

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 10/19/2026 7:34 AM

HITOSHI OMBE,

Plaintiff-Appellant,

v.

No. A-1-CA-41912

**FREDDIE BIERNER, LISA BIERNER,
and SIERRA COLLISION AND
TOWING SERVICES, LLC,**

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SIERRA COUNTY

Jim Foy, District Court Judge

Hitoshi Ombe

Truth or Consequences, NM

Pro Se Appellant

Gibson Law Office, LLC

Anne Gibson

Las Cruces, NM

for Appellees

MEMORANDUM OPINION

WRAY, Judge.

{1} Plaintiff, Hitoshi Ombe, is an unrepresented litigant with autism that results in
severe hypoarousal, which he asserts manifested in the present case as “extreme

1 literalism and severe executive dysfunction.” **[BIC ii, 1]**¹ In 2018, Plaintiff brought
2 claims **[4 RP 889, 926, 927]** against Defendants² Sierra Collision and Towing
3 Services, Freddie Bierner, and Lisa Bierner, related to his dissatisfaction with work
4 that was performed on his car and the invoice that he received. **[4 RP 957]** The
5 district court entered default judgment as to liability against Defendants on all claims
6 in 2023 and after a trial on damages, entered an award for Plaintiff against
7 Defendants for damages under the Unfair Trade Practices Act (the UPA). **[5 RP**
8 **1169-73, 1295; 6 RP 1372]** Plaintiff asserts that he brings this appeal to address state
9 court compliance with Title II of the Americans with Disabilities Act (the ADA),
10 Section 504 of the Rehabilitation Act, and the New Mexico Human Rights Act, as
11 well as to challenge the legal framework used by the district court to award damages
12 against Defendants. **[BIC ii, 1, 3]** As we explain in this opinion, the evidence did
13 not support the district court’s reduction of Plaintiff’s damages for failure to
14 mitigate. We therefore reverse the district court’s judgment and remand for entry of
15 judgment that reflects the damages without the reduction. Otherwise, for the reasons
16 stated below, we affirm the district court.

¹We have elected to include the Court’s citations in this opinion for the benefit of the parties. See Rule 23-112 NMRA, App. § XI. Citation of the Record and Pleadings (defining the abbreviations used).

² Defendants’ counsel initially entered an appearance in this case and Defendants had notice of the appeal. It appears counsel is no longer practicing in New Mexico, and despite communication with Defendants, no answer brief has been filed. This case has therefore been submitted on the amended brief in chief only.

DISCUSSION

An appeal to this Court is not a second opportunity to try a case. “We are a court of review and our function is to see if legal error that would change the result occurred.” *Barreras v. Archibeque*, 2024-NMCA-053, ¶ 11, 552 P.3d 711 (internal quotation marks and citation omitted). The parties had the opportunity in the district court “to present [their] case and challenge the case of [their] opponent.” *See Hinger v. Parker & Parsley Petroleum Co.*, 1995-NMCA-069, ¶ 24, 120 N.M. 430, 902 P.2d 1033. It is in this context that we address each of Plaintiff’s arguments on appeal. The headers in this opinion correlate to the arguments that Plaintiff makes in the amended brief in chief as follows:

I. The ADA and the District Court Proceedings (Plaintiff’s argument III(A)) **[BIC 7-12]**

A. The Early Proceedings (Plaintiff’s arguments III(A)(3)-(5)) **[BIC 7-9]**

1. Preservation of ADA Issues (Plaintiff’s argument III(A)(5)) **[BIC 9]**

2. The ADA and the Early Process Plaintiff Received (Plaintiff’s arguments III(A)(3) and (4)) **[BIC 7-8]**

B. The Damages Trial (Plaintiff’s arguments III(A)(6) and (7)) **[BIC 10-12]**

II. The District Court’s Mitigation Finding (Plaintiff’s argument III(B)) **[BIC 13-19]**

III. The Damages Framework (Plaintiff’s arguments III(C) and III(D)) **[BIC 19-29]**

1 A. Recovery Under the UPA (Plaintiff’s argument III(C)) **[BIC 19-**
2 **22]**

3 B. The Damages Award (Plaintiff’s argument III(D)) **[BIC 23-28]**

4 IV. The Trial Evidence (Plaintiff’s argument III(E)) **[BIC 29-31]**

5 V. Out-of-Pocket Expenses (Plaintiff’s argument III(F)) **[BIC 32-34]**

6 In each section, we provide a summary for how our analysis will proceed and/or a
7 broad statement of Plaintiff’s argument. We then set forth the relevant facts,
8 Plaintiff’s specific arguments, the relevant law, and apply the law to the facts to
9 reach our conclusion.

10 **I. The ADA and the District Court Proceedings**

11 {3} Plaintiff challenges the district court’s compliance with the ADA. **[BIC 7-12]**
12 We consider Plaintiff’s arguments in two sections. First, we consider the procedures
13 that were afforded in the early proceedings, before the final judge was assigned, and
14 the impact of the procedures implemented by the final judge. Second, we consider
15 the proceedings at the damages trial.

16 **A. The Early Proceedings**

17 {4} Plaintiff’s original complaint and accompanying request for free process, filed
18 in October 2018, included allegations about his disability, **[1 RP 001, 2, 28-29]** and
19 in December 2018 filings Plaintiff shared some additional aspects of his disability.
20 **[1 RP 072, 75-76]** The first notice of hearing was sent on February 5, 2019, and
21 informed Plaintiff that if he required accommodations under the ADA, he should

1 notify the clerk of the court at least five days before accommodations would be
2 required. **[1 RP 131]** Plaintiff filed a response to that notice and a later reply, and
3 both filings provided even more information about his disability. **[1 RP 135, 142-**
4 **45]** Generally, Plaintiff asked for open communication, more time, and notice about
5 exactly what he needed to prepare for the hearing. **[1 RP 135, 137, 143-44]** At the
6 end of the first hearing, Plaintiff expressed approval about how the district court
7 handled the hearing. **[3/20/19 CD 2:03:06-37]** After the district court set the next
8 hearing, Plaintiff responded with a request for more time to prepare, which the
9 district court accommodated by resetting the hearing for July 24, 2019. **[1 RP 153,**
10 **154-55, 156]**

11 {5} In many filings after the July 2019 hearing, Plaintiff expressed his distress
12 over the way that hearing proceeded, his inability to understand what happened, and
13 his frustration about the event. **[1 RP 171-76; 2 RP 302, 320-21, 334, 352, 389, 394-**
14 **429, 430-41, 433-34, 435-37, 438-48, 449-51]** In addition to the lack of
15 accommodation he claimed, the primary issue that concerned Plaintiff was the
16 district court's ruling that he refile his complaint in order to provide greater
17 particularity about his claims. **[Id.; 7/24/19 CD 10:26:35-10:30:15]** In June 2020,
18 Plaintiff requested that the district court and Defendant's counsel propose a
19 procedure to be put in place to ensure a fair proceeding. **[2 RP 469-71]** The initial
20 district court judge recused in July 2020. **[2 RP 477]** After two more judges recused,

1 the final district court judge was assigned to the case. [2 RP 479, 480, 482, 490-91]
2 Plaintiff then requested a status conference to address his disability needs with the
3 newly assigned judge. [2 RP 497] When a status conference was noticed, Plaintiff
4 responded by requesting an in-person hearing and providing information and
5 materials about autism. [2 RP 498, 500-08] After that status conference, Plaintiff
6 continued to file documents expressing concern about what had happened at the July
7 2019 hearing and seeking a procedure for moving forward. [2 RP 509, 516-20]

8 {6} On February 25, 2021, the district court sent Plaintiff a letter that
9 acknowledged Plaintiff's concerns, indicated that the judge had scheduled training
10 that was "specifically tailored to ensure individuals with autism can access the
11 justice system," and included an ADA accommodation request form. [2 RP 521-24]
12 Plaintiff filled out and filed the form. [2 RP 526-33] After that, the district court
13 entered an order titled "Rules of the Case." [2 RP 534] The order explained that (1)
14 a hearing schedule would identify what matters would be discussed at hearings; (2)
15 only motions permitted by the rules would be allowed; (3) if Plaintiff believed that
16 the ADA was being violated, the district court would allow Plaintiff to make a record
17 and the court would respond accordingly; and (4) attacks by either party on the other
18 would not be permitted. [2 RP 535-36] The notice of hearing that followed included
19 a detailed agenda. [2 RP 538-42]

{7} With these facts as context, we summarize Plaintiff’s arguments: (1) the early procedures used by the district court did not accommodate his disability and denied him due process; and (2) if this issue was not sufficiently preserved, the exception to the preservation rule in Rule 12-321(B)(2) NMRA should apply because the issues involve the fundamental right to meaningful access to the courts. **[BIC 8-9]** We begin with Plaintiff’s preservation argument.

1. Preservation of the ADA Issues

{8} A person who is appealing must demonstrate that the issue on appeal was preserved in the district court. *See* Rule 12-321(A). Preservation serves three purposes: (1) to let district courts know about and correct errors; (2) to permit the other party to respond; and (3) to make a record for this Court to review. *See Ferebee v. Hume*, 2021-NMCA-012, ¶ 25, 485 P.3d 778. This rule is primarily about fairness. *Hinger*, 1995-NMCA-069, ¶ 24. The party appealing also has the burden to demonstrate “that [their] rights were prejudiced by the claimed error.” *Apodaca v. U.S. Fid. & Guar. Co.*, 1967-NMSC-250, ¶ 7, 78 N.M. 501, 433 P.2d 86.

{9} Plaintiff repeatedly raised the issue of sufficient ADA accommodation and his dissatisfaction with the July 2019 hearing. Plaintiff raised his objections, Defendant had an opportunity to respond, and the district court was alerted to the issue. *See* Rule 12-321(A); *Ferebee*, 2021-NMCA-012, ¶ 25. As a result, we conclude that the

1 issue of ADA accommodations until the time that the final judge was assigned,
2 including for the conduct of the July 2019 hearing, was sufficiently preserved.

3 **2. The ADA and the Early Process Plaintiff Received**

4 {10} Plaintiff’s arguments involve the ADA and due process. The United States
5 Supreme Court has held that Title II of the ADA protects a qualified individual’s
6 fundamental right of access to the courts. *Tennessee v. Lane*, 541 U.S. 509, 533-34
7 (2004). The ADA therefore creates an “affirmative obligation to accommodate
8 persons with disabilities in the administration of justice.” *Id.* at 533. These ADA
9 principles are an extension of the constitutional right to due process. *See id.* at 532
10 (“This duty to accommodate [under the ADA] is perfectly consistent with the well-
11 established due process principle that, within the limits of practicability, a [s]tate
12 must afford to all individuals a meaningful opportunity to be heard in its courts.”
13 (internal quotation marks and citation omitted)); *see also* U.S. Const. amend. XIV
14 (addressing due process); N.M. Const. art. II, § 18 (same).

15 {11} The due process guarantee ensures the right to notice and a meaningful
16 opportunity to be heard in relation to the deprivation of a constitutionally protected
17 property, liberty, or life interest. *See Thomas v. Thomas*, 1999-NMCA-135, ¶ 19,
18 128 N.M. 177, 991 P.2d 7 (“Due process requires notice and a meaningful
19 opportunity to be heard.”); *Starko, Inc. v. Gallegos*, 2006-NMCA-085, ¶¶ 17-18, 140
20 N.M. 136, 140 P.3d 1085 (describing the due process protections). Generally, we

1 evaluate a due process claim according to three factors that were originally set forth
2 in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and that are articulated as follows:

3 (1) the private interest that will be affected by the official action; (2) the
4 risk of erroneous deprivation of such interest through the procedures
5 used, and the probable value, if any, of additional or substitute
6 procedural safeguards; and (3) the government’s interest, including the
7 function involved and the fiscal and administrative burdens that the
8 additional or substitute procedural requirements would entail.

9 *Gonzales v. Watson*, 2024-NMCA-033, ¶ 18, 545 P.3d 1190 (recognizing that that
10 the *Mathews* test is the analytical framework for a due process claim (alteration,
11 internal quotation marks, and citation omitted)). It is well established that “[d]ue
12 process is flexible and calls for such procedural protections as the particular situation
13 demands.” *Id.* ¶ 17 (alterations, internal quotation marks, and citation omitted). In
14 some circumstances, due process violations may be remedied after the fact by
15 implementing appropriate procedures, if the constitutional balance of factors allows.
16 See *id.* ¶ 28 (concluding that “the quick appeal process” satisfied the right to due
17 process under the circumstances); *Starko, Inc.*, 2006-NMCA-085, ¶ 18 (“In some
18 cases, state law remedies that are available after the deprivation has occurred will
19 suffice to meet due process guarantees.”).

20 {12} Plaintiff specifically argues that (1) the court clerks silently denied Plaintiff’s
21 requests for accommodations by holding those requests in administrative folders
22 instead of entering them on the docket for the case; (2) the district court did not

1 initially inform Plaintiff about the availability of an ADA coordinator; **[BIC 8]** and
2 (3) the procedure used by the district court at the July 2019 hearing denied Plaintiff
3 meaningful participation. **[BIC 8-9]** To evaluate these arguments we make two
4 initial assumptions in favor of Plaintiff. First, we assume, but do not decide, that
5 Plaintiff had a constitutionally protected interest in reasonable accommodation
6 during court proceedings. *See Gonzales*, 2024-NMCA-033, ¶ 18 (discussing the first
7 due process factor as the plaintiff’s protected interest); *Lane*, 541 U.S. at 533-34
8 (holding that Title II of the ADA protects a qualified individual’s fundamental right
9 of access to the courts). Second, we assume, but do not decide, that the court
10 proceedings before the final judge was assigned impermissibly infringed on
11 Plaintiff’s protected interest. From here we consider whether the processes
12 employed by the final district court judge cured any due process violation that had
13 already occurred. *See Gonzales*, 2024-NMCA-033, ¶ 16 (assuming but not deciding
14 that the process that was initially afforded was insufficient before considering
15 whether the process that followed satisfied constitutional requirements). We do this
16 by considering the second and third *Mathews* factors and evaluating the proceeding
17 as a whole.

18 {13} The second *Mathews* factor evaluates the risk that the procedures employed
19 would erroneously deprive Plaintiff’s protected interest and the value of alternate
20 procedures. *See Gonzales*, 2024-NMCA-033, ¶ 18. Plaintiff points to the district

1 court's handling of Plaintiff's requests for accommodation and the conduct of the
2 July 2019 hearing. As to Plaintiff's first argument, after the final judge was assigned,
3 the district court and staff scheduled ADA training, and an order was entered
4 outlining the procedures that would be followed going forward. **[2 RP 534]** Plaintiff
5 identified no further problems with the district court's handling of his requests for
6 accommodation until the damages trial, which we address in the next section. The
7 district court thereafter made efforts to address Plaintiff's requests for
8 accommodation and was responsive to Plaintiff throughout. As to Plaintiff's second
9 argument, the primary issue raised at the July 2019 hearing was Defendant's motion
10 for Plaintiff to provide a more particularized complaint. **[1 RP 156, 171-76; 2 RP**
11 **302, 320-21, 334, 352, 389, 394-429, 430-41, 433-34, 435-37, 438-48, 449-51]** That
12 issue was resolved in Plaintiff's favor when the district court accepted the September
13 22, 2022 final amended complaint. **[4 RP 957-98; 5 RP 1134]** The final judge's
14 procedures and rulings therefore reduced the risk that Plaintiff's interest would be
15 erroneously deprived, and Plaintiff does not point to alternate procedures that were
16 denied.

17 {14} The third *Mathews* factor "assesses the governmental interests at work,
18 including the function involved and the fiscal and administrative burdens that
19 additional procedural requirements would entail." *Gonzales*, 2024-NMCA-033,
20 ¶ 27. The governmental interest was the thorough and efficient resolution of

1 Plaintiff's claims, and as we have noted, Plaintiff does not explain what the final
2 judge could have done better to remedy what had already occurred.

3 {15} Considering the three due process factors and the proceeding as a whole, we
4 conclude that the constitutional balance was restored by the final judge's actions
5 taken before the damages trial. *See id.* ¶¶ 17-18, 29. Even assuming, without
6 deciding, that the court proceedings before the final judge was assigned
7 impermissibly infringed on Plaintiff's protected interest, the safeguards
8 implemented by the final judge adequately protected Plaintiff's interest in reasonable
9 accommodation. Plaintiff was able to address the issues with the district court shortly
10 after the final judge was assigned, and the final district court judge timely
11 implemented procedures to accommodate Plaintiff by way of the rules of the case
12 order, which provided a framework for Plaintiff to use to navigate the litigation and
13 to which Plaintiff did not object. *See id.* ¶¶ 25-26 (explaining that post-deprivation
14 process adequately protected the plaintiff's rights because the plaintiff was aware of
15 the proceedings and the appeal process was "robust and quick"). **[2 RP 502-08]** We
16 therefore conclude that the final judge's procedures sufficiently protected Plaintiff's
17 right to due process.³

³We do not address Plaintiff's suggestion that the way the proceedings were conducted caused him separate damage, apart from any negative impact on the claims that were filed and litigated against Defendants. **[BIC ii, 1-6]** This Court has no original jurisdiction to consider a claim that has not been filed or decided. *See*

1 **B. The Damages Trial**

2 {16} Plaintiff's other argument about the ADA relates to events that occurred at the
3 damages trial. Plaintiff maintains that the district court improperly characterized
4 Plaintiff's behavior during the damages trial as intentional misconduct rather than
5 an involuntary neurological symptom or response. **[BIC 10-11]** In briefing, Plaintiff
6 (referred to as "Appellant") describes what happened as follows:

7 During the trial, the judge made an abrupt attempt to terminate
8 Appellant's presentation by stating it was "already done." When
9 Appellant reacted to this sudden, high-stress threat, the judge
10 documented the reaction as "yelling" and summoned a sheriff's
11 deputy.

12 **[BIC 10]** Based on the audio recording of the damages trial, we recount the
13 following relevant interactions.

14 {17} After Plaintiff's opening arguments and early in his testimony, Plaintiff
15 realized that he had forgotten to make an argument in opening statement about other
16 equitable remedies. **[7/28/23 CD 11:39:15-16, 11:41:36-11:41:59, 11:46:01-23]**
17 The district court told Plaintiff, "You've already given me your opening statement,
18 sir. I'm very well aware of how to do damages. So you'll get a closing statement,
19 pick it up then." **[7/28/23 CD 11:46:23-32]** Plaintiff responded, "Okay, at the
20 closing?" and the district court agreed, "Right." **[7/28/23 CD 11:46:32-34]** Plaintiff

N.M. Const. art. VI, § 29 ("The [C]ourt of [A]ppeals shall have no original jurisdiction.").

1 stated, “That’s fine.” [7/28/23 CD 11:46:34-36] Plaintiff continued and when the
2 district court expressed uncertainty about the relevance of the facts Plaintiff was
3 presenting, [7/28/23 CD 11:49:18-11:50:49] Plaintiff responded in a loud voice and
4 explained that he was “trying to show you how much love money—these people—
5 he’s a money lover!” and “that’s the cause of the problem in this case.” [7/28/23 CD
6 11:50:51-11:51:07] The district court asked Plaintiff to “stop yelling” and indicated
7 that it was time for a five-minute break for Plaintiff to compose himself. [7/28/23
8 CD 11:51:08-22] Plaintiff asked to explain himself, the district court stated, “Go
9 ahead, go ahead, explain,” and Plaintiff continued. [7/28/23 CD 11:51:23-11:52:29]

10 {18} When the parties returned from a break shortly afterward, the district court
11 and Plaintiff had the following exchange:

12 Plaintiff: First to make—I want to make clear I’m not
13 dangerous person. I meant a loud voice because I
14 want to understand importance—what I want to say
15 from my perspective. When anybody do not try to
16 listen until the end of what I want to say, I get loud.

17 District court: And you have to understand, Mr. Ombe, from my
18 perspective, my job is to listen to things. I mean, the
19 good news is we don’t have a jury and so I can listen
20 and I can ferret out what I like and don’t like. But
21 for the most part, I just asked, don’t yell, okay?

22 Plaintiff: I understand.

23 District court: And—

24 Plaintiff: But, but—

1 District court: You'll get your chance. I'm giving you your chance
2 to tell me whatever you want today.

3 Plaintiff: The main concern I have is very often happens
4 people cut short my conversation or whatever
5 before I finish to say why this is important.
6 Whatever—that happened all the time. That's why
7 I tend to become loud if I feel like I'm threatened.

8 District Court: I understand.

9 Plaintiff: That's part of the autism.

10 District Court: Let's move forward.

11 **[7/28/23 CD 12:30:47-12:37:52, 12:39:33-12:40:42]** At the end of his testimony,
12 Plaintiff explained that autistic people “are very sensitive to your—what you have
13 in—deep in mind, not what you say. That autism. And right now, I have a secure—
14 secure feeling. But—I don't have much issue. But when I'm mentally, you kind of
15 say—that cause more distress, that common problem.” **[7/28/23 CD 1:10:47-**
16 **1:11:12]** In the remainder of the damages trial, the district court and Plaintiff had a
17 few additional discussions about the conduct for proceedings, and Plaintiff again
18 explained some features of his autism. **[7/28/23 CD 3:48:01-3:50:04, 3:54:52-25,**
19 **4:12:59-4:14:14]**

20 {19} In the findings of fact and conclusions of law, the district court summarized
21 the witnesses' testimony at the damages trial. **[6 RP 1386-89]** The district court then
22 described the parties' behavior throughout the litigation, including that during “the
23 damages hearing, [Plaintiff] yelled at the [c]ourt when matters were not perceived

1 by him as going his way.” [6 RP 1390-91, 1391 ¶ 22] Regardless, the district court
2 found that “putting all of the nonsense aside, believing the car repairs to [Plaintiff’s
3 car] were deficient, this court will rule on that basis only.” [6 RP 1391] Plaintiff
4 contends that the district court’s findings were skewed because the district court’s
5 responses caused him to freeze and prevented him from making a full record,
6 including the necessary arguments about punitive damages. [BIC 10-13] With this
7 in mind, we turn to the law governing this Court’s review of factual determinations.

8 {20} When there is a bench trial, the district court is the fact-finder, weighs the
9 evidence, and decides “the true facts.” *See Sanchez v. Molycorp, Inc.*, 1985-NMCA-
10 067, ¶ 21, 103 N.M. 148, 703 P.2d 925; *Aquifer Sci., LLC v. Verhines*, 2023-NMCA-
11 020, ¶ 25, 527 P.3d 667 (observing that the district court was the fact-finder and
12 “was free to resolve conflicts in the evidence and choose among the various opinions
13 offered”). This Court is “a court of review,” and on appeal we do not reweigh
14 evidence or revisit credibility determinations. *See Barreras*, 2024-NMCA-053, ¶ 11
15 (internal quotation marks and citation omitted); *Aquifer Sci., LLC*, 2023-NMCA-
16 020, ¶ 25 (“We will not reweigh the evidence nor substitute our judgment for that of
17 the fact-finder.”). We do not correct errors that would not change the result of the
18 proceeding. *See Sheraden v. Black*, 1988-NMCA-016, ¶ 10, 107 N.M. 76, 752 P.2d
19 791. We must rely on the evidence in the record and cannot rely on a party’s assertion
20 that something was true or something happened. *See In re Guardianship of C.G.*,

2020-NMCA-023, ¶ 33, 463 P.3d 487 (“[W]e do not consider arguments that rely on representations for which no record evidence is cited or that are unsupported by the evidence cited.”). We may, however, assume that a party has established that a fact or argument is true, in order to explain why a particular legal argument nevertheless fails in the analysis. *See Gonzales*, 2024-NMCA-033, ¶ 16 (explaining that “[i]t would be more efficient and more utile to assume—without deciding” that a constitutionally protected property interest existed in order to consider whether the procedures used were constitutional). With this law for context, as we explain, for multiple reasons, we do not agree with Plaintiff’s view of the damages trial.

{21} First, we have reviewed the audio recording of the entire trial and at no point did the district court state that Plaintiff was “already done,” nor does the record reflect that a sheriff’s deputy was called. Even if these events occurred as Plaintiff states, he offered the district court an explanation for his words and actions, which the fact-finder was free to accept or reject. *See Sanchez*, 1985-NMCA-067, ¶ 21. It appears that the district court did not entirely believe Plaintiff that the louder outbursts were entirely related to Plaintiff’s disability. **[6 RP 1390 ¶ 21, 1391 ¶ 22]** We do not second-guess that factual finding. *See Aquifer Sci., LLC*, 2023-NMCA-020, ¶ 25.

{22} Second, we note that the district court described the “intractable” behavior of both parties and nevertheless ruled on the basis of the deficient car repairs only,

1 “putting all of the nonsense aside.” **[6 RP 1390 ¶ 21, 1391 ¶ 23]** From this finding,
2 the district court did not weigh Plaintiff’s loud voice against him such that this aspect
3 of the proceedings could have constituted error in any respect.

4 {23} Third, Plaintiff had many opportunities, both at the damages trial and in
5 writing, to articulate his claims. The district court gave Plaintiff an opportunity for
6 a break when the volume of Plaintiff’s voice increased, but Plaintiff asked instead to
7 explain the matter being discussed and his loud voice. **[7/28/23 CD 11:51:15-36]**
8 The district court later listened to Plaintiff’s explanation for his loud voice. **[7/28/23**
9 **CD 12:39:33-12:40:42]** After trial, the district court granted Plaintiff’s request to
10 submit additional written argument, **[6 RP 1341-42]** which Plaintiff did before the
11 district court issued its decision and later when Plaintiff submitted a four-part motion
12 to reconsider. **[5 RP 1312-21; 6 RP 1333-40, 1366-71, 1399-1443]** We decline to
13 presume that the reason that Plaintiff did not prevail on every issue that he raised
14 was because he was not able to fully articulate his position.

15 {24} For all of these reasons, we decline to disturb the district court’s factual
16 assessment of Plaintiff’s actions or the evidence at trial. *See id.* We conclude that
17 Plaintiff has not demonstrated that his ability to present his case was unfairly
18 impacted. *See Apodaca*, 1967-NMSC-250, ¶ 7.

II. The District Court's Mitigation Finding

{25} Plaintiff argues that the district court improperly imposed on him a duty to mitigate damages. **[BIC 13-19]** The district court deducted Plaintiff's requested \$1,832 in damages "by roughly one-third" because it found that "Plaintiff failed to mitigate damages in this matter by failing to have the car fixed in close proximity in time to the alleged damage, and providing the [district c]ourt with [an] actual cost to fix the defects and deficiencies claimed." **[6 RP 1385-86]** The one-third reduction amounts to approximately \$600. Plaintiff challenges this deduction.

{26} "Mitigation of damages is required only to the extent that a loss to the injured party could have been avoided without undue risk or burden." *Skeen v. Boyles*, 2009-NMCA-080, ¶ 34, 146 N.M. 627, 213 P.3d 531. There are two ways that parties can fail to mitigate their damages. First, a person might "passively suffer[] economic loss which could be averted by reasonable efforts." *Hickey v. Griggs*, 1987-NMSC-050, ¶ 22, 106 N.M. 27, 738 P.2d 899. Second, a person could "actively increas[e] such loss where prudence requires that such activity cease." *Id.* The district court's determination about mitigation must be supported by substantial evidence. *See Skeen*, 2009-NMCA-080, ¶ 31 ("We will uphold the district court's award of damages if its determination that these were reasonable mitigation measures is supported by substantial evidence.").

1 {27} No evidence suggested that Plaintiff “passively” suffered a loss that could
2 have been averted. *See Hickey*, 1987-NMSC-050, ¶ 22. The loss occurred when
3 Defendants did not provide value for the approximately \$1,800 that Plaintiff paid
4 them—nothing Plaintiff did or did not do caused that loss. Nor did any evidence
5 suggest that Plaintiff “actively” increased the damages to \$1,800. *See id.* As a result,
6 Plaintiff did not fail to mitigate damages when he did not give Defendants a second
7 chance to repair the car or to have the car fixed by someone else. We conclude the
8 district court’s order to be erroneous in this respect.

9 {28} The district court found that the repairs to the car were deficient [6 RP 1391
10 ¶ 23] and relied on Plaintiff’s requested measure of damages—the amount of the
11 payment—to calculate the award. [6 RP 1385-86] The only evidence related to a
12 one-third reduction—or approximately \$600—was Defendant Lisa Bierner’s
13 testimony that the cost to repair Plaintiff’s car would have been around \$600.
14 [7/28/23 CD 3:02:28-37, 3:53:25-51] But if Plaintiff could have fixed the car by
15 paying an additional \$600, his damages would not be \$1,200—the contract price
16 minus \$600. That would result in Defendants essentially paying Plaintiff \$1,200 to
17 allow him to seek out a \$600 repair or allowing Defendants to keep \$600.00 for a
18 subsequent repair that they could have performed. The district court reduced the
19 award by one-third without a basis in the evidence, and for that reason, we reverse
20 the damage calculation. *See Hubbard v. Albuquerque Truck Ctr., Ltd.*, 1998-NMCA-

058, ¶ 30, 125 N.M. 153, 958 P.2d 111 (reversing a district court’s finding relating to damages where it was not supported by substantial evidence).

{29} Plaintiff challenges the district court’s mitigation findings on multiple other grounds, but because we reverse for the reasons explained, we do not need to address Plaintiff’s other specific arguments related to mitigation. *See Sheraden*, 1988-NMCA-016, ¶ 10 (“It is well settled in New Mexico that the function of a reviewing court on appeal is to correct erroneous results, not to correct errors that, even if corrected, would not change the result.”).

III. The Damages Framework

{30} Plaintiff argues that the district court did not properly calculate damages. At the start of trial, Plaintiff referred the district court to the prayer for relief in the final complaint for calculation of his requested damages. [7/28/23 CD 11:35:25-11:39:07] In that final complaint, Plaintiff sought the following damages: \$5,496 for the UPA claim; \$1,832 for the tort claim plus “at least \$9,000[] for noneconomic damage”; and \$1,058.78 for breach of contract. [4 RP 957, 997] The district court reduced Plaintiff’s damages from \$1,832 to \$1,200, based on the mitigation ruling, and then determined damages individually for each claim as follows: (1) for the UPA claim, \$1,200, multiplied by three for “willful” misrepresentations, *see* NMSA 1978, § 57-12-10(B) (2005), for a total of \$3,600; (2) for breach of contract, \$1,200; and (3) for the tort claim, \$1,200, multiplied by three to account for pain and suffering

1 resulting from gross negligence, for a total of \$3,600. [6 RP 1391-92 ¶¶ 24, 26, 12]

2 The district court ordered Plaintiff to elect which of the three damages awards that
3 he would accept. [6 RP 1392-94, 1395] Plaintiff did not do so, and the district court
4 ultimately elected the UPA damages on Plaintiff's behalf. [6 RP 1465, 1472]

5 {31} Plaintiff makes several arguments on appeal related to the framework for
6 damages. Plaintiff argues that the plain language of Section 57-12-10(D), as well as
7 the legislative history and other statutory provisions, permits recovery for UPA
8 violations in addition to other common law claims arising from the same facts. [BIC
9 19, 21-22] Plaintiff also argues that limiting recovery as set forth in *Hale v. Basin*
10 *Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006, improperly forecloses
11 recovery for different types of damages—emotional distress, punitive damages, and
12 the UPA statutory multiplier for willful misrepresentations. [BIC 24-25] Plaintiff
13 again maintains that the improper handling of his disability foreclosed him from
14 articulating “the severe reprehensibility of Defendants’ conduct” and “insulated the
15 defaulted Defendants from full financial liability.” [BIC 26] Plaintiff provides an
16 alternative model to calculate damages. [BIC 26-27] Plaintiff's damages model (1)
17 permits recovery for both the UPA claim and either the contract or the tort claim
18 (\$3,664); (2) multiplies that amount by three for emotional damages (\$10,992); (3)
19 multiplies \$14,656 (the total of (1) and (2)) by four for \$58,624 in punitive damages;
20 and (4) combines the damages in (1), (2), and (3) to reach \$73,280. [BIC 26-27]

1 Plaintiff agrees to reduce this amount to \$50,000. **[BIC 29]** We first address recovery
2 under the UPA and then turn to Plaintiff’s alternative damages model.

3 **A. Recovery Under the UPA**

4 {32} Section 57-12-10(D) declares that “[t]he relief provided in this section is in
5 addition to remedies otherwise available against the same conduct under the
6 common law or other statutes of this state.” The question arose in *Hale* whether
7 Section 57-12-10(D) allowed a plaintiff to recover both punitive damages for fraud
8 and the statutory multiplier damages under the UPA. *Hale*, 1990-NMSC-068, ¶ 19.
9 The *Hale* Court explained that because duplication of damages for injuries is not
10 permitted, *id.* ¶ 20, parties “may recover damages under separate theories of liability
11 based upon the same conduct of the defendant” and a district court “may make an
12 award under each theory,” *id.* ¶ 21. In those circumstances, a plaintiff “must elect
13 between awards that have duplicative elements of damages” and may “accept the
14 greater of the two awards.” *Id.* The *Hale* Court determined that “[a]s we read Section
15 57-12-10(D), the [L]egislature created a new statutory remedy in addition to those
16 otherwise available, but did not suggest that a party would be entitled to multiple
17 awards of damages arising out of the same conduct.” 1990-NMSC-068, ¶ 20. In
18 *Hale*, our Supreme Court construed the meaning of Section 57-12-10(D) in light of
19 the preexisting common law. *See Hale*, 1990-NMSC-068, ¶¶ 19-21. Courts have
20 long presumed that the Legislature is informed of the common law, and as a result

1 if a statute is intended to supplant the common law, the statute must include “an
2 explicit indication that the [L]egislature so intended.” *Sims v. Sims*, 1996-NMSC-
3 078, ¶¶ 22, 24, 122 N.M. 618, 930 P.2d 153.

4 {33} Such statutory interpretations by our Supreme Court are binding on this Court.
5 See *GTE Sw. Inc. v. Tax’n & Revenue Dep’t*, 1992-NMCA-024, ¶ 14, 113 N.M. 610,
6 830 P.2d 162 (“As an inferior court, we are bound by our [S]upreme [C]ourt’s
7 interpretation of statutory language.”). When our Supreme Court has “directly ruled
8 on an issue in a manner that would be dispositive in the case at bar, the Court of
9 Appeals must apply that same rule to the case at bar.” See *State v. Mares*, 2024-
10 NMSC-002, ¶ 42, 543 P.3d 1198; see also *id.* ¶¶ 33-37 (describing the “vertical stare
11 decisis” structure of the judiciary).

12 {34} We are bound by our Supreme Court’s interpretation of Section 57-12-10(D).
13 Plaintiff disagrees with the *Hale* Court’s analysis and argues that it can be
14 overturned. **[BIC 22-23]** But Plaintiff cites a United States Supreme Court case that
15 overturned that Court’s own precedent. See *Dobbs v. Jackson Women’s Health Org.*,
16 597 U.S. 215, 225-31 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973)). In the
17 present case, Plaintiff asks this Court to overturn “[a] precedential case” by our
18 Supreme Court that “compels the outcome” in the present case. See *Mares*, 2024-
19 NMSC-002, ¶ 41 (alteration, internal quotation marks, and citation omitted). Put
20 another way, *Hale* resolves whether a plaintiff who is successful on a UPA claim

1 and a common law claim must elect a single recovery. *See* 1990-NMSC-068, ¶ 21.
2 That resolution “answers the definitive question” in the present case. *See Mares*,
3 2024-NMSC-002, ¶ 41. In these circumstances, this Court is not “free to conduct its
4 own analysis of the issue,” and is bound by the analysis in *Hale*. *See Mares*, 2024-
5 NMSC-002, ¶ 41. We therefore do not address Plaintiff’s statutory construction
6 arguments or contentions that *Hale* requires an improper election between types of
7 damages.

8 **B. The Damages Award**

9 {35} Our review of Plaintiff’s proposed framework for damages is impacted by the
10 analyses that we have already conducted. We have explained that *Hale* provides the
11 binding structure for the damages model in this case: The total damages for each
12 claim are separately calculated and then Plaintiff was properly permitted to elect
13 which damages he preferred to recover. We have also already addressed Plaintiff’s
14 claim that the handling of his disability prevented him from presenting argument or
15 evidence. We do not address these arguments again. Plaintiff’s remaining arguments
16 related to the damages framework suggest that the district court should have awarded
17 higher noneconomic damages—emotional distress and punitive damages. No
18 additional facts are necessary to evaluate this argument, and we therefore turn to the
19 law about the calculation of damages and the need to preserve arguments.

1 {36} “On appeal, a reviewing court will not overturn the trial court’s findings of
2 fact or award of damages if there is substantial and competent evidence to support
3 such determination, or unless it is clearly demonstrated that the trial court employed
4 an incorrect measure of damages.” *Jones v. Lee*, 1999-NMCA-008, ¶ 7, 126 N.M.
5 467, 971 P.2d 858. Specifically, awards of punitive damages “are entrusted to a
6 fact[-]finder.” *Cf. Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105,
7 ¶ 19, 311 P.3d 1236 (distinguishing between punitive damages and sanctions).
8 Similarly, the fact-finder determines the value of noneconomic damages, such as
9 emotional distress. *See Morga v. FedEx Ground Package Sys., Inc.*, 2022-NMSC-
10 013, ¶ 18, 512 P.3d 774 (observing that the valuation of noneconomic damages “is
11 left to the jury”).

12 {37} Importantly, parties may not make different arguments on appeal than they
13 made to the district court. *See Hinger*, 1995-NMCA-069, ¶ 24 (“Objections to a
14 theory of recovery and the sufficiency of the factual allegations underlying it must
15 be brought to the trial court’s attention” and “the objection on appeal cannot change
16 from that argued to the trial court.”). As we have noted, the preservation rule is
17 principally about fairness. *See id.* There are exceptions to the preservation rule,
18 including when an issue involves the “fundamental rights of a party.” Rule 12-
19 321(B)(2)(d). But most “civil actions do not involve the plaintiff’s fundamental
20 rights.” *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 35, 121 N.M.

821, 918 P.2d 1321. In deciding whether to apply the fundamental rights exception to preservation, we consider the interests at stake: whether a fundamental constitutional right is involved, the remedial nature of the relevant statute, the nature of the error, and whether inequity would result if we decline to excuse the preservation requirement. *See State ex rel. Child., Youth & Fams. Dep’t v. Ruben C.*, 2022-NMCA-063, ¶¶ 46-50, 521 P.3d 431. When the asserted fundamental right is access to the courts, we view that right as fundamental only if the underlying right that the plaintiff is seeking to vindicate in the lawsuit is a fundamental right. *See Cummings*, 1996-NMSC-035, ¶ 35 (considering whether “access to the courts” was a fundamental right for the purposes of determining the appropriate level of constitutional scrutiny).

{38} Plaintiff seeks a higher multiplier for noneconomic damages, including emotional and punitive damages. **[BIC 26, 27-28]** But the quantity of noneconomic damages is for the fact-finder to decide. *See Harrison*, 2013-NMCA-105, ¶ 19 (“[P]unitive damage awards are entrusted to a fact[-]finder.”); *Morga*, 2022-NMSC-013, ¶ 18 (explaining that the valuation of noneconomic damages is “left to the jury”). In the district court, Plaintiff did not seek the amounts of emotional distress and punitive damages that he now seeks on appeal. Defendants had no opportunity to rebut those figures, and the district court had no opportunity to accept or reject those figures. Instead, the district court and Plaintiff discussed the damages

1 calculation early at trial, and Plaintiff directed the district court to the final
2 complaint, which sought approximately \$17,000.00—absent any election of
3 damages. [7/28/23 CD 11:35:25-11:39:07; 4 RP 957, 997] For these reasons, we
4 conclude that Plaintiff offers a new argument on appeal about how damages should
5 be calculated, and we decline to consider the merits of that argument, because it is
6 not preserved. *See Hinger*, 1995-NMCA-069, ¶ 23 (declining to address an issue
7 raised for the first time on appeal).

8 {39} Plaintiff acknowledges the lack of preservation but argues that we should
9 excuse preservation because the improper handling of his disability left him unable
10 to make the necessary arguments and the issue is one of access to the courts, which
11 is a fundamental right. [BIC 7, 25, 26] But we have already concluded that Plaintiff
12 was not prevented from making the necessary arguments. As a result, the right that
13 Plaintiff seeks to vindicate by access to the courts is not related to the ADA or due
14 process. The right Plaintiff seeks to vindicate is the right to recover greater
15 noneconomic and punitive damages. *See Cummings*, 1996-NMSC-035, ¶ 35. The
16 interests at stake counsel against excusing Plaintiff from the preservation
17 requirement: (1) Plaintiff’s damages argument does not implicate a fundamental
18 constitutional right; (2) the only remedial statute (the UPA) is not a factor in the
19 emotional distress and punitive damages calculation; and (3) the error asserted by
20 Plaintiff arose from a calculation that the fact-finder is entrusted to make. *See Ruben*

C., 2022-NMCA-063, ¶¶ 46-50 (analyzing the interests at stake); *Jones*, 1999-NMCA-008, ¶ 7 (same). We therefore decline to further consider Plaintiff's unpreserved damages model.

IV. The Trial Evidence

{40} Plaintiff argues that the district court should have imposed sanctions on Defendants for certain exhibits and testimony offered at the damages trial. **[BIC 30, 31]** Specifically, Plaintiff argues that Defendants' Exhibits 1 and 6 were backdated, "highly suspect," and "unauthenticated" and that "[b]y actively presenting these backdated documents and suppressing material facts under oath, [Defendant] Lisa Bierner committed a fraud on the tribunal, and her legal counsel violated her core ethical duties as an officer of the court by assisting in the introduction of known fabricated material." **[BIC 30, 31]**

{41} Defendant Lisa Bierner testified that Defendant's Exhibit 1 had been created the day before the damages trial, to show given her labor rate at the time, "how much it would cost to actually replace all the moldings." **[7/28/23 CD 3:12:00-09]** Plaintiff objected, and the district court admitted the document, indicating that it would take into consideration Plaintiff's argument that the document had been created only the day before. **[7/28/23 CD 3:14:02-3:15:53]** Defendant's Exhibit 6 was also created the day before the damages trial, in order to show how much Defendant Lisa Bierner charged Plaintiff to remove the moldings. **[7/28/23 CD 3:15:55-3:16:20]** Plaintiff

1 objected to Exhibit 6, and the district court admitted the exhibit, explaining that the
2 evidence went to whether Defendant tried to save Plaintiff some money. [7/28/23
3 **CD 3:17:18-3:18:12]**

4 {42} Plaintiff argues that the district court (1) should have excluded the evidence
5 or imposed sanctions, and (2) relied on the improper evidence to require Plaintiff to
6 mitigate damages. **[BIC 31]** In general, the district court may exercise inherent
7 authority “to command the obedience of litigants and their attorneys if it is to
8 perform its judicial functions.” *State ex rel. N.M. State Highway & Transp. Dep’t v.*
9 *Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 896 P.2d 1148. The decision to exercise
10 inherent authority to impose sanctions is reviewed for abuse of discretion. *See Weiss*
11 *v. THI of N.M. at Valle Norte, LLC*, 2013-NMCA-054, ¶¶ 14-16, 301 P.3d 875
12 (concluding that the imposition of sanctions based on inherent authority is reviewed
13 for abuse of discretion). “Under this standard, we will disturb the district court’s
14 ruling only when the district court’s decision is clearly untenable or contrary to logic
15 and reason.” *Id.* ¶ 15 (alterations, internal quotation marks, and citation omitted).

16 {43} Defendants did not hide from the district court that the exhibits had been
17 created the day before and were clear about the purpose of the exhibits. Defendants
18 did not claim that Exhibit 1 and Exhibit 6 were documents that were shown to
19 Plaintiff at the time of the transaction. Instead, Defendants attempted to use the
20 exhibits to show that the service performed was a less expensive service than it could

1 have been. The district court was not deceived nor does the record indicate that
2 Defendants acted in bad faith regarding these exhibits. *See id.* ¶ 22 (explaining that
3 sanctions may be appropriate “as an exercise of a court’s inherent powers when
4 litigants, their attorneys, or both have engaged in bad faith conduct before the court
5 or in direct defiance of the court’s authority” (internal quotation marks and citation
6 omitted)). As a result, we conclude that the district court did not abuse its discretion
7 by not sanctioning Defendants for offering these exhibits.

8 **V. Out-of-Pocket Expenses**

9 {44} Plaintiff last argues that the district court mischaracterized “\$7,000.00 in out-
10 of-pocket costs as unrecoverable ‘litigation delay damages.’” **[BIC 32]** Plaintiff
11 argues that he was required to preserve the vehicle in the same condition, rather than
12 repair it, in order to “prevent spoliation of evidence.” **[BIC 32]** Plaintiff states that
13 he preserved that claim at “**6 RP 1391 ¶ 23**” and “**Pltf Exhibit**” and argues that the
14 district court should have “include[d] these proven expenditures in the final
15 judgment.” **[BIC 32, 33]**

16 {45} Plaintiff’s first citation to the record is to the district court’s findings of fact.
17 At paragraph 23, the district court found: “However, putting all of the nonsense
18 aside, believing the car repairs to [Plaintiff]’s 2005 Honda were deficient, this court
19 will rule on that basis only.” **[6 RP 1391 ¶ 23]** Plaintiff’s other citation is to an
20 unidentified plaintiff’s exhibit. **[BIC 32]** We have reviewed Plaintiff’s post-

1 damages-trial motions and motions to reconsider and see no reference to \$7,000 in
2 out-of-pocket expenses. [6 RP 1333-40, 1366-71, 1399-1407, 1408-19, 1420-29,
3 1430-43] In the final complaint, Plaintiff did request \$1,832 for economic damages
4 and \$9,000 in noneconomic damages, for a total of \$10,832 in tort damages. [4 RP
5 996] The district court awarded Plaintiff \$3,600—and did not award the remaining
6 \$7,232 in noneconomic damages. [6 RP 1392] As we have set forth, parties may not
7 make different arguments on appeal than they made to the district court. *See Hinger*,
8 1995-NMCA-069, ¶ 24. To preserve an issue for appeal, “theories of liability” must
9 be presented to the district court. *See Spectron Dev. Lab’y v. Am. Hollow Boring*
10 *Co.*, 1997-NMCA-025, ¶ 30, 123 N.M. 170, 936 P.2d 852.

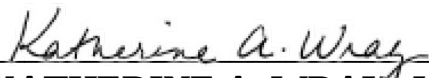
11 {46} Plaintiff either did not ask the district court for \$7,000 in out-of-pocket
12 expenses or shifted the theory of recovery on appeal from noneconomic damages to
13 out-of-pocket expenses. Either way, we conclude that the issue of \$7,000 for out-of-
14 pocket expenses was not preserved for our review.

15 CONCLUSION

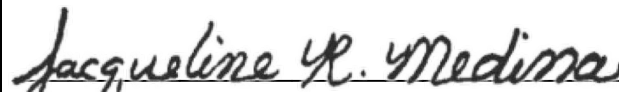
16 {47} We reverse on the issue of mitigation of damages. As set forth, after Plaintiff
17 did not elect damages, the district court elected UPA damages in the final judgment.
18 [6 RP 1465, 1472] Plaintiff did not appeal this portion of the final judgment, and so

1 we remand to the district court for entry of judgment for \$5,496.00 in damages⁴
2 under the UPA against Defendants, in addition to the costs and interest that the
3 district court has awarded. **[6 RP 1395]** Otherwise, we affirm and deny Plaintiff's
4 request for oral argument. **[BIC ii]**

5 {48} **IT IS SO ORDERED.**

6 
7 **KATHERINE A. WRAY, Judge**

8 **WE CONCUR:**

9 
10 **JACQUELINE R. MEDINA, Chief Judge**

11 
12 **J. MILES HANISEE, Judge**

⁴This amount reflects Plaintiff's base claim of \$1,832, multiplied by three according to Section 57-12-10(B) and the district court's associated findings. **[6 RP 1393]**