IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

SUNNYLAND FARMS, INC.

Plaintiff-Appellee/Cross-Appellant,

vs. Ct. App. No. 28,807

CENTRAL NEW MEXICO ELECTRIC COOPERATIVE, INC.,

Defendant-Appellant/Cross-Appellee.

Appeal from the Thirteenth Judicial District, Cibola County
The Honorable John W. Pope
D-1333-CV-2005-00192

CROSS-APPELLEE'S ANSWER BRIEF

Gregory V. Pelton
CUDDY & McCARTHY, LLP
7770 Jefferson Street, N.E., Suite 305
Albuquerque, New Mexico 87109

Sarah M. Singleton
Jaime R. Kennedy
MONTGOMERY & ANDREWS, PA
325 Paseo de Peralta
Post Office Box 2307
Santa Fe, New Mexico 87504-2307

Attorneys for Defendant-Appellant/Cross-Appellee Central New Mexico Electric Cooperative, Inc.

TABLE OF CONTENTS

STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface using Microsoft Word, and that the body of the brief contains 8,778 words.

TABLE OF AUTHORITIES

New Mexico Cases

Other Jurisdictions

Statutes and Rules

Other Authorities

SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

This action arose out of a fire that occurred at Sunnyland's hydroponic tomato greenhouse facility located outside of Estancia, New Mexico on September 9, 2003. [RP 762, ¶ 4; RP 766, ¶ 42] In its suit, Sunnyland claimed that Central New Mexico Electric Cooperative, Inc. ("Cooperative"), an electric cooperative that provided electricity for Sunnyland's greenhouse facility, wrongfully turned off electricity to the facility for nonpayment and that because of the Cooperative's actions, there was no electricity to operate the water pump or hoses when Sunnyland's employees started a fire. [RP 763-67] As a result of the fire, Sunnyland's packing facility and the support building were destroyed but the greenhouses were undamaged. [RP 1140, FOF 216]

Following a bench trial, the Honorable John W. Pope entered Findings of Fact and Conclusions of Law. [RP 1120-45] In his Findings of Fact and Conclusions of Law, Judge Pope found that the negligence of Sunnyland's employees caused 80 percent of the damages and that the Cooperative was only 20 percent at fault. [RP 1145, COL 11-12] Additionally, Judge Pope found that a contract existed between the Cooperative and Sunnyland and that the Cooperative breached that contract. [RP 1144, COL 1] Judge Pope concluded that Sunnyland's Unfair Trade Practices Act failed as a matter of law. [RP 1144, COL 4]

Judge Pope found property damages totaling $7,650,000 and lost crop damages of $13,704,828. [RP 1145, COL 13] Judge Pope initially awarded Sunnyland 20 percent of those total damages. [RP 1145, COL 12] He also awarded $100,000 in punitive damages based upon the Cooperative "impeding firefighters" after the fire started with the "threat" of liability if the electricity was energized as requested. [RP 1144, COL 6, 8]

After the Cooperative filed its Motion to Amend and Clarify Findings of Fact and Conclusions of Law [RP 1174-85] and Sunnyland filed a Memorandum in Support of Proposed Final Judgment [RP 1211-33], the Court heard oral arguments and entered judgment for the full amount of damages under a breach of contract theory, concluding that comparative fault did not apply to contract claims. [RP 1303] The Court left intact the apportionment of fault under Sunnyland's negligence claim. [*Id.*]

The Court declined to award pre-judgment interest and awarded post-judgment interest at 8.75 percent on contract damages and 15 percent on any tort-based damages. [*Id.*] The district court's amended judgment further provided that the Cooperative was entitled to a setoff of the judgment in the amount of the subrogation interest, which the Cooperative acquired in its settlement with Sunnyland's insurer, less attorney's fees and costs. [RP 1557] The court has not yet ruled on the amount of attorney's fees or costs. [*Id.*]

II. SUMMARY OF BACKGROUND FACTS

The Cooperative relies on and incorporates by reference its statement of background facts in its Brief in Chief. The following additional facts serve to clarify the district court's reasoning behind its denial of pre-judgment interest and its granting of an offset of the judgment based on the Cooperative's settlement with Sunnyland's insurer. Facts regarding the district court's decision to award post-judgment interest at a rate of 8.75 percent instead of the 15 percent requested by Sunnyland are largely duplicative of facts discussed in the Cooperative's Brief in Chief and will only be addressed below where relevant to the Cooperative's response to Sunnyland's arguments regarding post-judgment interest.

a. Facts Regarding Sunnyland's Claim for Pre-Judgment Interest

Sunnyland initially demanded $19 million to settle its claims. [RP 1292] Subsequently, Sunnyland asked for an advance payment of $2 million in conjunction with the hiring of two independent appraisers and an umpire to determine the amount of Sunnyland's losses. [*Id.*] The Cooperative would then be obligated to pay such losses as determined by the appraisers. [*Id.*] The Cooperative rejected these settlement offers. [*Id.*]

In May 1, 2006, Sunnyland Farms requested $12 million to settle its claims. [*Id.*] Before trial, the Cooperative made an offer of judgment in the amount of $531,001. [RP 1256] After trial, but before the district court entered its Findings

of Fact and Conclusions of Law, Sunnyland increased its demand from $12 million to $22 million. [RP 1293] The Cooperative offered $1.3 million to settle, which was rejected. [*Id.*] The Cooperative did, however, settle with Sunnyland's property insurer in the amount of $1.3 million. [*Id.*]

Below, in its request for pre-judgment interest, Sunnyland focused exclusively on whether the Cooperative made a reasonable and timely offer of settlement. [RP 1226-29; Tr. (Aug. 24, 2007) 87-93]

In response to Sunnyland's request for pre-judgment interest, the Cooperative pointed at that there were a number of additional equities that the court needed to consider. [RP 1293-95; Tr. (Aug. 24, 2007) 106-11] More specifically, the Cooperative argued that the court's own delay in entering its Findings of Fact and Conclusions of Law should not be counted against the Cooperative. [RP 1293] The Cooperative also pointed out that, contrary to Sunnyland's assertions, the liability and damages in the case were hotly contested and far from ascertainable. [RP 1294] Similarly, the Cooperative asserted that the case itself was complex, which, under *Bird v. State Farm Mutual Automobile Insurance Co.*, 2007-NMCA-088, 142 N.M. 346, 165 P.3d 343, may militate against an award of prejudgment interest. [*Id.*] The Cooperative also argued that any settlement offers should be considered in the context of the 80 percent comparative fault attributed by the court to Sunnyland. [*Id.*] Finally, the

Cooperative pointed out that it had not engaged in any dilatory tactics. [*Id.*] Sunnyland did not file a reply to these arguments.

Agreeing with the Cooperative's position, the district court declined to award prejudgment interest. [RP 1556, ¶ 2]

b. Facts Regarding the Settlement of the Subrogation Claim

West American Insurance Company ("West American"), a subsidiary of Ohio Casualty Insurance Company, was the property insurer for the facility at the time of the fire and paid its policy limits of $3,212,415.69 to Sunnyland. [RP 1158] It then hired the law firm of Cozen O'Connor (Harvey Fruman) to pursue its subrogation claim. [RP 63, 240] Shortly before trial, West American settled with the Cooperative, released all its claims, and assigned its subrogation interest to the Cooperative. [RP 1166-68] After trial, the Cooperative filed a motion for a setoff of the judgment in the amount of the subrogation interest, which Sunnyland opposed. [RP 1158-68, 1200-10, 1268-75] Sunnyland asked the court to award it attorney's fees and costs for representing the property insurer through the litigation, which the Cooperative opposed. [RP 1306-41, 1351-60, 1361-76, 1418-31, 1443-53]

The district court ruled the Cooperative was entitled to an offset from the total judgment for the amount of West American's subrogation claim, subject to a possible reduction for reasonable attorney's fees and costs incurred by Sunnyland

in pursuing the claim. [RP 1557, ¶ 7] The district court has not yet ruled on the amount of attorney's fees or costs. [*Id.*]

ARGUMENT

Sunnyland's cross-appeal fails to demonstrate reversible error by the district court. First, the district court properly denied Sunnyland's request for pre-judgment interest after considering the factors in NMSA 1978, § 56-8-4(B) (2004) and relevant equitable considerations. The court also correctly determined that NMSA 1978, § 56-8-3 (1980) was not applicable as a matter of law. Second, the court's award of post-judgment interest at a rate of 8.75 percent was appropriate given that the court found that none of the Cooperative's conduct prior to the fire was wanton or willful, and where the court's attempt to attribute post-fire conduct to a breach of contract was incorrect as a matter of law. Finally, relevant case law demonstrates that the court correctly allowed the Cooperative an offset of the judgment in the amount of Western American's subrogation interest. Each of these issues will be discussed in turn below.

I. THE DISTRICT COURT APPROPRIATELY AWARDED POST-JUDGMENT INTEREST AT THE RATE OF 8.75 PERCENT ON SUNNYLAND'S CONTRACT CLAIM WHERE THE COURT FOUND THAT NONE OF THE COOPERATIVE'S CONDUCT PRIOR TO THE FIRE WAS SUFFICIENTLY CULPABLE AND WHERE THE COURT'S FINDINGS WITH RESPECT TO WILLFUL AND WANTON CONDUCT CANNOT SERVE AS A BASIS FOR AN AWARD OF POST-JUDGMENT INTEREST AT THE ELEVATED RATE OF 15 PERCENT

In raising this issue, Sunnyland misstates the applicable standard of review. Sunnyland's reliance on paragraph 48 of *Public Service Company of New Mexico* v. *Diamond D Construction Co.* in support of a *de novo* standard of review is misplaced, as that paragraph deals with the standard of review in cases involving statutory interpretation. 2001-NMCA-082, ¶ 48, 131 N.M. 100, 33 P.3d 651. In this case, this Court does not need to interpret the statutory provision on post-judgment interest, NMSA 1978, § 56-8-4(A) (2004), but is instead being asked "to decide whether the evidence showed that [the Cooperative] had acted with the intent necessary to support an award of the 15 percent interest rate." *Pub. Serv. Co. of N.M.*, 2001-NMCA-082, ¶¶ 55, 60 (citation omitted). According to this Court, the standard of review under such circumstances is abuse of discretion. *Id.* ¶ 60.

"An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-78, ¶ 65, 122 N.M. 618, 930 P.2d 153. In this case, the district court did not abuse its discretion in determining that the Cooperative's conduct in

breaching its contract with Sunnyland did not rise to the requisite level of culpability for an award of post-judgment interest on Sunnyland's contract damages at a rate of 15 percent.

a. The district court expressly found that none of the Cooperative's pre-fire conduct was malicious, willful, wanton, fraudulent, or in bad faith, thereby precluding an award of post-judgment interest at the higher rate.

Under Section 56-8-4(A), post-judgment interest is generally calculated at a "rate of eight and three-fourths percent per year." However, where "the judgment is based on tortious conduct, bad faith or intentional or willful acts . . . interest shall be computed at the rate of fifteen percent." *Id.* In its Amended Judgment, the district court found that the Cooperative "did not act maliciously, wilfully [sic], wantonly, fraudulently or in bad faith toward Sunnyland Farms prior to the fire." [RP 1556 ¶ 4] This determination is supported by the evidence presented at trial and the district court did not therefore err in declining to award post-judgment interest at the elevated rate.

Sunnyland took over the operation of the greenhouse facility from Agstar of New Mexico Inc. ("Agstar") in June 2003, and in doing so, agreed to assume all the debts of Agstar, including any electrical bills to the Cooperative. [RP 1141, FOF 220; Tr. (Day 7) 15, 19, 77] Sunnyland brought Agstar's delinquent account current and then had new accounts created under its own name. [RP 1122, FOF 18-19] Because the billing cycle was not yet complete, the Cooperative informed

Sunnyland that additional bills for Agstar's accounts would be sent to Sunnyland after the meters were read. [RP 1122, FOF 20] Sunnyland agreed to pay these outstanding bills as well. [Tr. (Day 7) 22] These bills were sent out on or about July 17, 2003, were due immediately on receipt, and were delinquent after August 5, 2003. [RP 1127, FOF 61-62]

Sunnyland received its own initial electric bills on or about August 9, 2003, which were due immediately on receipt, and were delinquent after September 2, 2003. [RP 1127, FOF 63-64] Sunnyland failed to timely pay the Agstar final bills and its own initial electric bills. [RP 1127, FOF 65; Tr. (Day 7) 89-92]

Sunnyland suggests that it was improper to disconnect the electricity at the greenhouse facility because Rule 560 of the Public Regulation Commission provides that the "failure to pay the bill of another customer as guarantor thereof" is an insufficient reason to deny or discontinue service. [RP 1121, FOF 9] However, as pointed out by the Cooperative throughout this case, Sunnyland misunderstands the meaning of the term "guarantor." According to Section 1, Comment c of the *Restatement (Third) of Suretyship & Guaranty*, "[a] 'guarantor' typically contracts to fulfill an obligation upon the default of the principal obligor." This obligation of the guarantor is "collateral to another's contractual duty to perform." *United States v. Gonzales*, 541 F. Supp. 783, 785 (1982). A guarantor is only secondarily liable, i.e., it is not liable for a debt unless and until the

principal obligor fails to pay. *See generally Restatement (Third) of Suretyship & Guaranty* § 1 (1996).

In the instant case, Sunnyland did not inform the Cooperative that in the event that Agstar stopped paying its bills that Sunnyland could be held secondarily liable. Rather, at the time that Sunnyland was formed, Agstar had already stopped paying its electrical bills. [Tr. (Day 7) 17] In taking over Agstar, Sunnyland contractually agreed to assume all the debts of Agstar, including any electrical bills to the Cooperative. [RP 1141, FOF 220; Tr. (Day 7) 15, 19, 77] In other words, Sunnyland became the principal obligor for Agstar's debts and was not merely secondarily liable for the debts. *See, e.g., Dep't of Rev. v. PMR Resorts, Inc.*, 868 So.2d 621, 625 (Fla. Dist. Ct. App. 2004) (contrasting between being a secondary obligor or guarantor and the express assumption of a debt, which makes one a principal obligor). Because Sunnyland assumed Agstar's debts, the Cooperative was entitled to disconnect Sunnyland's electricity when such debts became delinquent. [RP 1121, FOF 10 (finding that Rule 560 states that an electrical cooperative may disconnect electricity "for failure of the customer to fulfill his contractual obligations for services and/or facilities subject to the regulations of the commission")]

In most instances, the Cooperative's computer system automatically generates a fifteen-day disconnection notice when a customer's bill is twenty days

past due. [RP 1124, FOF 36] In this case, however, because the Agstar account had been closed, the Cooperative's computer system failed to generate the fifteen-day disconnection notice. [Tr. (Day 2) 10-14] Mr. West was not aware that this fifteen-day disconnection notice had not been sent to Sunnyland when he instructed the Cooperative employees to begin disconnection procedures for Sunnyland Farms for its failure to pay the outstanding Agstar bills. [*Id.*; RP 1123, FOF 28-29]

The Cooperative attempted to call Sunnyland twice on August 29, 2003, to advise them that they were going to disconnect electricity for nonpayment but no one answered the phone for Sunnyland. [RP 1123, FOF 31] The Cooperative also sent at least one handwritten disconnection notice to Sunnyland on September 2, 2003, indicating electricity would be disconnected if payment was not received by 4:30 p.m. on September 5, 2003. [RP 1124, FOF 33] Sunnyland did not pay by that deadline. [Tr. (Day 7) 89-92]

An appellate court will only "find an abuse of discretion when the court's decision is without logic or reason, or that it is clearly unable to be defended." *McDowell v. Napolitano*, 119 N.M. 696, 702, 895 P.2d 218, 224 (1995) (internal quotation marks and citation omitted). The above facts suggest that the disconnection of electricity was lawful and that the failure to give the required advance notice was unintentional.

Further, to the extent that Sunnyland argues that the court's Conclusion of Law No. 5 supports its assertion that the Cooperative conduct was generally malicious, willful, and intentional, the court below acknowledged that the Conclusion of Law contained a typographical error in that it was missing the word "not" before "maliciously, willfully, recklessly, wantonly, or in bad faith toward Sunnyland Farms." [Tr. (Aug. 24, 2007) 45-46] This error was corrected by the court in its Amended Judgment and thus fails to support Sunnyland's contentions on appeal. [RP 1556]

While Sunnyland may certainly cast the above-described facts in a different light, it was certainly within the district court's discretion to determine that the Cooperative's pre-fire conduct simply did not rise to the level required for the imposition of post-judgment interest on the contract damages at an elevated rate. Thus, the district court did not err in awarding post-judgment interest at a rate of 8.75 percent as opposed to the elevated rate advocated by Sunnyland.

b. Despite the district court's language in the Amended Judgment, the Cooperative's post-fire conduct cannot serve as a basis for Sunnyland's breach of contract claim.

In its brief, Sunnyland argues that because the district court concluded in its amended judgment that the Cooperative willfully breached its contract with Sunnyland by "threatening" the firefighters with liability, the district court should have awarded post-judgment interest at a rate of 15 percent on Sunnyland's

contract damages. [Cross BIC 4, 11-12] The Cooperative does not dispute that an award of post-judgment interest at a rate of 15 percent is mandatory when the conduct at issue is "based on tortious conduct, bad faith, or a finding that the defendant acted intentionally or willfully." *Pub. Serv. Co. of N.M.*, 2001-NMCA-082, ¶ 55 (citing NMSA 1978, § 56-8-4(A) (2004)). However, in this case, the district court's conclusion that the Cooperative's apparent "threatening" of the firefighters was "a breach of its duty under its contact with Sunnyland," was simply not substantiated by the facts presented at trial. [RP 1556 ¶ 5] As such, any finding as to willful and wanton conduct with respect to that conduct cannot be considered a breach of conduct and should not be used to impose post-judgment interest on Sunnyland's contract damages at the 15 percent rate.

Below, the district court concluded that "the cause of contractual damages claimed by Sunnyland" was the Cooperative's failure "to provide advance notice of the disconnect of electrical service." [RP 1144, COL 1] This conclusion was in line with Sunnyland's own allegations regarding the Cooperative's conduct and the pertinent contractual provisions at issue. [RP 768, 1070-71, 1121, 1144-45]

According to the court's findings, the contractual provisions included Original Rule No. 11, which provides that "if payment is not made within the time specified . . . a disconnect notice will be mailed to the consumer. If the bill is not paid within 15 days from the date of the delinquent disconnect notice the customer

will be subject to disconnect." [RP 1121, FOF 6] Additionally, Rule 560 of the Public Regulation Commission identifies reasons insufficient for denying or discontinuing service and provides that the "failure to pay the bill of another customer as guarantor thereof" is an insufficient reason to deny or discontinue service. [RP 1121, FOF 9] Sunnyland did not allege, and the court did not find, that there were any contractual provisions regarding the Cooperative's conduct in the event of a fire. Indeed, the court expressly found that the Cooperative "was unable to produce any written procedure of what to do at the scene of a fire." [RP 1136, FOF 177]

In its conclusions of law, the only conduct that the district court found to be willful or in bad faith was the Cooperative's act of "threatening" Fire Chief Granger with liability before it would restore power to the greenhouse facility. [RP 1144, COL 7] Indeed, the district court's initial judgment indicated that punitive damages were awarded to "punitive fault occurring *after* the breach of contract." [RP 1303 ¶ 2 (emphasis added)]

Subsequently, the district court entered an amended judgment. [RP 1556-57] In the amended judgment the court concluded that the Cooperative "*did not* act maliciously, wilfully [sic], wantonly, fraudulently or in bad faith toward Sunnyland Farms *prior* to the fire." [RP 1556 ¶ 4 (emphasis)] The court did, however, conclude that the Cooperative did act willfully, maliciously, wantonly,

and recklessly when it "imped[ed] firefighters with the threat of liability in energizing the electricity." [RP 1556 ¶ 5] Although unsubstantiated by any of the court's findings of fact or conclusions of law, the court concluded that the Cooperative's apparent "threatening" of the firefighters was "a breach of its duty under its contact with Sunnyland." [*Id.*]

In a footnote, Sunnyland asserts that the unwillingness of the Cooperative linemen to reconnect electricity during the fire was a breach of contract because "[u]nder the terms of the contract . . . CNMEC was obligated to provide electric power to Sunnyland." [Cross BIC 13 n.6] While the Cooperative did receive a check for the delinquent amounts from Sunnyland on the day of the fire, Sunnyland did not present any evidence below to suggest that the Cooperative was contractually obligated to reconnect the electricity within a particular period of time after receiving the check. Moreover, while Sunnyland asserts that its bookkeeper was told that the electricity would be reconnected as soon as the payment was verified, Sunnyland does not suggest—and did not argue below—that whoever spoke to the bookkeeper was authorized to contractually bind the Cooperative. *See, e.g.*, *Romero v. Mervyn's*, 109 N.M. 249, 253, 784 P.2d 992, 996 (1989) ("Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to [the agent]." (internal citation marks and quotation omitted)). Finally, while

Sunnyland maintains that the restoration of power was required under the terms of the contract, it fails to provide a record cite to the pertinent contractual provision. As such, this Court need not consider Sunnyland's arguments in this regard. *See Murken v. Solv-Ex Corp.*, 2005-NMCA-137, ¶ 14, 138 N.M. 653, 14 P.3d 1192 ("[W]e decline to review the Intervenors' arguments to the extent that we would have to comb the record to do so.").

While Sunnyland attempts to attribute the conduct of the Cooperative's linemen after the fire started to the Cooperative's pre-fire breach of contract, there is simply no factual basis for drawing such a connection. As discussed above, the sole cause of contractual damages, as determined by the district court, was the Cooperative's failure to provide fifteen days notice before disconnecting Sunnyland's electricity. [RP 1144, COL 1] In light of the district court's conclusion of law, it is unclear how "impeding firefighters with the threat of liability in energizing the electricity" was a breach of the Cooperative's contract with Sunnyland. Thus, Sunnyland's assertion that such conduct constituted a willful and malicious breach of contract fails as a matter of law. Accordingly, there is no basis for an award of post-judgment interest at a rate of 15 percent on any contract damages for the conduct of the Cooperative's linemen at the fire scene.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING SUNNYLAND'S REQUEST FOR PRE-JUDGMENT INTEREST BECAUSE THE COURT APPROPRIATELY BALANCED EQUITIES IN DECIDING WHETHER PRE-JUDGMENT INTEREST SHOULD BE AWARDED AND BECAUSE SUNNYLAND'S ARGUMENTS REGARDING SECTION 56-8-3 WERE INCORRECT AS A MATTER OF LAW

a. The district court did not abuse its discretion by denying Sunnyland's request for pre-judgment interest under Section 56-8-4(B).

The district court's denial of Sunnyland's request for pre-judgment interest under Section 56-8-4(B) is reviewed by this Court under an abuse of discretion standard. *Abeita v. Northern Rio Arriba Elec. Coop.*, 1997-NMCA-097, ¶ 44, 124 N.M. 97, 946 P.2d 1108. "To reverse the district court under an abuse-of-discretion standard, it must be shown that the court's ruling exceeds the bounds of all reason . . . or that the judicial action taken is arbitrary, fanciful, or unreasonable." *Martinez v. Friede*, 2004-NMSC-006, ¶ 19, 135 N.M. 171, 86 P.3d 596 (internal quotation marks and citation omitted), *rev'd on other grounds by* 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596. In the instant case, the court's denial of pre-judgment interest was not an abuse of discretion.

An award of pre-judgment interest is governed by Section 56-8-4(B). "Section 56-8-4(B) is a tool whereby the trial court may 'ensure[] that the compensation due to a plaintiff is not unduly delayed by a defendant's dilatory

practices.'" *Bird*, 2007-NMCA-088, ¶ 33 (quoting *Pub. Serv. Co. of N.M.*, 2001-NMCA-082, ¶ 52). According to Section 56-8-4(B):

> [T]he court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering, among other things:
>
> (1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims; and
>
> (2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff.

Notably, the two factors outlined in Section 56-8-4(B) are not exclusive and the "court should take into account all relevant equitable considerations that further the goals of Section 56-8-4(B)." *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 150, 899 P.2d 576, 593 (1995).

Under Section 56-8-4, the court is not required to make specific findings regarding its denial of a request for pre-judgment interest; rather, "[t]he court's reasons for denying prejudgment interest need only be ascertainable from the record and not contrary to logic and reason." *Gonzales*, 120 N.M. at 150, 899 P.2d at 593. In this case, the record demonstrates that the court considered a number of relevant equitable considerations in denying Sunnyland's request for pre-judgment interest.

Below, Sunnyland focused its arguments entirely on the reasonableness of the settlement negotiations between the parties. [RP 1226-29; Tr. (Aug. 24, 2007),

pp. 87-94] To the extent that Sunnyland now argues that there are other equitable factors that the court should have considered, these factors were not raised below. [Cross BIC 20-22; RP 1226-29; Tr. (Aug. 24, 2007), pp. 87-94] As such, this Court need not consider Sunnyland's arguments in that regard. *See State v. Lucero*, 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct. App. 1986) (concluding that an argument was not preserved where "[t]he court had no opportunity to consider the merits of, or to rule intelligently on, the argument defendant now puts before us").

Unlike Sunnyland, the Cooperative *did* raise a number of equitable considerations in response to Sunnyland's request for pre-judgment interest. First, the Cooperative pointed out that in *Bird*, 2007-NMCA-088, ¶ 35, this Court recognized that "difficult legal issues, which could preclude settlement," are equitable considerations that may militate against an award of pre-judgment interest. [RP 1294-95] *See also Abeita*, 1997-NMCA-097, ¶ 45 (affirming the district court's denial of pre-judgment interest despite the plaintiffs' arguments regarding the reasonableness of settlement offers where "there were difficult legal issues to be decided which would probably preclude settlement and were worthy of full briefing and argument"). As in *Bird*, the district court in this case more than once indicated that it was struggling with the legal issues before it. [Tr. (Aug. 24, 2007), pp. 15, 112; Tr. (Sept. 18, 2008), pp. 20-21; Tr. (Day 7) 126-27] Indeed, the extensive briefing by the parties and *amici* regarding the issues on appeal and

cross-appeal further establishes the difficulty of the legal issues that the district court faced.

The Cooperative further argued to the court that the reasonableness of its settlement offers should be considered in conjunction with the court's comparative fault determination and the Cooperative's settlement of Sunnyland's insurer's subrogation interest prior to trial. [RP 1291, 1294-95] Moreover, the Cooperative pointed out that Sunnyland's own settlement offers had actually *increased* over time—while Sunnyland demanded $12 million to settle in May 2006, it later increased its settlement demand to $22 million in January 2007. [RP 1293, 1299 ¶ 6]

Additionally, as pointed out by Sunnyland, whether or not a defendant was "fairly able to ascertain the damages goes directly to the question of determining the reasonableness of settlement offers under Section 56-8-4(B)." *Southard v. Fox*, 113 N.M. 774, 777, 833 P.2d 251, 254 (1992). While the propositions of law at issue in this case were—and still are—hotly debated by the parties, the measure of damages was similarly disputed. [RP 1181-84, 1283-85] The fact that these damages calculations were disputed was certainly reflected in the parties' respective settlement offers. While the district court eventually adopted Sunnyland's calculations, the court's unwillingness to award pre-judgment interest

indicates that it likely viewed the issues and damages calculations as presenting close issues.

Further, while Sunnyland asserts that if the district court considered its own delays in the case, e.g., judgment was not entered in the case until 19 months after trial, in considering whether pre-judgment interest should be awarded, it abused its discretion. Sunnyland cites no authority in support of its assertion that a court cannot consider other causes of delay in the case aside from the actions of the litigants in determining the appropriateness of an award of pre-judgment interest. *See ITT Educ. Servs., Inc. v. Tax. & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969 (holding that appellate courts do not consider propositions unsupported by citation to authority). Accordingly, there is no reason why the court could not properly consider its own delays in weighing "equitable considerations" regarding an award of pre-judgment interest.

Sunnyland's citations to New Mexico case law do not support its position. For example, *Mascarenas v. Jaramillo*, 111 N.M. 410, 806 P.2d 59 (1991) involves pre-judgment interest under Section 56-8-3, not Section 56-8-4. As discussed in greater detail below, the purposes and approaches behind these two statutory sections are different. *See, e.g., Sunwest Bank of Albuquerque, N.A. v. Colucci*, 117 N.M. 373, 377-78, 872 P.2d 346, 350-51 (1994) (describing the different approaches behind prejudgment interest under Section 56-8-3 and pre-

judgment interest under Section 56-8-4(B)). As such, *Mascarenas* lends little support to Sunnyland's position that the district court abused its discretion in denying pre-judgment interest under Section 56-8-4(B).

For these same reasons, Sunnyland's reliance on *Economy Rentals, Inc. v. Garcia*, 112 N.M. 748, 819 P.2d 1306 (1991) in asserting that pre-judgment interest is a form of "damages to compensate a plaintiff for injuries," is similarly misplaced:

> The purpose of an award of prejudgment interest under Section 56-8-3 is to compensate a plaintiff for the lost opportunity to use the money owed between the time the plaintiff's claim accrued and the time of judgment. Section 56-8-4(B), on the other hand, gives a trial court the discretion to award prejudgment interest as a management tool or penalty to foster settlement and prevent delay in all types of litigation.

Pub. Serv. Co. of N.M., 2001-NMCA-082, ¶ 52 (internal quotation marks and citation omitted); *see also Sunwest Bank of Albuquerque*, N.A., 117 N.M. at 378, 872 P.2d at 351 ("Section 56-8-4(B) provides for prejudgment interest from the date of filing of the complaint, *not as damages*, but as a management tool or penalty to foster settlement and prevent delay in all types of litigation." (emphasis added)). Again, Sunnyland's reliance on cases discussing pre-judgment interest under Section 56-8-3 does little to support its claim that it is entitled to pre-judgment interest under Section 56-8-4(B).

Likewise, *Trego v. Scott*, 1998-NMCA-080, 125 N.M. 323, 961 P.2d 168 and *State Farm Fire & Casualty v. Farmers Alliance Mutual*, 2004-NMCA-101,

136 N.M. 259, 76 P.3d 1179, fail to demonstrate that the district court abused its discretion in denying pre-judgment interest. In both cases, this Court affirmed the granting of pre-judgment interest. *See State Farm*, 2004-NMCA-101, ¶ 18; *Trego*, 1998-NMCA-080, ¶ 25. Given the deferential standard of review on this issue, the fact that it *was not* an abuse of discretion in *State Farm* or *Trego* to award pre-judgment interest does not mean that it *was* an abuse of discretion to denying pre-judgment interest in the present case. *Cf. State ex rel. Children, Youth & Families Dep't v. Vincent L.*, 1998-NMCA-089, ¶ 14, 125 N.M. 452, 963 P.2d 529 (stating that "a trial court is not compelled to admit evidence simply because another case has held similar evidence admissible").

Further, to the extent that Sunnyland asserts that in *State Farm* this Court made observations regarding the "onus" being on defendant to make a settlement offer and the litigation delays in the case, it should be noted that these observations were simply summaries of the parties' respective positions on the pre-judgment interest issue and that this Court ultimately concluded that "[i]t was up to the trial court to resolve the issue, and determine whether prejudgment interest should be awarded." 2004-NMCA-101, ¶ 18. The district court in the instant case similarly exercised its discretion to resolve the parties' arguments regarding the propriety of pre-judgment interest.

b. Section 56-8-3 is not applicable in this case.

An award of pre-judgment interest under Section 56-8-3 differs from an award under Section 56-8-4(B). First, unlike Section 56-8-4(B), pre-judgment interest under Section 56-8-3 is considered mandatory when "when a party has breached a duty to pay a definite sum of money or the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices." *Smith v. McKee*, 116 N.M. 34, 36, 859 P.2d 1061, 1063 (1993) (internal quotation marks and citation omitted). Sunnyland does not contend that pre-judgment interest was mandatory in this case.

"In cases falling under Section 56-8-3, where the amount owed is not fixed or readily ascertainable, the trial court may in its discretion award prejudgment interest of not more than fifteen percent." *Sunwest Bank of Albuquerque, N.A.*, 117 N.M. at 377-78, 872 P.2d at 350-51. In this case, Sunnyland contends that the district court abused its discretion in denying pre-judgment interest.

While the language in Section 56-8-4(B) indicates that pre-judgment interest under that Section is available is all cases except for those "based on unpaid child support," pre-judgment interest under Section 56-8-3 is only available in three different circumstances:

> The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually in the following cases:

A. on money due by contract;

B. on money received to the use of another and retained without the owner's consent expressed or implied; and

C. on money due upon the settlement of matured accounts from the day the balance is ascertained.

§ 56-8-3. Since subsections B and C do not appear to apply, it is presumed that Sunnyland is basing its claim for pre-judgment interest on subsection A. Sunnyland, does not, however explain how the breach of a contractual provision providing for advance notice of a disconnection of electricity falls under subsection A of Section 56-8-3.

The purpose of an award of pre-judgment interest under Section 56-8-3 "is to compensate the plaintiff for damages resulting from loss of use of the funds in cases where money is due by contract, received to the use of another, or due on settlement of matured accounts." *Sunwest Bank of Albuquerque, N.A.*, 117 N.M. at 378, 872 P.2d at 351. While Sunnyland apparently believes that any breach of contract presents a situation in which "money is due by contract," relevant case law indicates that this is not the case. *See, e.g., Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc.*, 2004-NMCA-063, ¶ 34, 135 N.M. 603, 92 P.3d 53 (observing that Section 56-8-3 "does not use the term 'damages.' Instead, it refers to 'money due by contract.'").

For example, in *State ex rel. Bob Masonry, Inc. v. Safeco Ins. Co. of Am.*, 118 N.M. 558, 560, 883 P.2d 144, 146 (1994), the Supreme Court affirmed an award of pre-judgment interest under Section 56-8-3 where a construction company had failed to pay a subcontractor for labor and materials. The court observed that "[b]ecause the claim in this case arose from a dispute over money due . . . under a written contract, Section 56-8-3 applies." *Id.* at 561, 883 P.2d at 147. The court concluded that the construction company withheld certain specific amounts due to the subcontractor for labor and materials and that prejudgment interest was owed as a matter of right. *Id.*

New Mexico courts have likewise affirmed awards of prejudgment interest under Section 56-8-3(A) in cases involving money *due* under rental contracts, *Economy Rentals, Inc.*, 112 N.M. at 761-62, 819 P.2d at 1319-20; money *due* under insurance policies, *Ponder v. State Farm Mutual Automobile Insurance Co.*, 2000-NMSC-033, ¶¶ 36-40, 129 N.M. 698, 12 P.3d 960; and money *due* under construction contracts, *Aspen Landscaping, Inc.*, 2004-NMCA-063, ¶¶ 33-35.

Although not directly addressed by New Mexico courts, there is a distinction to be made between a suit for damages under a breach of contract theory and a suit for money due by contract. *Cf. Carter Realty Co. v. Rober Bros. Land Co.*, 461 So.2d 1029, 1030 (Fla. Dist. Ct. App. 1985) ("Where the alleged breach is a failure of a defendant to pay money due under the contract the breach occurs where the

defendant was obligated to pay and deliver the money. Money due under a contract creates a debtor-creditor relationship between the parties."); *Gen. Acc. Fire & Life Assur. Corp. v. Judd*, 400 S.W.2d 685, (Ky. 1966) ("The traditional measure of recovery for failure to pay money due under contract is the amount agreed to be paid."). This distinction is particularly evident when one considers the purpose behind Section 56-8-3: "The obligation to pay prejudgment interest . . . constitutes an *obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor* between the time the claimant's claim accrues and the time of judgment (the loss of use and earning power of the claimant's funds)." *Sunwest Bank Albuquerque N.A.*, 117 N.M. at 377, 872 P.2d at 350 (emphasis added).

In the instant case, Sunnyland did not sue for money owed it under the contract for electricity with the Cooperative, but instead sued for damages under a breach of contract theory. Indeed, there was no obligation for the Cooperative to pay money to Sunnyland until after the court determined liability and damages. As such, this is not a case where money owned Sunnyland was wrongfully withheld or retained. Under such circumstances, the district court did not err in refusing to award pre-judgment interest under Section 56-8-3(A).

Moreover, even if the contract at issue conceivably falls under Section 56-8-3, the district court nonetheless had the discretion to determine whether an award

of prejudgment interest was appropriate. *See Shaeffer v. Kelton*, 95 N.M. 182, 188, 619 P.2d 1226, 1232 (1980) (stating that pre-judgement interest awards should not be made "arbitrarily without regard for the equities of each particular situation"). As discussed above with respect to Section 56-8-4, *see* Section II.a, *supra*, the district court properly weighed equitable considerations in denying Sunnyland's request for pre-judgment interest and therefore did not abuse its discretion.

III. RELEVANT CASE LAW INDICATES THAT THE COOPERATIVE IS ENTITLED TO AN OFFSET BASED ON ITS SETTLEMENT OF SUNNYLAND'S INSURER'S SUBROGATION CLAIM

In arguing that the district court improperly allowed an offset of the judgment based upon the settlement of Western American's subrogation claim, Sunnyland discusses generally the collateral source rule and certain policy considerations, but fails to cite any case law directly on point. While case law on point is sparse, the few published cases on this issue demonstrate that the district court correctly allowed the offset.

Contrary to Sunnyland's assertions, the standard of review on appeal is not *de novo*. A court's decision to allow an offset based upon the settlement of a subrogation claim is reviewed under an abuse of discretion standard. *Hayes Sight & Sound, Inc. v. Oneok, Inc.*, 136 P.3d 428, 438 (Kan. 2006); *see generally Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 4, 124 N.M. 624, 954 P.2d 56 (recognizing that subrogation is an equitable remedy); *United Props. Ltd. v.*

Walgreen Props., Inc., 2003-NMCA-140, ¶ 7, 134 N.M. 725, 82 P.3d 535 ("[T]he issue of how the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion."). The district court in this case did not abuse its discretion in awarding the Cooperative an offset of the judgment.

Initially, it is worth questioning what Sunnyland hopes to accomplish by invalidating the assignment of Western American's subrogation interest. In *Quinn v. Warnes*, 144 Cal.App.3d 309, 311 (1983), an employee was injured while working for his employer and received workers' compensation from his employer's insurance carrier, El Dorado. El Dorado thus had a lien in the amount of the payments that it had made to the employee. *Id.* Subsequently, the employee filed suit against the tortfeasor. *Id.* Before trial, El Dorado settled its lien with the tortfeasor and the tortfeasor's liability insurer. *Id.* Although El Dorado had settled the lien for half its value, the district court nonetheless permitted the tortfeasor and his insurer to offset the judgment by the full value of the lien. *Id.* at 312.

On appeal, the employee argued that the district court should not have permitted the offset. *Id.* In addressing the issue on appeal, the court wondered what the employee actually hoped to gain from the appeal:

> [I]f the assignment is invalidated in its entirety, it would seem that the lien itself would remain in existence, for the benefit of El Dorado or its creditors. If so, appellant's net judgment would be increased by $2,009.15, and [the tortfeasor] would get back his . . . $2,009.15 from El Dorado. El Dorado would then get is full $4,198.30 [lien] from

> appellant's recovery, thus reducing it to exactly the same net amount as before.
>
> . . .
>
> On the other hand, if [the tortfeasor] is given credit for only half of the lien amount, what happens to the other half? Does it go to appellant? Or, should it go to El Dorado? If the former, then appellant has gotten a double recovery, but the expropriation of the fruits of the calculated risk [the tortfeasor] took when he purchased the lien rights . . . If the latter, all appellant will have accomplished, apparently, is to move $2,009.15 from [the tortfeasor] to El Dorado[.]

Id. at 312 n.2. In the instant case, by asking this Court to reverse the offset at issue, Sunnyland apparently seeks to have this Court invalidate the assignment of Western American's subrogation interest.[1] As in *Quinn*, it is not clear what Sunnyland hopes to gain from such a determination. Moreover, as discussed below, such offsets are not violative of the collateral source rule or otherwise contrary to public policy.

a. The collateral source rule does not preclude setoff.

As a general rule, the collateral source rule provides that "benefits received by the plaintiff from a source collateral to the tortfeasor or contract breacher may

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[1] Below, Sunnyland asked the district court in the alternative to only allow an offset in the amount that the Cooperative paid to settle the subrogation interest. [RP 1209] Sunnyland has apparently abandoned this argument on appeal. *See* Rule 12-213(A)(4) NMRA; *State v. Rendleman*, 2003-NMCA-150, ¶ 50, 134 N.M. 744, 82 P.3d 554 (concluding that defendant's argument, which was made to the district court, was deemed abandoned when it was not briefed on appeal), *overruled on other grounds by State v. Myers*, 2009-NMSC-006, ___ N.M. ___, ___ P.3d ___.

not be used to reduce the defendant's liability for damages." *McConal Aviation, Inc. v. Comm. Ins. Aviation Co.*, 110 N.M. 697, 700, 799 P.2d 133, 136 (1990) (quoting D. Dobbs, *Handbook on the Law of Remedies* § 3.6, at 185 (1973)). Where the benefits at issue, however, "derive from the defendant himself or a source identified with him, he is entitled to credit for it, since there is no collateral source but only funds provided by the defendant." *Aragon v. Brown*, 93 N.M. 646, 648, 603 P.2d 1103, 1105 (Ct. App. 1979), *overruled in part on other grounds by Smith v. Village of Ruidoso*, 1999-NMCA-151, 128 N.M. 470, 994 P.2d 50.

Initially, it is worth noting that Sunnyland's reliance on *McConal Aviation, Inc.* and *Sanchez v. Clayton*, 117 N.M. 761, 877 P.2d 567 (1994) is misplaced. Both cases involve circumstances in which a plaintiff sued multiple defendants and subsequently settled with some, but not all, defendants. *See Sanchez*, 117 N.M. at 764, 877 P.2d at 570; *McConal Aviation, Inc.*, 110 N.M. at 698-99, 877 P.2d at 134-35. Unlike the instant case, neither *McConal Aviation, Inc.* nor *Sanchez* address the applicability of the collateral source rule in the context of a subrogation claim and a settlement between a defendant and a plaintiff's insurer. Accordingly, neither case is helpful in this instance.

The Supreme Court of Kansas has considered, and rejected, the application of the collateral source rule to bar a setoff from the judgment where a defendant settled with a plaintiff's insurer before trial. *See Hayes Sight & Sound, Inc.*, 136

P.3d at 439-40. In *Hayes*, owners of a business sued an operator of underground natural gas storage caverns, claiming that the operator's negligence caused natural gas to migrate from the caverns and ignite, destroying the business premises. *Id.* at 434-35. Prior to trial, the operator of the caverns settled with the business owners' insurers. *Id.* at 437-38. The district court subsequently rejected the operator's claim for a setoff of the judgment based on the settlement of the subrogation claim. *Id.*

The Supreme Court reversed and in so doing, expressly rejected the business owners' reliance on the collateral source rule. *Id.* at 439-40, 442. Like New Mexico courts, the Kansas Supreme Court recognized that "[u]nder the collateral source rule, benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." *Id.* at 440 (internal quotation marks, citation, and emphasis omitted). The court noted, however, that the settlement payment in *Hayes* "was made to the insurers and not to the plaintiffs; it was not made by a source independent of the tortfeasor (defendants); and it did not diminish the plaintiffs' damages." *Id.* at 442. Thus, according to the court, "[t]he collateral source rule does not bar a setoff based upon the defendants' settlement of the plaintiff insurers' subrogation claim." *Id.*

The Colorado Court of Appeals reached a similar result in *Yeiser v. Ferrellgas, Inc.*, No. 06CA0494, 2008 WL 4330265, at *2 (Colo. Ct. App. Sept. 18, 2008). In that case, a homeowner sued a propane gas supplier for breach of contract when the supplier failed to timely deliver propane, causing the homeowner's pipes to freeze. *Id.* at *1. The homeowner's insurer paid for repairs to the home. *Id.* Thereafter, the homeowner filed suit. *Id.* The propane gas supplier then settled the insurer's subrogation claim. *Id.* After the homeowner received a jury verdict in her favor, the propane gas supplier moved for a setoff of the judgment in the amount of the settled subrogation claim. *Id.* The court granted the setoff and the homeowner appealed. *Id.*

As in *Hayes*, the court in *Yeiser* rejected the homeowner's claim that the collateral source ruled precluded any setoff of the judgment. *See id.* The court observed that "[a]lthough plaintiff received payments from her homeowners insurer pursuant to her policy, the insurer had a subrogation claim that entitled it to be reimbursed, out of the plaintiff's recovery against defendant[.]" *Id.* at *2. According to the court, it was not the insurer's payment of benefits to the homeowner that created the right to the setoff, but the propane gas supplier's settlement of the subrogation claim. *Id.* Thus, the court concluded that this was "not a case in which the plaintiff's compensation was wholly independent of the

wrongdoer and to which [the wrongdoer] has not contributed." *Id.* (internal quotation marks and citation omitted).

While not addressing the collateral source rule, other courts have similarly acknowledged that offsets of judgments are proper when a defendant has settled a subrogation claim with a plaintiff's insurer. *See, e.g., Brinkerhoff v. Swearingen Aviation Corp.*, 663 P.2d 937, 942 (Alaska 1983); *Great West Cas. Co. v. State Dep't of Transp. & Dev.*, 960 So.2d 973, 977 (La. Ct. App. 2007). Similarly, while not squarely addressing the question of the validity of an offset based on a settled subrogation interest, this Court has nonetheless recognized such offsets. In *Jaramillo v. Fisher Controls Co., Inc.*, 102 N.M. 614, 617, 698 P.2d 887, 890 (Ct. App. 1985), a products liability suit was brought after a faulty propane gas tank valve caused an explosion. State Farm, the property insurer, paid approximately $92,000 to the homeowners under their insurance policy. *Id.* at 627, 698 P.2d at 900. State Farm then intervened in the suit and subsequently settled its subrogation claim with one of the defendants for $60,500. *Id.* At trial, the jury awarded the homeowners damages in the amount of $190,000. *Id.* The court then subtracted the amount of the subrogation claim, which had been settled, from the amount of the judgment before then apportioning the judgment based on the defendants' respective degrees of fault. *Id.* While the central issue regarding the setoff in *Jaramillo* centered upon the district court's math, it is notable that neither

the parties nor this Court questioned the permissibility of the offset in the first instance. *See id.* at 628, 698 P.2d at 901 (citing case law and observing that the parties "agree[d] that the settlement of State Farm's subrogation is to be credited [against the judgment]").

As indicated by the above-cited cases, offset of judgments when an insurer settles with a tortfeasor are permitted by the few courts that have considered the issue. Accordingly, the district court's granting of a setoff in the amount of Western's subrogation claim should be affirmed by this Court.

b. The setoff is not contrary to public policy.

Sunnyland's assertion that allowing an offset in this case is tantamount to permitting an insurer to subrogate against its insured confuses the issues before this Court. As recognized in *Hayes*, absent a settlement, "the plaintiff would sue the tortfeasor for the entire loss, retain that part of the recovery representing their uninsured loss, and pay the remainder to their insurance carrier." *Hayes Sight & Sound, Inc.*, 136 P.3d at 441. Indeed, this is the very reason that Western American was joined as a party in the instant case—had it not settled its subrogation claim with the Cooperative, it would be entitled to recover the amounts it paid to Sunnyland from the judgment proceeds. *See Safeco Ins. Co. of Am. v. U.S. Fid. & Guar. Co.*, 101 N.M. 148, 150, 679 P.2d 816, 818 (1984) ("If the injured party or parties should recover damages, the insurer shall then be

permitted to prove its subrogation claim to the trial court and, from the proceeds of any recovery, the court shall apportion the recovery between the insured and his insurer according to their respective entitlements.").

Sunnyland's reliance on *State ex rel. Regents of New Mexico State University v. Siplast, Inc.*, 117 N.M. 738, 877 P.2d 38 (1994) is misplaced. In that case, an insurer sued a co-insured for a liability covered by the insurance policy. *Id.* at 739, 877 P.2d at 39. In affirming the district court's granting of summary judgment in favor of the co-insured, the court held that "an insurer may not be subrogated against a contractor who is insured against damage to his own property under a builder's risk policy, even though the subcontractor's negligence may have resulted in a loss to another co-insured." *Id.* at 742, 877 P.2d at 42 (internal quotation marks and citation omitted).

The instant case is not analogous. Western American did not sue Sunnyland for liability under the insurance policy entered into by Western American and Sunnyland. Rather, as discussed above, it was joined as a party to protect its subrogation rights. The fact that Western settled the subrogation claim and assigned its right to reimbursement from the judgment proceeds does not change this analysis. The Cooperative is simply standing in the shoes of Western American—it is not suing Sunnyland for liability under the insurance policy, as in *Siplast*, but is instead exercising the same rights that Western would have exercised

had the subrogation claim not been settled. *See Safeco Ins. Co. of Am.*, 101 N.M. at 150, 679 P.2d at 818. As discussed above, such an approach is wholly permissible. *See, e.g.*, *Brinkerhoff*, 663 P.2d at 942; *Yeiser*, 2008 WL 4330265, at *2; *Hayes Sight & Sound, Inc.*, 136 P.3d at 442; *Great West Cas. Co.*, 960 So.2d at 977. Thus, the policy issues raised in *Siplast* are simply not applicable to this case.

Finally, Sunnyland's hyperbolic suggestions that the settlement of the subrogation claim is the "height of cynicism" and is "mischievous," are simply not well-founded in light of the above-cited cases. Significantly, the court in *Brinkerhoff*, "attach[ed] no relevance to [the owner's] allegation that the settlement agreement . . . was collusive," and concluded that "[a]n insurance company is free to settle its subrogation claims for any amount." 663 P.2d at 942. Moreover, in *Hayes Sight & Sound, Inc.*, the court observed that "[a]bsent a setoff, the plaintiffs will be made more than whole, and the defendants will pay more than the amount of plaintiffs' damages." 136 P.3d at 442. Sunnyland's attempts to reap a windfall from the damages award in this case should not be countenanced by this Court.

CONCLUSION

For the foregoing reasons, the Cooperative respectfully requests that this Court affirm the district court on the issues raised in this cross-appeal.

Respectfully submitted,

CUDDY & McCARTHY, LLP
Gregory V. Pelton
7770 Jefferson Street, N.E., Suite 305
Albuquerque, New Mexico 87109-5912
(505) 888-1335
(505) 888-1369 – facsimile

and

MONTGOMERY & ANDREWS, P.A.

By _____
Sarah M. Singleton
Jaime R. Kennedy
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
(505) 982-4289 – facsimile

Attorneys for Defendant-Appellant/
Cross-Appellee Central New Mexico
Electric Cooperative, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2009, I caused a true and correct copy of Cross-Appellee's Answer Brief to be served via U.S. Mail, postage prepaid, to the following:

W. Kenneth Martinez
Walter K. Martinez Law Office
Post Office Box 730
Grants, New Mexico 87020-0730

Kevin Martinez
Walter K. Martinez Law Office
219 Ninth Street, N.W.
Albuquerque, New Mexico 87102

Joseph Goldberg
Michael Goldberg
Freeman, Boyd, Hollander,
Goldberg & Ives, P.A.
Post Office Box 25326
Albuquerque, New Mexico 87125-0326

Sarah M. Singleton