defendants’ appellate work and remand with instructions that it award attorney fees
8 in accordance with this opinion. We otherwise affirm.

9 **BACKGROUND**

10 {2} At the crux of this case is the interpretation of the provision authorizing an
11 award of attorney fees in NMSA 1978, Section 38-2-9.1 (2001), otherwise known
12 as the Anti-SLAPP statute.² The Legislature adopted the Anti-SLAPP statute to
13 ensure citizens have the right “to participate in quasi-judicial proceedings” before
14 state governmental tribunals without fear of an “abuse of the legal process” or undue
15 “financial burden[s] on those having to respond to and defend such [baseless]
16 lawsuits.” NMSA 1978, § 38-2-9.2 (2001) (stating the purpose of the Anti-SLAPP
17 statute).

¹Jill Cline, Loretta Delong, Jeanelle Livingston, Catherine Collins, Rose Martinez, Esther Winter, Elizabeth Trujillo, and Jane Does 1-10.

²The Anti-SLAPP statute is New Mexico’s law “prohibiting strategic litigation against public participation.” *Cordova v. Cline*, 2017-NMSC-020, ¶ 1, 396 P.3d 159.

1 {3} In September 2009, Plaintiff filed a complaint alleging that when Defendants
2 signed a petition and actively supported Plaintiff’s recall from the Taos School
3 Board, such acts constituted malicious abuse of process, civil conspiracy, and prima
4 facie tort. In response, Defendants followed the procedural mechanisms set forth in
5 the Anti-SLAPP statute and filed “special motion[s] to dismiss” alleging that
6 Plaintiff’s complaint infringed on Defendants’ First Amendment right to petition
7 under the *Noerr-Pennington* doctrine.³ See § 38-2-9.1(A) (stating, “[a]ny action
8 seeking money damages against a person for conduct or speech undertaken or made
9 in connection with a public hearing . . . before a tribunal . . . is subject to a *special*
10 *motion to dismiss* . . . that shall be considered by the court on a priority or expedited
11 basis” (emphasis added)). The district court granted Defendants’ special motions to
12 dismiss finding Defendants’ support of Plaintiff’s recall from the Taos School Board
13 invoked “the substantive protection of the First Amendment and the procedural and
14 remedial provisions” of the Anti-SLAPP statute. Under the Anti-SLAPP statute,
15 Plaintiff appealed the district court’s order granting the special motions to dismiss.
16 See § 38-2-9.1(C) (stating that “[a]ny party shall have the right to an expedited
17 appeal from a trial court order on the special motion [to dismiss]”). Our Supreme

³“The *Noerr-Pennington* doctrine is a body of federal law that provides First Amendment protections for citizens who petition the government” and “[u]nder the *Noerr-Pennington* doctrine, those who engage in conduct aimed at influencing the government, including litigation, are shielded from retaliation provided their conduct is not a sham.” *Cordova*, 2017-NMSC-020, ¶ 24.

1 Court upheld the dismissal in a final appeal and remanded the case to the district
2 court stating, “Pursuant to Section 38-2-9.1(B) [of the Anti-SLAPP statute], [the
3 defendants] are statutorily entitled to an award of attorney fees.” *Cordova*, 2017-
4 NMSC-020, ¶¶ 2-3, 42.

5 {4} On remand, Defendants filed applications requesting attorney fees, including
6 a request for fees incurred by Defendants on appeal. The district court granted
7 attorney fees only for work completed while the case was pending in the district
8 court, plus postjudgment interest “at the statutory rate of 8.75 [percent].” The district
9 court denied Defendants’ request for attorney fees for the work done on appeal and
10 denied Defendants’ request for an award of prejudgment interest with respect to the
11 awarded attorney fees. Defendants appeal.

12 **DISCUSSION**

13 {5} Defendants argue: (1) they are entitled to attorney fees under the Anti-SLAPP
14 statute for appellate work in defending their special motions to dismiss, (2) attorney
15 fees are an element of damages, and (3) the district court erred in denying Defendants
16 request for prejudgment interest and awarding postjudgment interest at the statutory
17 rate of 8.75 percent, rather than Defendants’ requested 15 percent rate. We address
18 each argument in turn.

1 **I. Attorney Fees Apply to Appellate Work, Pursuant to the Anti-SLAPP**
2 **Statute**

3 {6} Defendants argue that Section 38-2-9.1(B), which authorizes an award of
4 attorney fees under the Anti-SLAPP statute, applies to fees incurred while their case
5 was on appeal. In contrast, Plaintiff contends that applying the rules of statutory
6 construction “it[’s] clear that the [L]egislature meant to award attorney[] fees for the
7 underlying motion to dismiss, and not the interlocutory appeal, or any other appeal,
8 taken pursuant to, or in response to, said motion to dismiss.”⁴ We agree with
9 Defendants.

10 {7} The “[i]nterpretation of a statute is an issue of law which we review de novo.”
11 *Badilla v. Wal-Mart Stores E., Inc.*, 2017-NMCA-021, ¶ 8, 389 P. 3d 1050 (internal
12 quotation marks and citation omitted). In interpreting statutes, our primary goal is to
13 discern the intent of the Legislature. *Valenzuela v. Snyder*, 2014-NMCA-061, ¶ 16,
14 326 P.3d 1120. If the statute is clear or unambiguous, we interpret it according to its
15 plain language and refrain from further statutory interpretation. *Starko, Inc. v. N.M.*
16 *Human Servs. Dep’t*, 2014-NMSC-033, ¶ 46, 333 P.3d 947 (Vigil, C.J., dissenting);

⁴Plaintiff cites to *Paz v. Tijerina*, 2007-NMCA-109, ¶¶ 9-12, 142 N.M. 391, 165 P.3d 1167, arguing that because our Supreme Court “did not mandate or award attorney[] fees for any of the appeals,” Defendants are not entitled to reasonable attorney fees for their work on appeal. However, in *Paz* this Court declined to award attorney fees because the plaintiff did not direct us to any statute specifically authorizing the award. *Id.* Here, the opposite is true. Section 38-2-9.1(B) explicitly authorizes an award of attorney fees. Hence, Plaintiff’s argument is unpersuasive.

1 *see Whitely v. N.M. State Pers. Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308, 850 P.2d
2 1011 (recognizing that “the plain language of the statute [is] the primary indicator
3 of legislative intent”). However, if “adherence to the literal use of the words would
4 lead to injustice, absurdity or contradiction, we will reject the plain meaning in favor
5 of an interpretation driven by the statute’s obvious spirit or reason.” *State v. Trujillo*,
6 2009-NMSC-012, ¶ 21, 146 N.M. 14, 206 P.3d 125 (internal quotation marks and
7 citations omitted).

8 {8} We begin by interpreting Section 38-2-9.1(B) of the Anti-SLAPP statute in
9 accordance with its plain language to determine whether the district court erred in
10 denying Defendants’ request for the attorney fees they incurred while this case was
11 on appeal. The Anti-SLAPP statute provides, “[a]ny action seeking money damages
12 against a person for conduct or speech undertaken or made in connection with a
13 public hearing . . . is subject to a special motion to dismiss[.]” Section 38-2-9.1(A).
14 The plain language of Section 38-2-9.1(B) states, “if a court grants a motion to
15 dismiss . . . filed within ninety days of the filing of the moving party’s answer, the
16 court *shall* award reasonable attorney fees and costs incurred by the moving party in
17 *defending the action.*” (Emphasis added.) First, we note the word “shall” is
18 mandatory, and requires the district court to award attorney fees if the defendant is
19 successful in defending the action. *See Marbob Energy Corp. v. N.M. Oil*
20 *Conservation Comm’n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 206 P.3d 135 (“It is

1 widely accepted that when construing statutes, ‘shall’ indicates that the provision is
2 mandatory, and we must assume that the Legislature intended the provision to be
3 mandatory absent [a] clear indication to the contrary.”). Next, we interpret the phrase
4 “defending the action” in Section 38-2-9.1(B). An “action” is “any judicial
5 proceeding, which, if conducted to a determination, will result in a judgment or
6 decree.” *Action*, *Black’s Law Dictionary* (11th ed. 2019) (internal quotation marks
7 and citation omitted). Importantly, our case law also provides that “[a]n action is to
8 be regarded as pending from the time of its commencement until its final
9 termination.” *Baldonado v. Navajo Freight Lines, Inc.*, 1977-NMCA-008, ¶ 10, 90
10 N.M. 284, 562 P.2d 1138 (internal quotation marks and citation omitted), *rev’d on*
11 *other grounds*, 1977-NMSC-025, ¶ 14, 90 N.M. 264, 562 P.2d 497. We construe the
12 words “defending the action” under Section 38-2-9.1(B) of the Anti-SLAPP statute
13 as encompassing all work related to defense of any of the various special motions
14 permitted by the statute. *See* § 38-2-9-1(A) (listing the special motions as a “motion
15 to dismiss, motion for judgment on the pleadings, or [a] motion for summary
16 judgment”). For purposes of the Anti-SLAPP statute, we do not see any distinction
17 between defending the action at the district court and defending the same action on
18 appeal. The “action” in Section 38-2-9.1(B), as indicated by the plain language,
19 includes a special motion to dismiss, like the motions filed in this case, which a party
20 can defend throughout the appellate process via an expedited appeal. *See Whitely*,

1 1993-NMSC-019, ¶ 5 (reaffirming that the plain language of a statute is the primary
2 indicator of legislative intent).

3 {9} Additionally, Plaintiff contends that the Legislature “excluded the award of
4 attorney[] fees” on appeal because attorney fees are not mentioned in Section 38-2-
5 9.1(C), which provides parties with a right to an expedited appeal. We decline to
6 read such an express limitation. The Legislature “knows how to include language in
7 a statute if it so desires[,]” *Chatterjee v. King*, 2011-NMCA-012, ¶ 15, 149 N.M.
8 625, 253 P.3d 915, and could have incorporated limiting language in Section 38-2-
9 9.1(A)-(C), had it chosen to. *See Giddings v. SRT-Mountain Vista, LLC*, 2019-
10 NMCA-025, ¶ 21, 458 P.3d 596 (acknowledging that if the Legislature intended to
11 limit the language present in a statute it would have included limiting language to
12 that effect). Our decision aligns with other cases where our Supreme Court
13 interpreted provisions in statutes as including attorney fees for appellate work,
14 despite the absence of explicit statutory language providing for the award of such
15 fees. *See, e.g., Superior Concrete Pumping, Inc. v. David Montoya Contrs., Inc.*,
16 1989-NMSC-023, ¶¶ 15-16, 108 N.M. 401, 773 P.3d 346 (awarding attorney fees
17 for appellate work under NMSA 1978, Section 36-2-39 (1975, Repl. Pamp.1984),
18 recompiled as NMSA 1978, Section 39-2-2.1 (1975)); *Hale v. Basin Motor Co.*,
19 1990-NMSC-068, ¶ 27, 110 N.M. 314, 795 P.2d 1006 (awarding attorney fees for
20 appellate work under NMSA 1978, Section 57-12-10(C) (1987, amended 2005) of

1 the Unfair Trade Practices Act, despite the Act not explicitly mentioning attorney
2 fees for appellate work). We hold that the plain language of the Anti-SLAPP statute
3 requires attorney fees to be awarded to a defendant who prevails on any of the special
4 motions provided by the statute, and further hold that such an award applies to all
5 stages of litigation reasonably related to the defense of the action, whether at the trial
6 level, or on appeal.

7 {10} We briefly address the district court’s basis for denying Defendants’ request
8 for an award of the attorney fees incurred while this case was previously on appeal.
9 The district court cited to Rule 12-403 NMRA and reasoned that “[a]ssessment of
10 costs on appeal is for the appellate court, and not for the trial court.” Rule 12-403(A)
11 provides “[u]nless otherwise provided by law, the appellate court may, in its
12 discretion, award costs to the prevailing party on request.” (Emphasis added.) In
13 contrast to other actions brought pursuant to other statutory schemes, wherein an
14 award of attorney fees is not “provided by law,” *id.*, or where an award of attorney
15 fees is left to the discretion of the appellate court, the specific use of the word “shall”
16 in Section 38-2-9.1(B) of the Anti-SLAPP statute is a clear indication the Legislature
17 intended the award of attorney fees, including fees incurred on appeal, to be
18 mandatory. Accordingly, the district court here had the authority to award appellate
19 attorney fees incurred as part of a party’s “defense of the action” in Section 38-2-
20 9.1(B). *See Measday v. Sweazea*, 1968-NMCA-008, ¶¶ 35-36, 78 N.M. 781, 438

1 P.2d 525 (remanding to the district court for a determination of attorney fees
2 including fees incurred on appeal).

3 **II. Attorney Fees Are Sanctions Under the Anti-SLAPP Statute**

4 {11} Defendants contend that under the Anti-SLAPP statute attorney fees are
5 awarded as “an element of damages.” In contrast, Plaintiff argues attorney fees are
6 awarded as sanctions and “not as an element of damages.” As we explain below, we
7 conclude attorney fees awarded under the Anti-SLAPP statute are sanctions and not
8 a compensatory mechanism for damages.

9 {12} “It is well-settled that, absent statutory authority or rule of court, attorney fees
10 are not recoverable as an item of damages.” *Lenz v. Chalamidas*, 1989-NMSC-067,
11 ¶ 19, 109 N.M. 113, 782 P.2d 85. With this principle in mind, we turn again to the
12 language of the Anti-SLAPP statute to determine if the Legislature intended the
13 provision authorizing an award of attorney fees to constitute an award of damages
14 or a sanction. *See Valenzuela*, 2014-NMCA-061, ¶ 16 (deriving the intent of the
15 Legislature is the most important goal in statutory interpretation). Section 38-2-
16 9.1(B) states, “If the rights afforded by this section are raised as an affirmative
17 defense and if [the] court grants a motion to dismiss . . . the court shall award
18 reasonable attorney fees and costs incurred by the moving party in defending the
19 action.” In determining “legislative intent we may look to the title, and ordinarily it
20 may be considered as a part of the act if necessary to its construction.” *State v.*

1 *Richardson*, 1944-NMSC-059, ¶ 21, 48 N.M. 544, 154 P.2d 224. The title of the
2 Anti-SLAPP statute states, “Special motion to dismiss unwarranted or specious
3 lawsuits; procedures; *sanctions*; severability.” Section 38-2-9.1 (emphasis added).⁵
4 The issue of whether an award of attorney fees constitutes a sanction under New
5 Mexico law has already been addressed by the United States Court of Appeals for
6 the Tenth Circuit, and we find its reasoning persuasive. In *Los Lobos Renewable*
7 *Power, LLC v. AmeriCulture, Inc.*, the court reasoned, “as [Section] 38-2-9.1’s title
8 plainly suggests, Subsection B’s first sentence provides for the imposition of fees
9 and costs as a *sanction* primarily designed not to compensate for legal services but
10 to vindicate First Amendment rights threatened by a kind of unwarranted or specious
11 litigation.” 885 F.3d 659, 671 (10th Cir. 2018) (internal quotation marks omitted).
12 We agree.

13 {13} Our conclusion is consistent with the fact that the Anti-SLAPP statute is a
14 procedural mechanism and does not create a cause of action or claim entitling a party
15 to damages, which is a further indication that an award of attorney fees is a sanction.
16 The Anti-SLAPP statute does not reference any potential claim; rather subsequent

⁵In further support of our conclusion that the Legislature intended attorney fees awarded, pursuant to the Anti-SLAPP statute to be a sanction, we highlight that the Legislature removed the word “damages” and in its place added “sanctions” in Section 38-2-9.1. See H.B. 241, 45th Leg., 1st Sess. (N.M. 2001), available at <https://www.nmlegis.gov/Sessions/01%20Regular/bills/house/HB0241.pdf> (the Anti-SLAPP statute was titled “Immunity—Special Motion to Dismiss Unwarranted or Specious Lawsuits—Procedures—*Damages*—Severability” (emphasis added)).

1 cases interpreting the statute universally recognize that it is a procedural mechanism.
2 *See, e.g., Los Lobos Renewable Power*, 885 F.3d. at 673 (“The statute’s purpose is
3 the prompt termination of certain lawsuits the New Mexico Legislature deemed to
4 be both unduly burdensome and a threat to First Amendment rights.”); *Cordova*,
5 2017-NMSC-020, ¶¶ 1, 19 (recognizing a defendant is “entitled to the procedural
6 protections” of the Anti-SLAPP statute and stating that the statute creates “expedited
7 procedures for dismissing” SLAPP suits). To the contrary, the Anti-SLAPP statute
8 does not limit the exercise of a party’s “right or remedy . . . granted pursuant to
9 another constitutional, statutory, common law or administrative provision, including
10 civil actions for defamation or malicious abuse of process.” Section 38-2-9.1(E).
11 Consequentially, because the Anti-SLAPP statute does not create a cause of action,
12 we cannot reasonably read the provision authorizing an award of attorney fees in
13 Section 38-2-9.1(B) as entitling a party to damages. Thus, we hold that the
14 Legislature intended the provision authorizing an award of attorney fees in Section
15 38-2-9.1(B) of the Anti-SLAPP statute to be a sanction, and not a mechanism for
16 compensating or awarding damages.

17 **III. Interest on Attorney Fees**

18 {14} Lastly, Defendants argue that Plaintiff’s original SLAPP suit constituted
19 tortious conduct against Defendants entitling them to: (1) an award of prejudgment

1 interest on their request for attorney fees, and (2) a 15 percent rate on postjudgment
2 interest as opposed to an 8.75 percent rate.

3 **A. Prejudgment Interest**

4 {15} Defendants contend they are entitled to an award of prejudgment interest on
5 their request for attorney fees. The district court denied Defendants request for
6 prejudgment interest stating, “[Section] 38-2-9.1(B) allows [for attorney] fees and
7 costs for the prevailing party on a motion to dismiss” and “it does not include an
8 award of prejudgment interest.” Because Defendants’ couched their prejudgment
9 interest argument as a purely legal challenge—asserting that attorney fees are
10 damages—we review it de novo. *See State ex rel. Solsbury Hill, LLC v. Liberty Mut.*
11 *Ins. Co.*, 2012-NMCA-032, ¶ 31, 273 P.3d 1 (reviewing a party’s prejudgment
12 interest argument under a de novo standard of review when it involves a purely legal
13 question).

14 {16} NMSA 1978, Section 56-8-4(B)(1), (2) (2004) provides the district court with
15 discretion to award prejudgment interest in certain circumstances. Section 56-8-4(B)
16 provides that, “the court in its discretion may allow interest of up to ten percent from
17 the date the complaint is served upon the defendant after considering, among other
18 things: (1) if the plaintiff was the cause of unreasonable delay in the adjudication of
19 the plaintiff’s claims; and (2) if the defendant had previously made a reasonable and
20 timely offer of settlement to the plaintiff.” Section 56-8-4 applies to all actions,

1 including tort actions in which *damages* are not reasonably ascertainable before trial.
2 *Southard v. Fox*, 1992-NMCA-045, ¶ 7, 113 N.M. 774, 833 P.2d 251(emphasis
3 added).

4 {17} As we understand Defendants’ argument, they allege that because their award
5 of attorney fees under the Anti-SLAPP statute are damages, they are entitled to
6 prejudgment interest. We have already rejected Defendants’ argument that attorney
7 fees constitute damages in this context. The Anti-SLAPP statute does not provide a
8 statutory basis for Defendants to file a cause of action or assert a claim or
9 counterclaim against Plaintiff and thus, Plaintiff is not liable for damages to
10 Defendants.⁶ To the contrary, “the [Anti-SLAPP] statute is procedural in all its
11 aspects.” *Los Lobos Renewable Power*, 885 F.3d. at 673. Because the Anti-SLAPP
12 statute does not establish an independent claim that Defendants can pursue, we
13 cannot reasonably interpret Section 38-2-9.1(B) as entitling them to prejudgment
14 interest on their request for attorney fees. Accordingly, the district court did not err
15 in denying Defendants’ request for prejudgment interest.

⁶Although we conclude that attorney fees are sanctions under the Anti-SLAPP statute, as we note above, nothing in the Anti-SLAPP statute prohibits or limits a party’s right to pursue an outside claim/counterclaim seeking damages. *See* Section 38-2-9.1(E). As an example, in this case, Defendant Cline filed a counterclaim for malicious abuse of process, which she later voluntarily dismissed.

1 **B. Postjudgment Interest**

2 {18} Relying on Section 56-8-4(A), Defendants’ argue the district court erred in
3 only awarding postjudgment interest at an 8.75 percent rate claiming that their
4 requested attorney fees were damages. We are not persuaded.

5 {19} “We review the court’s application of Section 56-8-4(A) to the facts de novo.”
6 *Bird v. State Farm. Mut. Auto. Ins. Co.*, 2007-NMCA-088, ¶ 36, 142 N.M. 346, 165
7 P.3d 343. Section 56-8-4(A)(2) provides, “Interest shall be allowed on judgments
8 and decrees for the payment of money from entry and shall be calculated at the rate
9 of eight and three-fourths percent per year, unless . . . the judgment is based on
10 tortious conduct, bad faith or intentional or willful acts, in which case interest shall
11 be computed at the rate of fifteen percent.” Defendants fail to direct our attention to
12 evidence or findings in the record supporting their contention that the filing of
13 Plaintiff’s complaint constituted conduct that was tortious, intentional, or in bad faith
14 as required by Section 56-8-4(A)(2). *Cf Pub. Serv. Co. of N.M. v. Diamond D Constr.*
15 *Co.*, 2001-NMCA-082, ¶ 62, 131 N.M. 100, 33 P.3d 651 (“[I]f a plaintiff wants to
16 [e]nsure that a judgment is assessed the higher 15 percent interest rate in a case not
17 based in tort or bad faith, the plaintiff must specifically request that the fact[-]finder
18 make a finding of intention or willfulness.”). Thus, we decline to address
19 Defendants’ postjudgment interest argument further. *See Muse v. Muse*, 2009-
20 NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 (“We will not search the record for

1 facts, arguments, and rulings in order to support generalized arguments.”); *see also*
2 *Santa Fe Expl. Co. v. Oil Conservation Comm’n*, 1992-NMSC-044, ¶ 11, 114 N.M.
3 103, 835 P.2d 819 (stating appellate courts have no duty to entertain uncited and
4 unsupported arguments).

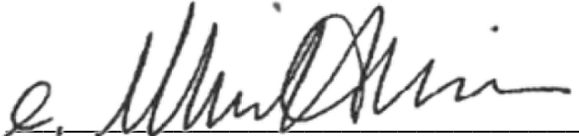
5 **CONCLUSION**

6 {20} We reverse the district court’s denial of Defendants’ request for an award of
7 reasonable attorney fees to fees incurred related to the appeal. We remand for the
8 district court to award reasonable attorney fees to Defendants in accordance with our
9 holding, but we otherwise affirm.

10 {21} **IT IS SO ORDERED.**

11 
12 **BRIANA H. ZAMORA, Judge**

13 **WE CONCUR:**

14 
15 **J. MILES HANISEE, Chief Judge**

16 
17 **KRISTINA BOGARDUS, Judge**