

LEWIS V. HUMAN SERVICES DEPT

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NANCY LEWIS and BROWN DOG,
Plaintiff-Appellant,

v.

**STATE OF NEW MEXICO HUMAN SERVICES DEPARTMENT, ANTOINETTE
CORDOVA COUNTY DIRECTOR,**
Defendants-Appellees.

NO. 29,582

COURT OF APPEALS OF NEW MEXICO

October 5, 2009

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY, Sheri A.
Raphelson, District Judge

COUNSEL

Nancy Lewis, Espanola, NM, Pro Se Appellant

Long, Pound & Komer, P.A., Little V. West, Santa, NM, for Appellees

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, LINDA
M. VANZI, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

Appellant appeals, pro se, from the district court order dismissing her complaint. This Court issued a calendar notice proposing to affirm. Appellant has filed a memorandum in opposition and a motion to amend the docketing statement. Appellees

have filed a response to Appellant's motion to amend the docketing statement. Having considered the parties' arguments, we deny Appellant's motion to amend her docketing statement and affirm the district court order dismissing her complaint.

DISCUSSION

District Court's Dismissal of Appellant's Complaint

In this Court's calendar notice we proposed to affirm the district court's decision dismissing Appellant's complaint on the grounds that (1) to the extent Appellant's complaint was an appeal from an administrative order, it was untimely, [CN 2-3] and (2) to the extent Appellant was initiating litigation based on the district court's original jurisdiction, Appellant had failed to state a claim for relief. [CN 3-5] In response, Appellant does not contest this Court's proposal that, to the extent her complaint was an appeal, it was untimely. [Appellant's motion to amend the D.S. (hereafter, ADS) 2] Instead, Appellant contends that dismissal of her complaint alleging claims of fraud, abuse, and negligence, was error. [ADS 2]

As we pointed out in our calendar notice, Appellant did not plead the necessary requirements for fraud and cited no legal authority on appeal indicating that the facts of the case constitute fraud and that dismissal was inappropriate. [CN 4-5] See Rule 1-009(B) NMRA ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."); see also *In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (stating that an appellate court will not consider an issue if no authority is cited in support of the issue). We further noted that, to the extent Appellant claimed negligence and abuse, Appellant had not informed this Court how her complaint satisfied the pleading requirements for a claim of negligence, see UJI 13-1601 NMRA, and Appellant had not identified the elements of abuse or alleged how they were satisfied. See Rule 1-008(A) NMRA (providing that general rules of pleading require a pleading to include "a short and plain statement of the claim showing that the pleader is entitled to relief"). [CN 5] We further proposed to presume that, in the absence of such a demonstration, the district court was correct. See *Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 111 N.M. 6, 8, 800 P.2d 1063, 1065 (1990). [CN 5]

In response, Appellant still has not pointed out how her allegations satisfy the requirements for alleging a claim of fraud, negligence, or abuse. [ADS 2-9] Accordingly, we conclude that Appellant has not satisfied her burden of demonstrating error in this Court's proposed disposition, see *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law."), or error on the part of the district court, see *Farmers, Inc.*, 111 N.M. at 8, 800 P.2d at 1065 ("The presumption upon review favors the correctness of the trial court's actions. Appellant must affirmatively demonstrate its assertion of error."). To the extent Appellant argues that pro se litigants should be provided the opportunity to file a responsive pleading to a motion to dismiss, rather than the complaint being

dismissed outright [MIO 3-4 (citing the opinion of Justice Thurgood Marshall)], we note that Appellant was provided the opportunity to respond to Appellees' motion to dismiss in the district court [RP 41-45]; thus, we are unpersuaded.

Motion to Amend the Docketing Statement

Appellant filed a motion to amend her docketing statement. The essential requirements to show good cause for our allowance of an amendment to an appellant's docketing statement are: (1) that the motion be timely, (2) that the new issue sought to be raised was either (a) properly preserved below or (b) allowed to be raised for the first time on appeal, and (3) that the issues raised are viable. See *State v. Moore*, 109 N.M. 119, 129, 782 P.2d 91, 101 (Ct. App. 1989), *overruled on other grounds by State v. Salgado*, 112 N.M. 537, 538, 817 P.2d 730, 731 (Ct. App. 1991). As Appellees point out, Appellant has not complied with these requirements for demonstrating good cause for an allowance of an amendment to her docketing statement. Thus, to the extent Appellant's proposed amended docketing statement raises new issues, Appellant's motion to amend is denied. We note, however, that it is unclear what additional arguments Appellant has raised. Ultimately, it is unnecessary for this Court to decipher which issues are newly raised and which issues were raised in Appellant's docketing statement since we have considered the arguments contained in Appellant's proposed amended docketing statement and, for the reasons stated above, conclude that none of the issues raised is viable.

CONCLUSION

For the reasons stated above and in this Court's notice of proposed disposition, we affirm the district court order dismissing Appellant's complaint. We further deny Appellant's motion to amend her docketing statement to the extent it raises new issues.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

LINDA M. VANZI, Judge