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

2 Opinion Number: _____

3 Filing Date: October 9, 2024

4 **No. A-1-CA-40692**

5 **MARINA HERNANDEZ,**

6 Plaintiff-Appellee,

7 v.

8 **OUTWEST AUTO CORRAL, LLC**
9 **and WESTERN SURETY COMPANY,**

10 Defendants-Appellants.

11 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
12 **Victor S. Lopez, District Court Judge**

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23 for Appellants

1 **OPINION**

2 **WRAY, Judge.**

3 {1} Plaintiff Marina Hernandez and Defendants Outwest Auto Corral, LLC and
4 Western Surety Company (collectively, Defendant), brought claims against each
5 other arising from the sale of a used car. Defendant, a licensed retail automobile
6 dealer, appeals several issues arising before, during, and after trial. We conclude that
7 the district court properly granted partial summary judgment to Plaintiff on the claim
8 arising under the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -26 (1967,
9 as amended through 2019). Under these circumstances, an affidavit from the dealer
10 as to the age and condition of the car was required under Section 57-12-6 and
11 accompanying regulations. Defendant did not provide an affidavit, and the lack of
12 affidavit established a prima facie case that Defendant willfully misrepresented the
13 age or condition of the vehicle, *see id.*, which Defendant did not rebut. For this
14 reason and because the district court did not otherwise err, we affirm.

15 **BACKGROUND**

16 {2} The following background is taken from the undisputed material facts on
17 summary judgment as well as the evidence that was developed at trial. Defendant
18 sold Plaintiff a used car on January 11, 2008. At that time, Plaintiff signed documents
19 titled “Damage Disclosure Statement” and “Rule 12.2.14.14 Inspection Form.” We
20 refer to these two documents together as “the provided reports.” The parties entered

1 into a retail installment contract and security agreement (the retail installment
2 contract), which required Plaintiff to make monthly payments. Plaintiff made a
3 partial down payment and took the car on that date, but because an emissions test
4 could not be performed that evening, Defendant waited to transfer title to Plaintiff.
5 On January 31, 2018, Plaintiff reported the vehicle stolen and a few days later,
6 informed Defendant about the theft. Plaintiff paid the remaining portion of the down
7 payment and one installment payment. When law enforcement recovered the car,
8 Plaintiff was not permitted to reclaim it, because title was not in Plaintiff's name.
9 After Plaintiff indicated no desire to have the car back and made no more payments,
10 Defendant transferred title to itself and recovered insurance proceeds from Plaintiff's
11 insurance company. After further investigation, Plaintiff's counsel discovered
12 evidence that before the purchase, Defendant had not properly disclosed damage to
13 the car.

14 {3} Plaintiff filed a complaint against Defendant and subsequently amended that
15 complaint to include claims for violations of Sections 57-12-2 and 57-12-6 of the
16 UPA. Defendant responded with counterclaims, which eventually included
17 counterclaims for breach of contract and malicious abuse of process. Before trial,
18 the district court dismissed Defendant's counterclaim for malicious abuse of process
19 and granted partial summary judgment to Plaintiff as to liability on the Section 57-
20 12-6 claim. The parties went to trial, again in relevant part, on Plaintiff's claim under

1 Section 57-12-2(D)(14), (15), and (17) of the UPA and Defendant's counterclaim
2 for breach of contract.

3 {4} After the parties presented evidence at trial, the district court granted
4 Plaintiff's motion for judgment as a matter of law on Defendant's counterclaim for
5 breach of contract. The jury found for Defendant on Plaintiff's claims and awarded
6 no damages. Posttrial, both parties filed motions for attorney fees and costs arising
7 from the outcomes of the different UPA claims. *See* § 57-12-10(C) (addressing
8 attorney fees under the UPA). The district court denied Defendant's motion, granted
9 Plaintiff's motion, and entered a judgment awarding Plaintiff statutory damages
10 under the UPA as well as attorney fees and costs. Defendant appeals.

11 **DISCUSSION**

12 {5} Defendant raises four issues on appeal: (1) partial summary judgment on the
13 Section 57-12-6 claim; (2) judgment as a matter of law on Defendant's breach of
14 contract counterclaim; (3) attorney fees and costs under the UPA; and (4) the pretrial
15 dismissal of Defendant's counterclaim for malicious abuse of process. We begin
16 with the grant of partial summary judgment.

17 **I. Partial Summary Judgment**

18 {6} We review de novo whether the undisputed material facts supported judgment
19 as a matter of law. *See McAlpine v. Zangara Dodge, Inc.*, 2008-NMCA-064, ¶ 17,
20 144 N.M. 90, 183 P.3d 975; *see also* Rule 1-056(C) NMRA. The district court

1 concluded that the undisputed material facts established that Section 57-12-6
2 required Defendant to provide an affidavit, Defendant did not provide an affidavit,
3 and that summary judgment on the Section 57-12-6 claim was justified. Defendant
4 argues that partial summary judgment on the Section 57-12-6 claim was unjustified
5 because a separate, notarized affidavit was not required under the circumstances. To
6 put Defendant's arguments in context, we first examine Section 57-12-6.

7 {7} Section 57-12-6 creates a penalty for the willful misrepresentation of the age
8 or condition of a vehicle. Under Section 57-12-6(A),

9 [t]he willful misrepresentation of the age or condition of a motor
10 vehicle by any person, including regrooving tires or performing chassis
11 repair, without informing the purchaser of the vehicle that the
12 regrooving or chassis repair has been performed, is an unlawful practice
13 within the meaning of the [UPA], unless the alleged misrepresentation
14 is based wholly on repair of damage, the disclosure of which was not
15 required pursuant to Subsection C of this section. The failure to provide
16 an affidavit pursuant to Subsection B of this section when there has
17 been repair for which disclosure is required shall constitute prima facie
18 evidence of willful misrepresentation.

19 Section 57-12-6(B), referred to by Section 57-12-6(A), states that "a seller of a motor
20 vehicle shall furnish at the time of sale of a motor vehicle an affidavit that: (1)
21 describes the vehicle; and (2) states to the best of the seller's knowledge whether
22 there has been an alteration or chassis repair due to wreck damage." Our Supreme
23 Court has explained that "within the context of Section 57-12-6(B), goods are
24 'altered' if, as measured against the reasonable expectations of the consumer, the
25 characteristics or value of the motor vehicle is affected in a meaningful way." *Hale*

1 *v. Basin Motor Co.*, 1990-NMSC-068, ¶ 10, 110 N.M. 314, 795 P.2d 1006. An
2 affidavit is not required if the cost of relevant repairs is less than 6 percent of the
3 sales price of the vehicle, Section 57-12-6(C), or in “a private-party sale of a vehicle”
4 except on the purchasing party’s request, Section 57-12-6(D).

5 {8} Under Section 57-12-6, the undisputed material facts in the present case
6 showed that an affidavit was required. The provided reports listed repairs that had
7 been made to the vehicle. Defendant checked “Yes” on the inspection report next to
8 the box with the following language: “Good Faith estimate whether discovered prior
9 alteration/damage/repair cost exceeds 6% of sales price?” Under Section 57-12-
10 6(B)(2), Plaintiff was entitled to, but did not, receive an affidavit from Defendant
11 setting forth to the best of Defendant’s knowledge “whether there ha[d] been an
12 alteration or chassis repair due to wreck damage.” As a result, Plaintiff established
13 a prima facie case that Defendant willfully misrepresented the age or condition of
14 the vehicle. *See* § 57-12-6(A).

15 {9} The prima facie case, however, does not establish as a matter of law that
16 Defendant violated Section 57-12-6(A). Defendant had the opportunity to rebut
17 Plaintiff’s prima facie case of willful misrepresentation with evidence in response to
18 the motion for summary judgment. *See Blauwkamp v. Univ. of N.M. Hosp.*, 1992-
19 NMCA-048, ¶ 9, 114 N.M. 228, 836 P.2d 1249 (explaining that in reviewing a grant
20 of summary judgment “we look to whether [the] defendants made a prima facie case

1 that no genuine issue of material fact existed and, if so, whether plaintiffs rebutted
2 the prima facie case.” (alteration, internal quotation marks, and citation omitted)).
3 Defendant, however, in the district court and more importantly on appeal, has
4 maintained that an affidavit was not required under the circumstances of this case
5 and not that Plaintiff’s prima facie evidence of willful misrepresentation was
6 rebutted by Defendant’s evidence. Because the issue of whether an affidavit was
7 required at all is the issue that Defendant preserved and raised on appeal, that is the
8 issue we consider now, beginning with Defendant’s first argument that satisfaction
9 of certain regulations was sufficient to comply with Section 57-12-6 before turning
10 to Defendant’s second argument that Plaintiff did not establish that, measured
11 against her reasonable expectations as a consumer, the repairs altered the vehicle in
12 a meaningful way.

13 **A. Section 57-12-6 and the Corresponding Regulations**

14 {10} Defendant first argues that a notarized affidavit was not required based on the
15 provisions of the related regulation, 12.2.14.8(B) NMAC, which provides that
16 “[w]hen a seller in good faith: (1) conducts a motor vehicle inspection in compliance
17 with 12.2.14.10 NMAC; (2) completes an inspection report pursuant to 12.2.14.11
18 NMAC; (3) provides the inspection report to the buyer; and (4) maintains the
19 inspection report in seller’s records for four years, the seller may be deemed to have
20 complied with Section 57-12-6.” Defendant maintains that no notarized affidavit

1 was required, because Plaintiff received the provided reports and those documents
2 satisfied 12.2.14.8(B) NMAC, and as a result, Defendant should be “deemed to have
3 complied with Section 57-12-6.” *See* 12.2.14.8(B) NMAC. We evaluate Defendant’s
4 interpretation of 12.2.14.8(B) NMAC using “the same rules as used in statutory
5 interpretation,” and begin with the plain language of the regulation. *See Alliance*
6 *Health of Santa Teresa, Inc. v. Nat’l Presto Indus., Inc.*, 2007-NMCA-157, ¶¶ 18-
7 19, 143 N.M. 133, 173 P.3d 55; *see also T-N-T Taxi, Ltd. v. N.M. Pub. Reg. Comm’n*,
8 2006-NMSC-016, ¶ 5, 139 N.M. 550, 135 P.3d 814 (“Under the plain meaning rule,
9 statutes are given effect as written without room for construction unless the language
10 is doubtful, ambiguous, or adherence to the literal use of the words would lead to
11 injustice, absurdity or contradiction, in which case the statute is to be construed
12 according to its obvious purpose.”).

13 {11} Defendant’s interpretation of the plain language of 12.2.14.8(B) NMAC
14 contradicts Section 57-12-6. According to Defendant, a seller may satisfy the
15 requirements of Section 57-12-6 without an affidavit by complying with
16 12.2.14.8(B) NMAC. But under Section 57-12-6(A), the absence of an affidavit
17 when disclosure is required is prima facie evidence of “the willful misrepresentation
18 of the age or condition of a motor vehicle,” the conduct that is prohibited by Section
19 57-12-6(A). The regulation cannot be read to contradict the statute. *See Gallegos v.*
20 *State Bd. of Educ.*, 1997-NMCA-040, ¶ 23, 123 N.M. 362, 940 P.2d 468 (“When a

1 statute and a regulation conflict, the statute prevails.”). Because the plain language
2 of the regulation results in a contradiction of the statute, we construe 12.2.14.8(B)
3 NMAC and the affidavit requirement, each “according to its obvious purpose,” *see*
4 *T-N-T Taxi, Ltd.*, 2006-NMSC-016, ¶ 5, as well as the other provisions of 12.2.14.8
5 NMAC, *see Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶¶ 30, 37, 147 N.M. 583,
6 227 P.3d 73 (interpreting the provisions of the UPA “liberally to facilitate and
7 accomplish its purposes and intent” and considering the plain language “in the
8 context of the statutory text as a whole” (internal quotation marks and citation
9 omitted)).

10 {12} The purpose of 12.2.14.8(B) NMAC is to provide a mechanism for dealers to
11 perform an inspection of the vehicle in order to obtain sufficient information to
12 evaluate the age and condition of the vehicle and to avoid the willful
13 misrepresentation prohibited by Section 57-12-6(A). Section 57-12-6(B) sets out
14 broad disclosure parameters and requires that an affidavit (1) describe the vehicle
15 and (2) state “to the best of the seller’s knowledge whether there has been an
16 alteration or chassis repair due to wreck damage.” But Section 57-12-6 neither
17 defines “to the best of the seller’s knowledge” nor outlines the seller’s obligation to
18 investigate the vehicle to determine if the circumstances require disclosure. Each of
19 the numbered provisions of 12.2.14.8(B) NMAC relate to investigating the condition
20 of the vehicle, and the numbered provisions fill in the gap left by the statute by

1 providing “clear legal standards as to what constitutes ‘to the best of seller’s
2 knowledge’ when selling used motor vehicles to retail buyers.” *See* 12.2.14.6(A)(3)
3 NMAC (quoting Section 57-12-6(B)(2) and setting out a purpose for the regulation).
4 {13} The standards in 12.2.14.8(B) NMAC do not by themselves, however, fulfill
5 the purpose of the affidavit requirement. The provisions of Section 57-12-6 require
6 the affidavit in order to ensure that sellers disclose—and do not misrepresent—the
7 age or condition of a vehicle and to provide evidence to that effect. *See* § 57-12-6(A)
8 (defining the prohibited conduct). In the present case, Plaintiff and a dealership
9 representative signed the damage disclosure statement, but that form was an
10 acknowledgement by Plaintiff that the form was received and questions were
11 answered. The seller made no representation or acknowledgement to Plaintiff. The
12 inspection form was signed by an inspector but not the seller. Neither document is a
13 statement from the seller—or is conclusive evidence—about whether “to the best of
14 the seller’s knowledge” the vehicle had sustained the relevant damage. *See* § 57-12-
15 6(B); *cf.* Rule 1-056(E) (setting forth the requirements for an affidavit in support of
16 summary judgment, which requires the witness’s competency and personal
17 knowledge of facts that “would be admissible in evidence”). The broader disclosure
18 requirement of Section 57-12-6 “is intended to protect consumers from deceptive
19 business practices that negate reasonable expectations.” *See Hale*, 1990-NMSC-068,
20 ¶ 10. The affidavit requirement serves that purpose by requiring the seller to attest

1 to certain knowledge about the vehicle, properly obtained by compliance with
2 12.2.14.8(B) NMAC.

3 {14} The remaining provisions of 12.2.14.8 NMAC demonstrate that the affidavit
4 is required despite compliance with 12.2.14.8(B) NMAC. The entirety of 12.2.14.8
5 NMAC is titled “Affidavit Required.” The premise of the regulation is set forth in
6 12.2.14.8(A) NMAC, which requires the seller to “furnish at the time of sale of a
7 motor vehicle an affidavit that states to the best of the seller’s knowledge whether
8 there has been an alteration or chassis repair due to wreck damage, except where not
9 required.” As we have explained, 12.2.14.8(B) NMAC describes how the seller can
10 obtain the necessary knowledge in good faith. Regulation 12.2.14.8(C) NMAC
11 explains that “[w]hen a seller determines that an affidavit is required pursuant to
12 Subsection B of Section 57-12-6 . . . , the seller shall attach a report which
13 substantially complies with 12.2.14.11 NMAC to the affidavit to disclose the prior
14 alteration or repair.” 12.2.14.8(C) NMAC. Thus, even where an inspection report is
15 provided in accordance with 12.2.14.8(B)NMAC, that report does not take the place
16 of an affidavit but rather must be attached to the affidavit when the affidavit is also
17 required. Similarly, 12.2.14.8(F) NMAC directs that when an affidavit is required,
18 “a copy of the affidavit shall also be maintained by the seller for four years.” This
19 provision relates back to the requirement in 12.2.14.8(B)(4) NMAC that an
20 inspection report be maintained in the seller’s records for four years. If the inspection

1 report could substitute for the affidavit when an affidavit is required, as Defendant
2 argues, there would be no need to separately account for affidavits to “also be
3 maintained.” *See* 12.2.14.8(F) NMAC. These additional provisions reinforce our
4 conclusion that an affidavit is required, despite the broad “deemed to have complied”
5 language contained in 12.2.14.8(B) NMAC.

6 **B. Plaintiff’s Reasonable Expectations**

7 {15} Apart from 12.2.14.8(B) NMAC, Defendant argues that based on *Hale*,
8 Plaintiff did not establish the requisite factual basis to require an affidavit. As we
9 have noted, in *Hale*, our Supreme Court concluded that, under Section 57-12-6(B) a
10 vehicle is “‘altered’ if, as measured against the reasonable expectations of the
11 consumer, the characteristics or value of the motor vehicle is affected in a
12 meaningful way.” *Hale*, 1990-NMSC-068, ¶ 10. Defendant argues that no affidavit
13 was required in the present case because Plaintiff did not show that the repairs
14 itemized on the provided reports, when “measured against the reasonable
15 expectations of Plaintiff as a consumer, altered the characteristics or value of the
16 motor vehicle in a meaningful way.” This argument disregards amendments to
17 Section 57-12-6 since *Hale* was decided.

18 {16} While the current Section 57-12-6(C) excuses an affidavit “if the flat rate
19 manual cost of the alteration or chassis repair is less than six percent of the sales
20 price of the vehicle,” *see* § 57-12-6, that language was not included in the statute at

1 the time *Hale* was decided, *see* NMSA 1978, § 57-12-6 (1990). In that context, the
2 *Hale* Court determined that “just any change” was not sufficient and that whether a
3 vehicle was “altered” must be measured against the reasonable expectations of the
4 consumer. 1990-NMSC-068, ¶ 10. In the year following the decision in *Hale*,
5 however, the Legislature amended Section 57-12-6 to include limitations on the
6 affidavit requirement arising from the cost of repairs or the “new” status of the
7 vehicle. *See* NMSA 1978, § 57-12-6(C) (1991). The current statute correlates the
8 disclosure requirement with the cost of “alteration or chassis repair” as it relates to
9 a percentage of the sales price. Section 57-12-6(C). While *Hale* establishes a
10 standard for evaluating the significance of alterations, Section 57-12-6(C) provides
11 an alternate method to establish that a reasonable consumer would expect that
12 alterations affected “the characteristics or value of the motor vehicle . . . in a
13 meaningful way”—by showing that the cost of alterations equaled or exceeded 6
14 percent of the sales price of the vehicle. *See Hale*, 1990-NMSC-068, ¶ 10. In the
15 present case, the inspection report affirmatively stated as much. Plaintiff therefore
16 met the burden on summary judgment to establish that a reasonable consumer would
17 expect that the alterations to the vehicle affected its characteristics or value in a
18 meaningful way.

1 {17} For these reasons, we reject Defendant’s arguments that an affidavit was not
2 required and affirm the grant of partial summary judgment on the Section 57-12-6
3 claim.

4 **II. Judgment as a Matter of Law**

5 {18} Defendant next argues that at the close of evidence at trial, under Rule 1-050
6 NMRA, the district court should have denied Plaintiff’s motion for judgment as a
7 matter of law and permitted the jury to decide the breach of contract counterclaim.
8 Neither party designated the transcript of the argument on Plaintiff’s motion. To
9 assist our review, we are therefore left with only the district court’s order granting
10 the motion, Defendant’s pleadings, the briefing on Defendant’s motion to reconsider
11 the ruling, and the parties’ arguments on appeal. In that endeavor, we must—as must
12 the district court—consider all of the evidence offered at trial and resolve conflicts
13 in the evidence and draw reasonable inferences in favor of the party resisting the
14 motion. *See Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶ 10, 106
15 N.M. 726, 749 P.2d 1105. But first, we set forth the factual basis for the
16 counterclaim, the district court’s written ruling, and Defendant’s appellate
17 arguments.

18 {19} In the amended counterclaim, Defendant maintained that Plaintiff breached
19 the retail installment contract by not paying two additional installment payments
20 after the vehicle was stolen. The district court concluded that the contract was

1 “mutually rescinded or avoided” because Defendant did not transfer title to Plaintiff,
2 transferred title to itself after the vehicle was stolen, and received payment from
3 Plaintiff’s insurance company. As the district court further observed, Defendant’s
4 representative admitted at trial that Plaintiff “owed him nothing.” Both in its motion
5 to reconsider in the district court and on appeal, Defendant asserted that (1) the
6 district court did not correctly weigh the evidence in favor of the nonmovant as
7 required by Rule 1-050; and (2) the failure to transfer title did not breach the contract
8 because Plaintiff was its owner when she drove the vehicle off the lot. On appeal,
9 Defendant also argues that the retail installment contract provided that Plaintiff was
10 responsible for attorney fees and costs “in the event of a default” and that those
11 attorney fees and costs were the damages owed as a result of Plaintiff’s breach. We
12 begin with Defendant’s final argument because we determine that the lack of
13 evidence on damages resolves the issue on appeal. *See Trujillo v. N. Rio Arriba Elec.*
14 *Coop., Inc.*, 2002-NMSC-004, ¶¶ 26-27, 131 N.M. 607, 41 P.3d 333 (affirming a
15 granted motion for judgment as a matter of law because “no evidence” supported an
16 element of the claim and “the failure of any one of the elements will defeat the
17 claim”).

18 {20} Defendant points to no evidence presented at trial that demonstrates
19 entitlement to an amount of attorney fees and costs as damages for breach of the
20 retail installment contract. *See State ex rel. Nichols v. Safeco Ins. Co. of Am.*, 1983-

1 NMCA-112, ¶ 29, 100 N.M. 440, 671 P.2d 1151 (“In breach of contract suits where
2 damages are sought for award of attorney[] fees under the contract, the party seeking
3 the award must prove the claim for attorney[] fees with reasonable certainty in the
4 same manner as other claimed damages.”). Regarding fees, the installment contract
5 states as follows:

6 If you default, you agree to pay our court costs and fees for
7 repossession, repair, storage and sale of the Property securing this
8 Contract. If we refer this Contract to an attorney who is not a salaried
9 employee of ours, you agree to pay attorney’s fees not exceeding 15
10 percent of the amount due and payable under the Contract, plus court
11 costs.

12 On appeal, Defendant argues that the loan “payoff amount” at the time of the two
13 missed payments was over \$9,000, the retail installment contract fee provision
14 allowed for 15 percent of the “amount due” plus costs, and that costs amounted to
15 more than \$12,000. The retail installment contract, however, directs that attorney
16 fees would be a percentage of the “amount due and payable” on the contract.

17 {21} At trial, Defendant’s representative acknowledged that Plaintiff owed nothing
18 for breach of contract because Plaintiff’s insurance company had paid Defendant for
19 the vehicle. As a result, no “amount due and payable” existed on which the jury
20 could have calculated 15 percent for attorney fees. *See Silva v. Albuquerque*
21 *Assembly & Distrib. Freeport Warehouse Corp.*, 1987-NMSC-045, ¶ 9, 106 N.M.
22 19, 738 P.2d 513 (“The purpose of allowing damages in a breach of contract case is
23 the restoration to the injured of what he has lost by the breach, and what he

1 reasonably could have expected to gain if there had been no breach.” (alteration,
2 internal quotation marks, and citation omitted)). For support on costs, Defendant
3 cites the cost bill that was filed posttrial but does not indicate that the jury received
4 evidence on costs. For these reasons, we conclude that Defendant presented no
5 evidence to the jury to support an award of attorney fees and costs as damages for
6 breach of contract. *See Nichols*, 1983-NMCA-112, ¶ 29. We affirm the district
7 court’s grant of Plaintiff’s motion for judgment as a matter of law and need not reach
8 Plaintiff’s remaining arguments related to this issue.

9 **III. Attorney Fees and Costs**

10 {22} Defendant argues that the district court should have (1) granted its motion for
11 attorney fees and costs under Section 57-12-10(C), which was based on the jury’s
12 verdict rejecting Plaintiff’s Section 57-12-2 claim; (2) and denied Plaintiff’s motion
13 for attorney fees and costs, which was based on the grant of partial summary
14 judgment on the Section 57-12-6 claim. “We review the award of attorney fees for
15 abuse of discretion, but we review de novo whether” the district court based these
16 decisions “on a misapprehension of the law.” *Atherton v. Gopin*, 2012-NMCA-023,
17 ¶ 5, 272 P.3d 700.

18 **A. Defendant’s Motion for Attorney Fees and Costs**

19 {23} “Under the UPA, a party who successfully defends against a UPA claim is
20 entitled to an award of attorney fees if the district court finds that the party

1 complaining of such trade practice brought an action that was groundless.” *Autovest,*
2 *L.L.C. v. Agosto*, 2021-NMCA-053, ¶ 30, 497 P.3d 642 (emphasis, internal
3 quotation marks, and citation omitted). Our Courts have long held that “to be entitled
4 to such award, it is not enough to show that [the p]laintiff did not prevail on such
5 claims.” *Jones v. Beavers*, 1993-NMCA-100, ¶ 23, 116 N.M. 634, 866 P.2d 362.
6 Instead, “[t]he party must also establish that, at the time such claim was filed, the
7 claim was initiated in bad faith or there was no credible evidence to support it.” *Id.*
8 To evaluate whether Plaintiff’s Section 57-12-2 claim was groundless, we consider
9 the basis for the claim as set forth in Plaintiff’s complaint.

10 {24} In the second amended complaint, Plaintiff alleged facts that implicated
11 whether Defendant knew or should have known of prior damage to the vehicle but
12 did not disclose the prior damage. *See* § 57-12-2(D) (defining “unfair or deceptive
13 trade practices” in relevant part as “false or misleading oral or written statement[s]
14 . . . of any kind knowingly made in connection with the sale . . . of goods”); *see also*
15 *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (“Our Supreme Court has
16 said that a ‘knowingly made’ statement is made when the party was actually aware
17 that the statement was false or misleading when made, or in the exercise of
18 reasonable diligence should have been aware that the statement was false or
19 misleading.” (internal quotation marks and citation omitted)). Plaintiff’s claim as
20 pleaded therefore was grounded in both facts and law—facts related to prior damage

1 and law related to knowledge. Defendant does not argue that at the time the second
2 amended complaint was filed, no evidence existed to establish prior damage but
3 instead contends that Defendant had no way of knowing about any prior damage.
4 Any dispute about Defendant’s knowledge was subject to proof at trial but does not
5 demonstrate that the claim was groundless from its initiation. *See Atherton v. Gopin*,
6 2015-NMCA-003, ¶ 47, 340 P.3d 630 (“Our case law makes clear that ‘knowingly
7 made’ is an integral part of all UPA claims and that it must be the subject of actual
8 proof.” (citation omitted)). Defendant makes no attempt to otherwise demonstrate
9 that the claim was brought in bad faith. *See Autovest, L.L.C.*, 2021-NMCA-053, ¶ 32.
10 The district court therefore properly determined that Plaintiff’s claim was not
11 groundless and denied Defendant’s motion for attorney fees under Section 57-12-
12 10(C).

13 **B. Plaintiff’s Motion for Attorney Fees and Costs**

14 {25} Defendant makes two challenges to the district court’s award of attorney fees
15 and costs to Plaintiff. Defendant contends that (1) Plaintiff was not entitled to
16 attorney fees under Section 57-12-10 because the district court made no finding of
17 willfulness in granting partial summary judgment to Plaintiff on the Section 57-12-
18 6 claim; and (2) Plaintiff did not establish that the attorney fees awarded related only
19 to the successful UPA claim. To understand Defendant’s first argument we briefly
20 return to the record.

1 {26} In the motion for partial summary judgment related to Section 57-12-6,
2 Plaintiff sought “summary judgment as to liability under the UPA” and observed
3 that “UPA damages and whether the violation was willful, as that term is defined
4 under the UPA, will be issues dealt with at the trial.” Plaintiff’s observation related
5 to a portion of the UPA “[p]rivate remedies” provision, which permits “three times
6 actual damages or three hundred dollars” if the trier of fact finds that a UPA violation
7 was willful. *See* § 57-12-10(B). Before trial, Plaintiff waived the opportunity to
8 obtain a jury finding on “willfulness” in relation to Section 57-12-6 but reserved that
9 opportunity in relation to the separate Section 57-12-2 claim. After the defense
10 verdict on the Section 57-12-2 claim, Defendant argued that because Plaintiff waived
11 a finding of willfulness in relation to Section 57-12-6, Plaintiff was not entitled to
12 fees under Section 57-12-10. On appeal, Defendant’s argument is framed as follows:
13 Section 57-12-6 makes *willful* misrepresentation an unfair trade practice, the district
14 court made no willfulness finding in relation to Section 57-12-6, and Plaintiff
15 abandoned a willfulness finding from the jury. Therefore, Defendant maintains that
16 Plaintiff did not establish a violation of the UPA that would result in an entitlement
17 to fees under Section 57-12-10(C). The record, however, does not support
18 Defendant’s view.

19 {27} Defendant’s argument hinges on the lack of willfulness finding by the district
20 court on partial summary judgment and the pretrial waiver of a jury determination

1 of willfulness. As we have explained, however, Defendant’s failure to provide an
2 affidavit established a prima facie case for willful misrepresentation under Section
3 57-12-6(A), which Defendant did not rebut. The district court granted summary
4 judgment on Plaintiff’s claim that Defendant violated Section 57-12-6, which
5 necessarily means that Defendant willfully misrepresented the age or condition of
6 the vehicle. The partial summary judgment ruling therefore established that Plaintiff
7 was the prevailing party for the purposes of attorney fees under Section 57-12-10(C).
8 Plaintiff’s pretrial waiver of a jury finding on willfulness, in context, did not unravel
9 the district court’s determination that Defendant violated Section 57-12-6. The
10 district court explained Plaintiff’s position as follows: Plaintiff’s “intent to pursue a
11 trebling of damages . . . for willfulness that under Section 57-12-6 at least—that will
12 not be—that will be abandoned or withdrawn, but that if there’s anything under
13 [Section] 57-12-2, that will be pursued.” Plaintiff therefore waived the opportunity
14 to have the jury find willfulness under Section 57-12-10(B), for the purposes of
15 trebling damages in relation to Section 57-12-6, but not for the purposes of liability
16 under Section 57-12-6. For these reasons, Plaintiff’s award of attorney fees was
17 justified under Section 57-12-10(C).

18 {28} Defendant additionally challenges the amount of attorney fees awarded to
19 Plaintiff and argues that the attorney fee award was erroneous because Plaintiff
20 failed to separate time counsel spent on the successful UPA claim from time spent

1 on other matters. *See Dean v. Brizuela*, 2010-NMCA-076, ¶ 17, 148 N.M. 548, 238
2 P.3d 917 (explaining that generally, recoverable fees under the UPA must be
3 separated from nonrecoverable fees “to ensure that only those fees for which there
4 is authority to award attorney fees are in fact awarded”). After a party makes a claim
5 for attorney fees, it is left “to the discretion of the [district] court to make the award
6 based upon [the p]laintiffs’ proof of the reasonableness of the fees.” *Jaramillo v.*
7 *Gonzales*, 2002-NMCA-072, ¶ 41, 132 N.M. 459, 50 P.3d 554. On the record before
8 us, we discern no abuse of discretion.

9 {29} The district court’s findings support a conclusion that Plaintiff offered proof
10 of the reasonableness of the fees requested. The district court found in relevant part
11 that

12 5. Plaintiff properly distinguished and excluded fees and
13 costs that were not inextricably intertwined with Plaintiff’s [UPA]
14 claim that she prevailed on. *See* Plaintiff’s Reply, filed 11/22/2021.

15 6. The remaining fees and costs sought by Plaintiff are
16 inextricably intertwined with her [UPA] claim that she prevailed on.

17 7. In an exercise of further billing discretion, Plaintiff has
18 agreed to reduce her attorney’s lodestar by 10%.

19 The district court reviewed Plaintiff’s original and amended attorney fee requests,
20 which were supported by affidavits and billing records, as well as Defendant’s
21 objections and heard argument from counsel. As this Court has observed, the district
22 court, “intimately familiar with the nuances of the case, is in a far better position to

1 make such decisions than is an appellate court, which must work from a cold record.”
2 *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 14, 140 N.M.
3 879, 149 P.3d 976 (alteration, internal quotation marks, and citation omitted).
4 Generally, “[t]his court is not inclined to second-guess the [district court] in [its]
5 determination as to the reasonableness of an award of attorney[] fees unless there is
6 a lack of evidentiary basis for the court’s determination or unless the court has been
7 shown to have clearly abused its discretion.” *Schall v. Schall*, 1982-NMCA-045,
8 ¶ 40, 97 N.M. 665, 642 P.2d 1124. In the present case, the district court was apprised
9 of the law and facts and ruled that Plaintiff sufficiently separated or accounted for
10 attorney fees unrelated to the grant of partial summary judgment on the Section 57-
11 12-6 claim. We therefore conclude that the attorney fee award was not an abuse of
12 discretion. *See Jaramillo*, 2002-NMCA-072, ¶ 41.

13 **IV. Malicious Abuse of Process**

14 {30} Defendant last argues that the district court wrongly dismissed the malicious
15 abuse of process counterclaim, because sufficient facts were pleaded to put Plaintiff
16 on notice of the claim. “A motion to dismiss tests the legal sufficiency of the
17 complaint, not the factual allegations of the pleadings which, for purposes of ruling
18 on the motion, the court must accept as true.” *N.M. Pub. Regul. Comm’n v. New*
19 *Mexican, Inc.*, ___-NMSC-___, ¶ 17, ___ P.3d ___ (S-1-SC-39602, Aug. 29, 2024)
20 (omission, internal quotation marks, and citation omitted). Based on the factual

1 allegations in the counterclaim, Defendant’s malicious abuse of process claim
2 appears to arise from an allegation that Plaintiff lacked probable cause to file the
3 complaint. *See Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 204 P.3d
4 19 (defining as an element of a malicious abuse of process claim the “irregular or
5 improper” use of process, which can include filing a complaint without probable
6 cause). In order “[t]o prove that a lawsuit lacks probable cause, a claimant must show
7 that the opponent did not hold a reasonable belief in the validity of the allegations of
8 fact or law of the underlying claim.” *LensCrafters, Inc. v. Kehoe*, 2012-NMSC-020,
9 ¶ 31, 282 P.3d 758 (internal quotation marks and citation omitted). To avoid
10 discouraging “the fundamental right of access to the courts, the lack of probable
11 cause must be manifest.” *Id.* (internal quotation marks and citations omitted).

12 {31} Any lack of probable cause to file the complaint in the present case was not
13 “manifest.” *See id.* In the amended complaint, Plaintiff alleged that the inspection
14 form indicated that the cost of repairs exceeded 6 percent of the sales price for the
15 vehicle and that Defendant provided no affidavit. In the answer and counterclaim,
16 Defendant did not deny the contents of the inspection report, nor did Defendant
17 allege either that the cost of repairs was less than 6 percent or that an affidavit was
18 provided. The counterclaim therefore did not establish that Plaintiff had no factual
19 basis for the Section 57-12-6 claim. As we have explained, the failure to provide an
20 affidavit in the factual circumstances that were alleged is prima facie evidence that

1 the dealer willfully misrepresented the age or condition of the vehicle. *See* § 57-12-
2 6(A). Defendant’s counterclaim alleged disagreement with this legal basis, but did
3 not show that Plaintiff had no “reasonable belief in the validity of the allegations of
4 fact or law” underlying the claim. *See LensCrafters, Inc.*, 2012-NMSC-020, ¶ 31
5 (internal quotation marks and citation omitted). For these reasons, a lack of probable
6 cause was not “manifest” in the complaint, and Defendant’s counterclaim for
7 malicious abuse of process was legally insufficient and properly dismissed. *See id.*

8 **CONCLUSION**

9 {32} We affirm.

10 {33} **IT IS SO ORDERED.**

11
12

KATHERINE A. WRAY, Judge

13 **WE CONCUR:**

14
15

SHAMMARA H. HENDERSON, Judge

16
17

JANE B. YOHALEM, Judge