

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

Gena Lopez

LEOPOLDO PINEDA,

Plaintiff,

v.

Case No. D-202-CV-2011-11975

SOCORRO ELECTRIC COOPERATIVE, INC.,
PAUL BUSTAMANTE and CHARLES WAGNER,

Defendants.

**DEFENDANT SOCORRO ELECTRIC COOPERATIVE, INC.'S REPLY IN SUPPORT
OF MOTION FOR RELIEF FROM ORDER GRANTING PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT AS TO COUNT VI**

Defendant Socorro Electric Cooperative, Inc. (SEC) moves under Rule 1-060(B)(2) and (6) for an order vacating the granting of Plaintiff's motion for summary judgment as to liability on Count III (Breach of Contract – Violations of the New Mexico Open Meetings Act) and entering summary judgment in Defendants' favor on that count. SEC bases its request on Judge Reynolds' decision on December 12, 2012, in *West v. SEC*, No. D-725-CV-2012-89. In that case, Judge Reynolds found that despite what its By-Law says, SEC cannot be sued for violating the Inspection of Public Records Act because SEC cannot voluntarily submit to a statute that does not apply to it, i.e., one cannot stipulate to the existence of subject matter jurisdiction where it does not otherwise exist. Judge Reynolds' decision is directly contradictory to this Court's ruling on Plaintiff's Count III (finding no. 2 in particular), and it is both new information not available at the time of this Court's written ruling on summary judgment in November 2012 and an exceptional circumstance justifying relief from judgment.

Plaintiff's response is not persuasive. His primary position is that because Judge Reynolds' remarks in *West* were verbal and have not (yet) been reduced to writing, they should be ignored. Plaintiff also contends – accurately but irrelevantly – that Judge Reynolds was faced with issues different than some of those before this Court. He closes by arguing that Judge Reynolds' opinions, as those of a district judge, are not binding on this Court (true) and that the weight of authority is to permit parties to sue SEC for breach of the Open Meetings Act (not exactly).

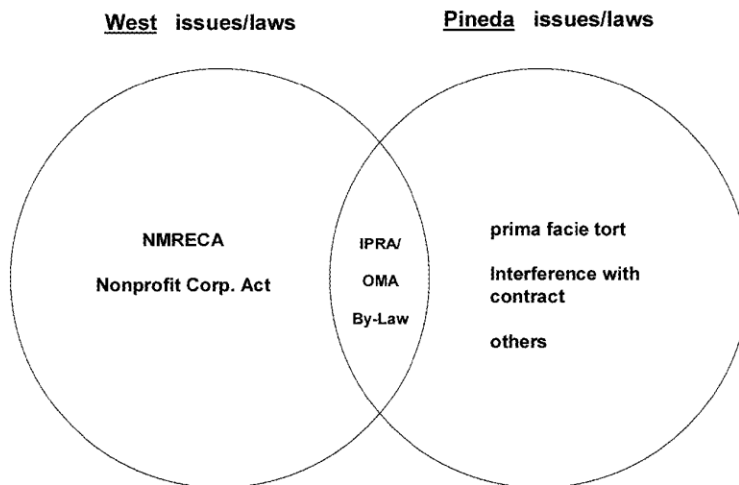
I. Pronouncements From the Bench Cannot Be Ignored Merely Because They Are Not In Writing.

Plaintiff's lead argument is that Judge Reynolds' decision does not need to be followed because it was verbal and has not yet been reduced to writing. In support, Plaintiff cites *Ulibarri v. Gee*, 106 N.M. 637, 748 P.2d 10 (1987). That case stands for the unremarkable proposition that “court comments from the bench [may not] be substituted for material facts appearing as findings in the decision.” *Id.* at 640, 748 P.2d at 13. That proposition is not relevant here. As Plaintiff herself points out, as of this writing there is no written decision from Judge Reynolds so SEC is of course not attempting to substitute verbal remarks for non-existent written findings.

Furthermore, any concern about the weight to be given to Judge Reynolds' remarks because they are “only” verbal should soon be moot. It is the understanding of the undersigned counsel that presentment of a form of order will occur soon in the *West* case. It is likely that by the time this motion is heard at oral argument, Judge Reynolds' comments regarding SEC's inability to submit voluntarily to a statute will be memorialized in writing.

II. Judge Reynolds Dealt With the Same Issue Facing This Court On Plaintiff's Motion For Partial Summary Judgment: Can SEC Be Sued For Breach Of the SEC By-Law On the OMA and IPRA?

In his response, Plaintiff repeatedly points out that in *West*, Judge Reynolds interpreted the New Mexico Rural Electric Cooperative Act and made decisions based on it. That is true. He also analyzed the Nonprofit Corporations Act and the Confidential Materials Act as well. (Tr. 12/12/12 at 9 & 17, attached as Ex. C to Def. SEC's Mot. for Relief from Order Granting Pl's Mot. for Partial Summ. J.) But those were not the only matters under consideration. Also facing Judge Reynolds in *West* was the very issue in front of this Court on the parties' cross motions for summary judgment on Count III, namely, whether SEC can be sued for violating the SEC By-Law Art. VI, Section 5, which says, "The SEC voluntarily agrees to abide by the Open Meetings Act and Inspection of Public Records Act." (See Ex. A to Def. SEC's Mot. for Relief from Order Granting Pl's Mot. for Partial Summ. J.) A Venn diagram of the two cases would look like this:



Judge Reynolds in *West* ruled on the By-Law regarding the IPRA and the OMA just like he did regarding the other statutes he considered, and in the case of the IPRA he found that SEC cannot voluntarily submit itself to subject matter jurisdiction in state district court for breach of those laws. (Tr. 12/12/12 at 8, attached as Ex. C to Def. SEC's Mot. for Relief from Order Granting Pl's Mot. for Partial Summ. J.) Accordingly, Judge Reynolds denied plaintiffs' request for relief based on those laws.¹

III. Judge Reynolds' Decision Is Persuasive.

Plaintiff is correct that District Judge Parsons in Carrizozo has ruled the same as this Court on whether SEC can be sued for breach of the IPRA and OMA (and a motion identical to this one is pending before Her Honor). Plaintiff is wrong, however, to suggest as he does on page 5 of his response that Judge Mitchell in Tucumcari has also ruled that SEC can be sued for breach of the OMA and IPRA. Judge Mitchell simply found that the IPRA and OMA By-Law was validly enacted and did not address the issue of whether an individual could sue SEC for breach of that By-Law. There is certainly disharmony and a lack of uniformity on the question at issue, but it is not as lopsided in his favor as Plaintiff would have this Court believe.

SEC readily acknowledges that one district judge's opinions cannot bind another in the same way as an opinion from the court of appeals or supreme court. This Court can, however, give weight to the fact that Judge Reynolds sits in the judicial district and city where suits involving this matter are most likely to arise. This Court can also be guided by the principle that like cases should be treated similarly. *State v. Riley*, 2010-NMSC-005, ¶ 34, 147 N.M. 557, 226

¹ Plaintiff points out that Judge Reynolds confined his comments mainly to the IPRA rather than the OMA. That is an irrelevant distinction because both of those statutes are listed in SEC By-Law Art. VI, Section 5, and the principle that "subject matter jurisdiction can't be conferred by stipulation" is exactly the same as to both. (Tr. 12/12/12 at 8, attached as Ex. C to Def. SEC's Mot. for Relief from Order Granting Pl's Mot. for Partial Summ. J.)

P.3d 656. At the moment, whether SEC can be sued for violating the OMA depends on which judge hears the case. This Court has the power to correct this situation and restore uniformity.

III. Conclusion

In December 2012, District Judge Reynolds recognized that SEC cannot create subject matter jurisdiction where it does not exist. Judge Reynolds' ruling is therefore at odds with this Court's decision granting summary judgment to Plaintiff on his cause of action for breach of the OMA. For the reasons stated in SEC's briefing, that order should be vacated under Rule 1-060(B)(2) and (6), and summary judgment should be entered in SEC's favor on Plaintiff's Count III (Breach of Contract – Violations of the New Mexico Open Meetings Act).

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of March, 2013 I filed the foregoing pleading through the electronic filing system of the Second Judicial District Court, which caused counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing. Also on this day copies were hand-delivered to the following counsel:

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