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

2 **GABRIEL BECERRA,**

3 Plaintiff-Appellant,

4 v.

NO. 33,758

5 **ALLSTATE INSURANCE COMPANY;**
6 **THE DUNSIRN AGENCY; LEE DUNSIRN;**
7 **JENNIE BURRILL; CATHY LANKFORD;**
8 **STIFF, KEITH & GARCIA, LLC; ANN L.**
9 **KEITH, ESQ.; RUGGE, ROSALES & ASSOCIATES**
10 **P.C.; DALE R. RUGGE, ESQ.; SIMONE, ROBERTS,**
11 **& WEISS, P.A.; STEPHEN M. SIMONE, ESQ.;**
12 **DAVID W. FRIZZELL, ESQ.; MARIO SALAZAR;**
13 **AND NARCISO GARCIA JR., ESQ.**

14 Defendants-Appellees.

15 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
16 **Nan G. Nash, District Judge**

17 Gabriel Becerra
18 Albuquerque, NM

19 Pro Se Appellant

20 Jennie Burrill
21 Phoenix, AZ

22 Pro Se Appellee

1 Mario Salazar
2 Albuquerque, NM

3 Pro Se Appellee
4 Stiff, Keith & Garcia, LLC
5 Ann L. Keith
6 Albuquerque, NM

7 for Appellee Ann L. Keith

8 Simone, Roberts & Weiss, PA
9 Stephen M. Simone
10 Albuquerque, NM

11 for Appellees Stephen M. Simon & Allstate Insurance Company

12 **MEMORANDUM OPINION**

13 **GARCIA, Judge.**

14 {1} Plaintiff appeals from a judgment entered in his favor following a bench trial.

15 We proposed to affirm, and Plaintiff has filed a motion to amend the docketing

16 statement as well as a memorandum in opposition to the proposed affirmance. The

17 motion to amend raises no new issues, but instead presents additional facts and

18 argument in support of the issues discussed in the memorandum in opposition. We

19 therefore construe the motion to amend as a supplement to the memorandum in

20 opposition. Having carefully considered the information and arguments presented in

21 Plaintiff's pleadings, we are not persuaded that Plaintiff has demonstrated reversible

22 error. We therefore affirm, for the reasons discussed below as well as those set out in

1 the notice of proposed disposition.

2 {2} Plaintiff continues to argue that Allstate violated its duty to defend him against
3 the frivolous lawsuit filed against him by Mario Salazar. As we pointed out in the
4 notice of proposed disposition, the district court agreed with Plaintiff; therefore,
5 Plaintiff prevailed on this issue and all of his arguments concerning Allstate's duty
6 to defend are unnecessary.

7 {3} We also pointed out in the notice that the district court awarded damages to
8 Plaintiff as recompense for Allstate's breach, and suggested that Plaintiff had failed
9 to show how that damages award was insufficient. Plaintiff has now attempted to
10 detail his damages by claiming that he suffered grave emotional distress as a result
11 of Allstate's initial failure to defend him against the Salazar lawsuit. [Amended DS
12 16] He states that he gained 60 pounds, suffers constant pain as a result of "unending"
13 stress, and has suffered humiliation, embarrassment, loss of enjoyment of life, and
14 other damages. [*Id.*] In essence, Plaintiff asks this Court to re-weigh the evidence
15 presented to the trial court and determine that the trial court's award of over \$17,000
16 in damages was legally insufficient. This we may not do. On appeal, an award of
17 damages will not be reversed unless it was a result of passion, prejudice, or a palpable
18 error, or where the measure of damages used was erroneous. *Hicks v. Eller*,
19 2012-NMCA-061, ¶ 35, 280 P.3d 304. In this case, the trial court found that Plaintiff

1 presented little concrete evidence of damages, and most of the damages claimed by
2 Plaintiff on appeal are based on his subjective claims of emotional distress rather than
3 on concrete demonstrations of harm such as medical bills. Given the subjective nature
4 of his damages, we are not in a position to substitute our judgment for that of the
5 district court, who was present at trial, observed Plaintiff’s testimony, and determined
6 the extent to which Plaintiff had been harmed by Allstate’s actions. *See Shadoan v.*
7 *Cities of Gold Casino*, 2010-NMCA-002, ¶ 18, 147 N.M. 444, 224 P.3d 671 (pointing
8 out that appellate courts are not in a position to evaluate the value of a plaintiff’s pain
9 and suffering, and may not speculate as to what the amounts might have been).

10 {4} Plaintiff reiterates his argument that Allstate should not have been allowed to
11 settle the Salazar lawsuit by paying Salazar \$7500, because the lawsuit was frivolous
12 and factually baseless. As part of this argument Plaintiff contends he had a “legal
13 right” to prevent any payment to Salazar unless Salazar could prove that Plaintiff was
14 liable for Salazar’s injuries; he also claims Allstate could not enter into settlement
15 negotiations with Salazar without first obtaining written consent from Plaintiff.
16 [Amended DS 11] Plaintiff cites no legal authority for either proposition, and as we
17 discussed in the notice of proposed disposition we do not believe either proposition
18 is a correct statement of the law. In the notice we discussed the concept of a claim for
19 “wrongful settlement” of a claim by an insurer, and we pointed out that such a claim

1 has been allowed in only limited circumstances, where it has been allowed at all.
2 Even assuming New Mexico would adopt a cause of action for wrongful settlement,
3 those limited circumstances are not present in this case-- the settlement with Salazar
4 did not cost Plaintiff any money, as Allstate paid the entire \$7500, and Plaintiff has
5 not shown that the settlement otherwise caused him to suffer any legally-cognizable
6 harm. We therefore reject Plaintiff's contention that he is entitled to some type of
7 recovery arising from Allstate's settlement of the Salazar lawsuit, for the reasons
8 stated in the notice of proposed disposition as well as this opinion.

9 {5} Plaintiff also continues to argue that the Allstate attorney appointed to
10 represent him in the Salazar lawsuit had a conflict of interest and conspired with
11 Allstate to violate Plaintiff's rights, and that he should have been allowed to have a
12 different attorney represent him. [Amended DS 12-15] These arguments are premised
13 on Plaintiff's belief that he should have been allowed to prevent any payment of
14 money to Salazar in settlement of the Salazar lawsuit; as we have discussed above,
15 that belief does not comport with the law. The bottom line is that the Allstate-
16 appointed attorney represented Plaintiff in such a fashion that Plaintiff incurred no
17 liability to Salazar and was not required to expend any of his own funds to pay for the
18 settlement. He therefore cannot show that he suffered any compensable damage as a
19 result of his representation by the attorney chosen by Allstate. Put simply, Plaintiff's

1 outrage at the fact that Salazar was paid \$7500 by Allstate, for what Plaintiff
2 considers to be a frivolous claim, does not give rise to any legally-recognized cause
3 of action against either Allstate or the attorney hired by Allstate to represent Plaintiff.

4 {6} Plaintiff raises two new arguments concerning the settlement. He contends that
5 the settlement included language indicating that neither party admitted liability for
6 the alleged incident that led to the settlement, and that this language somehow aided
7 Allstate in the duty-to-defend litigation between Allstate and Plaintiff. [Amended DS
8 13] He also argues that the settlement concealed Allstate's wrongdoing in its handling
9 of the defense of Salazar's claim against Plaintiff. [*Id.* 13-14] Plaintiff does not
10 explain either of these arguments further, and cites no specific facts or law in support
11 of either one. We are unable to perceive how the non-admission-of-liability language
12 had any impact on the litigation between Allstate and Plaintiff, and in any event
13 Plaintiff prevailed in that litigation and therefore suffered no harm from the language.
14 Furthermore, we do not see how the settlement could conceal any wrongdoing by
15 Allstate in handling the defense of Salazar's claim against Plaintiff, and we point out
16 once again that even if such wrongdoing occurred, the end result of Allstate's
17 representation of Plaintiff was that Plaintiff owed Salazar no money or compensation
18 of any kind. Plaintiff simply has failed to demonstrate that he was harmed in any
19 legally-recognized manner by the settlement Allstate entered into with Salazar. In

1 sum, even if New Mexico were to recognize a claim for wrongful settlement by an
2 insurance company, an issue we need not decide, Plaintiff has failed to satisfy the
3 requirements of such a claim by failing to demonstrate that he suffered compensable
4 harm as a result of the settlement.

5 {7} Plaintiff contends that his discovery was impermissibly limited by the special
6 master appointed by the district court. The special master refused to allow Plaintiff
7 to conduct any discovery concerning matters arising after the date on which the
8 litigation between Allstate and Plaintiff was initiated. [RP Vol. 10, 4041] Given the
9 status of the litigation at the time this matter was before the special master, her
10 decision, which was affirmed by the district court, was correct. Under the amended
11 complaint that Plaintiff was allowed to file against Allstate, his claims were limited
12 to Allstate's alleged breaches of contract for failing to investigate and defend Plaintiff
13 against the lawsuit filed by Salazar. [RP Vol. 9, 3856-60] However, by the time the
14 litigation between Plaintiff and Allstate was initiated, Allstate was already providing
15 a defense to the lawsuit under a reservation of rights. [RP Vol. 1, 369, 376, the
16 allegation in Allstate's complaint in intervention, admitted in Plaintiff's answer and
17 counterclaim] Plaintiff's requested discovery concerning events occurring after that
18 date was aimed at showing that Allstate wrongfully settled the Salazar lawsuit;
19 however, such a claim was not raised in the amended complaint that Plaintiff was

1 allowed to file, and as we have discussed was not a viable claim in any event.
2 Therefore, Plaintiff was allowed discovery tailored specifically to the amended
3 complaint he was allowed to file. We hold that he has not demonstrated reversible
4 error in the district court's discovery ruling. *See Doe v. Roman Catholic Diocese of*
5 *Boise, Inc.*, 1996-NMCA-057, ¶ 21, 121 N.M. 738, 918 P.2d 17 (stating that the party
6 challenging a limitation on discovery must show an abuse of discretion and
7 prejudice).

8 {8} Plaintiff's final arguments concern the district court's refusal to allow him to
9 amend his complaint to include a malicious-abuse-of-process claim against Narciso
10 Garcia, Mr. Salazar's attorney. The district court refused to do so for two reasons:
11 first, Plaintiff's failure to obtain an expert who could testify that Mr. Garcia's conduct
12 during the litigation was unreasonable; and second, the court's determination that
13 Plaintiff could not satisfy the elements of a claim for malicious abuse of process. As
14 we discussed in the notice, this case is somewhat unusual because the motion to amend
15 was not submitted or decided simply on the pleadings; instead, both parties submitted
16 evidentiary material for the district court's consideration. We therefore proposed to
17 treat the motion to amend in the same manner as a case in which matters outside the
18 four corners of the complaint are considered in deciding a motion to dismiss – that is,
19 to decide the issue under a summary-judgment standard rather than the normal

1 standard that is applied when we review only the allegations of the complaint. *See*
2 *Tunis v. Country Club Estates Homeowners Ass’n, Inc.*, 2014-NMCA-025, ¶ 17, 318
3 P.3d 713. Plaintiff has not objected to our proposal, and we therefore continue to apply
4 that standard of review.

5 {9} In our notice we pointed out that at the time the Salazar lawsuit was filed, Mr.
6 Garcia was in possession of information indicating that Plaintiff allegedly aided,
7 abetted, and encouraged the individual who allegedly battered Salazar. That
8 information was presented to the district court. [RP Vol. 5, 2052-55] Thus, it appears
9 that Mr. Garcia had probable cause to believe Plaintiff was potentially liable for
10 Salazar’s injuries. This is especially true, given the fact that in malicious-abuse-of-
11 process cases there must be a “manifest” lack of probable cause in order to protect
12 litigants’ right of access to the courts. *LensCrafters, Inc. v. Kehoe*, 2012-NMSC-020,
13 ¶ 29, 282 P.3d 758 .

14 {10} In response to our notice Plaintiff does not discuss the probable-cause issue as
15 it pertains to the initial filing of the complaint. Instead, he contends that Mr. Garcia
16 wrongfully prolonged the litigation without probable cause to do so, by attempting to
17 file an amended complaint rather than dismissing the lawsuit. [Amended DS 20-21]
18 There are at least two problems with Plaintiff’s argument. First, at the time Mr. Garcia
19 requested permission to amend the complaint, the facts surrounding the Salazar

1 incident were still disputed. Although no witness had identified Plaintiff as the
2 individual who allegedly struck Salazar, responses to interrogatories had been filed
3 indicating that Plaintiff was identified as the driver of the vehicle that approached
4 Salazar and in which the alleged assailant was seated; that Plaintiff exited the vehicle
5 and urged his companion to attack Salazar; and that Plaintiff drove the vehicle away
6 from the scene. [RP Vol. 5, 2057] We understand that Plaintiff claims these alleged
7 facts are complete fabrications; however, Plaintiff has cited no authority indicating
8 that a dispute concerning the factual background of an incident means that probable
9 cause is lacking for a particular version of the events, and we do not believe such
10 authority exists. *See, e.g., LensCrafters*, 2012-NMSC-020, ¶ 31 (holding that to
11 establish lack of probable cause, a party must show that the opposing party lacked a
12 reasonable belief in the factual allegations or the law applicable to those facts).
13 Furthermore, Plaintiff has not argued or cited authority for the proposition that the
14 evidence outlined above could not as a matter of law give rise to a claim for damages
15 against him. *See id.* It therefore appears, based on the record before us, that Mr. Garcia
16 had probable cause to believe that the filing of an amended complaint was proper.

17 {11} The other problem with Plaintiff's argument is that the issue of the filing of the
18 amended complaint arose shortly before Allstate settled with Salazar, thereby
19 preventing Plaintiff from having any possible liability to Salazar. [RP Vol. 2, 723,

1 January 14, 2011 motion to file amended complaint; amended DS 12, settlement
2 conference held January 28; RP Vol. 2, 782, stipulation of dismissal filed March 9]
3 There is nothing in the record to indicate that Plaintiff suffered any damage during the
4 brief time period from the attempt to file the amended complaint to the settlement.
5 Such a showing of damages is one of the elements of the malicious-abuse-of-process
6 cause of action. *See LensCrafters*, 2012-NMSC-020, ¶ 30. Therefore, the district court
7 did not err in finding that Plaintiff could not establish all of the elements of the claim
8 he sought to bring against Mr. Garcia, and did not err in denying Plaintiff's motion to
9 amend to add Mr. Garcia as a party.

10 {12} Based on the foregoing, we affirm the district court's judgment in this case.

11 {13} **IT IS SO ORDERED.**

12
13

TIMOTHY L. GARCIA, Judge

14 **WE CONCUR:**

15
16

CYNTHIA A. FRY, Judge

17
18

RODERICK T. KENNEDY, Judge

