IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
SOLSBURY HILL, LLC, d/b/a
NEUMARK IRRIGATION

Plaintiff/Appellee and Cross-Appellant,

v.

Ct. App. No. 30,068
Case No. CV-0202-2007-08460

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant/Appellant and Cross-Appellee.

ANSWER BRIEF TO APPELLANT LIBERTY MUTUAL INSURANCE COMPANY'S BRIEF-IN-CHIEF

On Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Valerie A. Huling, Presiding

KELEHER & McLEOD, P.A.
James Rasmussen
Justin Breen
Post Office Box AA
Albuquerque, New Mexico 87102
Telephone: (505) 346-4646
Facsimile: (505) 346-1370

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I. COURSE OF PROCEEDINGS

Appellee Solsbury Hill, LLC, d/b/a Neumark Irrigation ("Appellee" or "Neumark") takes exception to Liberty Mutual Insurance Company's ("Appellant" or "Liberty") "Nature of the Case[1]" and "Summary of Facts Relevant to Issues." The former mischaracterizes the District Court's ruling and the latter ignores unchallenged material findings by the District Court and includes numerous allegations not relevant to the appeal. Those allegations and the purportedly supporting citations to the transcript and exhibits are irrelevant at least because Appellant did **not** "set forth a specific attack on any finding" so that the District Court's findings must be deemed "conclusive." Rule 12-213(A)(4) NMRA. Similarly, Appellant did not contend that any finding of fact was unsupported by substantial evidence; any such claim has been waived. *See* Rule 12-213(A)(1)(c) NMRA. Neither did Appellant claim that the District Court incorrectly refused any

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[1] Neumark notes that Appellant states in its Nature of the Case section that "[Appellant] answered the Complaint, and asserted *affirmative defenses* that Neumark's notice of its claim . . . was not timely, and that Neumark failed to establish that the materials it provided were, in fact, incorporated into the Unser Project." (Emphasis added) [RP 11, Answer Compl.; Brief-in-Chief at 6]. Appellant also claims that the District Court erred in placing the burden of proof on Appellant "that the materials were not delivered to or used in the [Unser Project]." Brief-in-Chief at 7. Appellee notes that Appellant had the burden of proof on each of its affirmative defenses. See Carter v. Burn Constr. Co., 85 N.M. 27, 32, 508 P.2d 1324, 1329 (N.M. Ct. App. 1973) ("The law in New Mexico still remains that 'the party alleging the affirmative has the burden of proof.'").

particular finding of fact offered by Appellant. Accordingly the only facts relevant to the issues raised in the Brief-in-Chief consist of the following:

1. In 2006, Salls Brothers Construction, Inc. ("Salls") entered into a contract with the City of Rio Rancho for a project known as the Unser Boulevard Widening Project ("Unser Project") wherein Salls agreed, among other things, to install the irrigation system for the project [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 1];

2. Appellant is surety on the bond for the Unser Project [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 3];

3. Salls subcontracted the irrigation work for the Unser Project to Desertscapes, Inc. [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 4];

4. Desertscapes, through its agent Brian Bachuzewski, submitted a credit application to Neumark on January 10, 2003 [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 5; Pl.'s Trial Ex. A];

5. Desertscapes, through its agent Carlo Papazian, submitted a credit application to Neumark on August 31, 2005 [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 6; Pl.'s Trial Ex. B];

6. Neumark accepted the credit applications and they became the credit agreements between Desertscapes and Neumark [RP 806, Findings of Fact &

Conclusions of Law, Finding of Fact ¶ 7];

7. The credit agreements between Desertscapes and Neumark provide "interest . . . at the rate of eighteen percent (18%) per annum from original due date." [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 8];

8. The dates on each of the invoices, for the material at issue, from Neumark reflect the dates of delivery or pick up, or approximate dates of delivery or pick up, of the materials contained in each of the invoices [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 10];

9. Neumark provided Desertscapes materials for the installation of the irrigation system on the Unser Project [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 27];

10. Neumark supplied irrigation materials to Desertscapes as a subcontractor on the Unser Project from August 30, 2006, to May 3, 2007 [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶¶ 27, 34];

11. Neumark was not paid for materials provided for the Unser Project from November 13, 2006, through May 3, 2007 [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 29];

12. Neumark provided irrigation materials for the Unser Project each consecutive month from November 2006 to May 2007 [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 30];

13. Neumark had a good faith belief that the irrigation material were being supplied for the prosecution of work specified in the contract for the Unser Project [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 31];

14. Based on the testimony, each of Neumark's invoices for which it asserts its Little Miller Act claim for the Unser Project was in fact for materials for the Unser Project, regardless of how the project was identified on certain invoices [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 32];

15. On May 22, 2007, Neumark mailed its notices of the claim on the bond for the Unser Project by certified mail, return receipt requested, to each of Salls' addresses reported by Salls to the New Mexico Public Regulation Commission [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 37];

16. The notice to Salls stated the claim on the Unser Project with substantial accuracy [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 38];

17. Salls actually received the notice to Salls of the Unser Project claims [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 39];

18. On September 25, 2007, Neumark brought this action against Appellant under New Mexico's Little Miller Act [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 40];

19. On July 23, 2009, Neumark mailed notices of its claims on the bond for the Unser Project to the City of Rio Rancho [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 41].

II. ARGUMENT

Issue A: **The District Court specifically found that Appellee provided irrigation materials for the Unser Project. The District Court did not rule that a supplier of materials need only have a good faith belief that the materials it claimed it supplied were for a particular public works project in order to recover against a surety.**

Standard of Review: Appellant's Issue One or A is a non-issue. If the Court had ruled that a supplier of materials need only have a good faith belief that the materials for which it made a claim were supplied for a particular project to recover on the supplier's claim, a conclusion of law, then the standard of review would be *de novo*. Allen v. Timberlake Ranch Landowners Ass'n, 2005-NMCA-115, ¶ 13, 138 N.M. 318, 119 P.3d 743. However, the District Court did not conclude that a supplier of materials need only have a good faith belief that the materials it claimed it supplied were for a particular project to recover against a surety. Appellant did **not** contend that any findings of fact relevant to this issue were unsupported by substantial evidence. Appellant therefore waived any substantial evidence challenge to the District Court's specific findings that the materials at issue were provided for the Unser Project, and all of the other findings

for that matter. See McLam v. McLam, 85 N.M. 196, 197, 510 P.2d 914, 915 (1973) ("The burden was on appellant to state in argument her precise ground or grounds for challenging the findings . . . . It was also her burden to clearly point out the claimed error or errors in the findings upon which she relies."). If the Appellant had challenged those findings, the standard of review on those issues would be substantial evidence. See Summit Props., Inc. v. Pub. Serv. Co., 2005-NMCA-90, ¶ 7, 138 N.M. 208, 118 P.3d 716. Appellant's references to evidence allegedly supporting a conclusion opposite to that reached by the District Court, without challenging any specific finding of fact, are irrelevant. The findings not challenged are the facts of the case on appeal. See State ex rel. Thornton v. Hesselden Constr. Co., 80 N.M. 121, 122, 452 P.2d 190, 191 (1969) ("In making this argument, plaintiff makes what should probably be termed a generalized attack upon certain findings without naming them and actually failing to challenge any one of the trial court's findings . . . . In any event, the generalized attack on the findings must fail under the provisions of our rules and many decisions . . . plaintiff is bound by the findings of the trial court.").

Contentions of Appellee: The Appellant's statement that the District Court ruled that a supplier need only have a good faith belief that materials were being supplied for a particular project to recover on its claim against a surety is inaccurate. The District Court did not apply a "good faith standard" as stated on

page 13 of the Brief-in-Chief. Appellant erroneously attempts to couch this issue as one of law when it is really one of fact. The District Court specifically found that "each of Neumark's invoices for which it asserts" its claim for the Unser Project "was in fact for materials for the Unser Project . . .[,]" a finding not challenged by Appellant. [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 32].

Preservation: Considering the foregoing, Appellant waived any challenge to the District Court's specific findings that the material at issue was provided for the Unser Project.

Argument on Issue A

Appellant argues that "Neumark failed to prove that it delivered the material to the Unser Widening Project or that the Material was used on the Unser Widening Project." Those are issues of fact on which the Court found in favor of Appellee. The issue raised by Appellant is a challenge to a purported conclusion of law not present in this case. Even though the Court's language cited by Appellant (Brief-in-Chief at 13) is located under the "Conclusion of Law" heading in the Findings of Fact and Conclusions of Law, it is in essence a finding of fact, not a conclusion of law. See Sheraden v. Black, 107 N.M. 76, 80, 752 P.2d 791, 795 (N.M. Ct. App. 1988) ("A mislabeled finding of fact may nevertheless be

treated as a finding, even though it may appear under a 'Conclusion of Law' heading.").

The District Court issued specific and independent findings of fact finding that the material at issue was provided for the Unser Project. None of those findings of fact were challenged by Appellant in its Brief-in-Chief and Appellant has therefore waived any challenges to them. Mayeux v. Winder, 2006-NMCA-28, ¶ 12, 139 N.M. 235, 131 P.3d 85 ("Plaintiffs do not appear to actually argue that the trial court's findings were not supported by substantial evidence. Nor do Plaintiffs identify any of the trial court's findings to which they take exception."); see also Rule 12-213(A)(4) NMRA ("A contention that a . . . finding of fact is not supported by substantial evidence shall be deemed waived unless the argument has identified with particularity the fact or facts which are not supported by substantial evidence."). The court ruled in Mayeux that under such circumstances, a court need not conduct a thorough review for substantial evidence. Id. ¶ 13. Nor must the Court engage in such a review here.[2] As in the case at bar, the party in Mayeux

[2] Neumark notes, however, that on page 9 of the Brief-in-Chief, Appellant refers to the testimony of Carlo Papazian. [Pl.'s Trial Ex. 33 at 138, lines 15-25, and 139, lines 1-24]. Appellant failed to also note that, when the deposition transcript was being read into the record, Neumark objected to the language cited by Appellant. The District Court properly sustained that objection. (Tr. 74, lines 19-22) Appellant has not challenged on appeal the District Court's decision on the objection. Accordingly, the testimony referred to by the Appellant is not part of the record on which this appeal is to be decided.

failed to argue that the findings at issue were not supported by substantial evidence. Id.

Appellant does not contend, among the issues presented for appeal, that any finding of fact was unsupported by substantial evidence. In Maloof v. San Juan County Valuation Protests Bd., 114 N.M. 755, 758, 845 P.2d 849, 852 (N.M. Ct. App. 1992) an appellant raised, as its second point on appeal, that an order was not supported by substantial evidence. Id. The court there held that the appellant's argument was "undermined by her failure to properly set forth in the summary of proceedings contained in her Brief-in-Chief the substance of all the evidence presented by the [Appellee], or to specifically challenge each of the Board's findings of fact relating to the Assessor's testimony and evidence supporting his ad valorem tax valuation for the Inn." Id. Here, Appellant did not specifically challenge any finding by the District Court.

Appellant generally argues that Appellee did not prove that it provided materials to Desertscapes for the Unser Project and argues that there is evidence allegedly supporting a result opposite to the factual findings of the District Court. However, even if the Court were to review the factual findings of the District Court, despite the Appellant's failure to challenge them, when an appellate court reviews "a trial court's factual findings, the presence of evidence supporting the result opposite from that reached by the trial court is not relevant." Mayeux, 2006-

NMCA-28, ¶ 11. Furthermore, "on appeal, the evidence is to be viewed in the aspect most favorable to the action of the court which is being appealed" and "[e]very reasonable intendment and presumption will be resolved against appellants in favor of proceedings in the trial court." Lopez v. N.M. Bd. of Med. Exam'rs, 107 N.M. 145, 146, 754 P.2d 522, 523 (1988); see also Allen, 2005-NMCA-115,¶ 13 ("We resolve all disputed facts and indulge all reasonable inferences in favor of the trial court's findings.").

Even if the District Court had not specifically found that the material at issue was supplied for the Unser Project, and had that court concluded that a supplier need only have a good faith belief that material was being provided for a bonded project, there is no support for Appellant's contention that "it is well established in New Mexico that in order for a materials supplier to collect against a payment bond, the supplier must not only prove the materials were delivered but that they were incorporated into the project." There is, however, support among federal courts for the argument under the federal Miller Act that a supplier need only have a good faith belief that the materials were being supplied for the project. New Mexico's Little Miller Act is modeled after the federal Miller Act[3]. See State ex rel. Nichols v. Safeco Ins. Co., 100 N.M. 440, 446, 671 P.2d 1151, 1157 (N.M. Ct. App. 1983).

[3] Neumark notes that the Federal Miller Act has been amended a number of times. However, those amendments are not relevant to issues presented herein.

Appellant cited Crane O'Fallon Co. v. Via, 56 N.M. 772, 251 P.2d 260 (1952) and State ex rel. Goodmans Office Furnishing, Inc., 102 N.M. 22, 690 P.2d 1016 (1984), as establishing that a supplier must prove that materials "were incorporated into the project."

The language of Crane O'Fallon cited by Appellant on page 14 of its Brief-in-Chief simply does not create a "well established" proposition. In fact, the language of New Mexico's Little Miller Act itself contradicts Appellant's statement:

> Every person, . . . who has furnished labor or material *in the prosecution of work* . . . and who has not been paid in full . . . before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or *material was furnished or supplied by him for which such claim* is made . . . shall have the right to sue . . . provided, however, that any person having direct contractual relationship with a subcontractor, but no contractual relationship . . . with the contractor furnishing such payment bond shall have a right of action upon said payment bond upon giving written notice to said contractor within ninety days from the date on which such person . . . *furnished or supplied the last of the material for which such claim is made. . . .*"

NMSA 1978, § 13-4-19(A) (1975) (emphasis added).

Section 13-4-19 expressly provides that the furnishing of materials in the prosecution of work is the relevant inquiry. The text of the Little Miller Act itself does not require that a supplier prove that the materials actually be incorporated into the work, as argued by Appellant. Nor do Crane and Goodmans stand for that proposition.

Crane involved the installation of a lavatory, and an owner's subsequent decision that the lavatory was unsatisfactory. The owner contacted the architect of the project, who in turn contacted the subcontractor, who then ordered a new lavatory from the plaintiff-supplier. 56 N.M. at 777, 251 P.2d at 264. The sole issue there was whether the new lavatory could "properly be treated as the last item" for purposes of the Little Miller Act's provision regarding when material is furnished. Id. The defendant argued that it should not, because it was not included in the original plans of the contract, nor was it demanded pursuant to the contract, and it was never accepted by the contractor. Id. After the delivery, the lavatory remained uncrated in a storage room. Id. at 744. The lavatory was also materially different from the type called for by the specifications in the contract. Id. In Crane it was undisputed that the lavatory was not used in the project. In that context, the court mentioned, in passing, that "[a]pparently, the trial court took the view that if materials were furnished to a subcontractor by a materialmen who at the time of furnishing them believed in good faith they were to be used in the performance . . . a recovery on the bond could be had . . . whether or not such materials were actually used in a due performance of the contract . . . ." Id. at 776.[4] Here, in contrast, the District Court found, based on the testimony, each of Neumark's invoices for which it asserts its Little Miller Act claim for the Unser Project was in

[4] The New Mexico Supreme Court has apparently not revisited this language since 1952.

fact for materials for the Unser Project. [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 32].

Crane simply does not stand for the purported proposition that in New Mexico a supplier under the Little Miller Act must prove that material was incorporated into the project. Importantly, Crane is distinguishable from the case at bar because the one item at issue in that case was "intended as a substitute for a lavatory already installed in exact accordance with the plans and specifications . . . and [was] in admitted defiance of the governing contract . . . ." Id. at 780. The language from Crane relied on by Appellant may be interpreted to mean that when material is supplied to a Little Miller project, but never used in the project, **and** when there is no dispute that the material was never used in the project, **and** when the material was not called for by the governing contract, the material was not being furnished in prosecution of the work, then the supplier's good faith belief that the material was being supplied for the project is not enough. The language cannot be interpreted to state affirmatively that in New Mexico a "supplier must not only prove the materials were delivered but that they were incorporated into the project" to recover.

In a similar vein, the plaintiff in Goodmans did not dispute that the materials at issue there were not used in the project, but claimed that mere delivery was enough, as opposed to actual incorporation. 102 N.M. at 24, 690 P.2d at 1018. The

court disagreed and would not allow the plaintiff to recover for excess material, merely because it was delivered. Id. That is not the case here where the District Court found that:

1. Neumark provided irrigation materials for the Unser Project each consecutive month from November 2006 to May 2007 [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 30];
2. Based on the testimony, each of Neumark's invoices for which it asserts its Little Miller Act claim for the Unser Project was in fact for materials for the Unser Project [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 32].

Furthermore, the District Court concluded that Neumark supplied irrigation materials for the Unser Project in prosecution of the work provided for in the contract for the project. [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law, ¶ 4].

Under persuasive federal case law interpreting the Miller Act, it is not a plaintiff's burden to prove that the materials were actually delivered to the project: "As long as there is good faith, 'under the law of this Circuit, delivery to the job site or actual use in the prosecution of the work is immaterial to a right of recovery.'" United States ex rel. Krupp Steel Prod., Inc. v. Aetna Ins. Co., 831 F.2d 978, 980 (11th Cir. 1987); see also United States ex rel. Westinghouse Elec. Supply Co. v. Endebrock-White Co., 275 F.2d 57, 60 (4th Cir. 1960) ("Neither delivery of the material to the prime contract job site nor actual incorporation of the material into the work is required."). The case of United States ex rel. J. P.

Byrne & Co. v. Fire Asso. of Philadelphia, 260 F.2d 541, 545 (2nd Cir. 1958) illustrates the important policy reasons underlying this rationale:

> [R]equiring the supplier to trace specific materials after they have left his control may often place upon him an impossible burden of proof even when the items involved were in fact consumed. Moreover, even if appropriate tracing measures could be devised, the courts, in enforcing one remedial policy, should be hesitant to compel an industry to accept what may be artificial and burdensome accounting practices."

Id.[5]

That language is in accord with both New Mexico law, and federal law, requiring that the Little Miller Act and Miller Act be construed liberally in favor of the claimant. Goodmans, 102 NM at 25, 690 P.2d at 1019 ("The Act is afforded a liberal construction in favor of the claimant."); United States ex rel. Moody v. American Ins. Co., 835 F.2d 745, 747 (10th Cir. 1987) ("In general, the Miller Act is 'entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects.'").

Additionally, in a case relied on by Appellant in another part of its Brief-in-Chief, at page 20, Krupp, 831 F.2d at 983-84, the court held:

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[5]J. P. Byrne & Co. also discussed the history of the Miller Act, noting an important distinction between the Miller Act and its predecessor, the Heard Act: "Significantly the language of the Miller Act, unlike that of its immediate predecessor the Heard Act, requires only that materials be furnished in the prosecution of the work, not that they be used as well." Id. at 545.

> Four elements must be proven by a plaintiff to collect under [the Federal Miller Act]: 1) that materials were supplied for work in the particular contract at issue; 2) that the supplier is unpaid; 3) that the supplier had a good faith belief that the materials were for the specified work; and 4) that jurisdictional requisites are met.

Id. at 980.

The Appellant acknowledged that the Tenth Circuit does not require that a supplier prove that the materials were actually incorporated into the project, citing United States ex rel. State Elec. Supply Co., v. Hesselden Constr., Co. 404 F.2d 774 (10th Cir. 1968). Appellant also relies on St. Paul-Mercury Indemn. Co. v. United States ex rel. H. C. Jones, 238 F.2d 917 (10th Cir. 1954) ("There must be some reliable evidence from which it can be reasonably inferred that the labor and materials went into the prosecution of the bonded job. Conjecture or guesswork is not enough."). Id. at 925. Unlike in St. Paul-Mercury, the District Court here found that there was plenty of reliable evidence from which it could reasonably be inferred that the labor and materials went into the prosecution of the bonded job. Although it can be read as a mixed question of law and fact, the District Court specifically ruled that "Neumark supplied irrigation materials for the Unser Project in prosecution of the work provided for in the contract for the project." [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law ¶ 4].

Lastly, and with respect to the Appellant's argument as to what Neumark's paperwork did or did not establish, the District Court specifically found that "each

of Neumark's invoices . . . was in fact for materials for the Unser Project, regardless of any clerical errors in how the project was identified on certain of the invoices [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 32], a finding not challenged by Appellant. For the foregoing reasons, the Court should affirm the judgment of the District Court on this issue.

Issue B: The District Court did not place the burden of proof on the Contractor/Surety to show that material claimed to have been provided was in fact not provided by the supplier.

Standard of Review: If the Court had ruled that a Contractor/Surety has the burden of proving that material claimed to have been provided was not provided by the supplier, a conclusion of law, then the standard of review would be *de novo*. Allen, 2005-NMCA-115, ¶ 13. There was no conclusion of law from the District Court to the effect that a Contractor/Surety had the burden to show material claimed was not provided to a project.

Contentions of Appellee: Appellant's Issue Two or B is a non-issue. The District Court, under the heading Conclusions of Law, did note that "[Appellant] produced no evidence to contradict that Neumark had a good faith belief that the materials were being provided for the bonded Unser Project." [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law, ¶ 6]. Even though the Court's language cited by Appellant (Brief-in-Chief at 16-17) is located under the "Conclusion of Law" heading in the Findings of Fact and Conclusions of Law, it is

in essence a finding of fact, not a conclusion of law. See Sheraden, 107 N.M. at 80, 752 P.2d at 795.

Argument on Issue B

Appellee acknowledges that the supplier has the burden of proof on a Little Miller Act claim. The District Court did not rule to the contrary. The District Court found that Appellee supplied material to the project at issue [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶¶ 29-32]. The District Court merely found that, once Appellee had met its burden of proof, Appellant failed to produce any evidence to disprove Appellee's good faith belief that the materials were provided in prosecution of the work being performed on the Unser Project. The District Court did not shift the burden to Appellant to prove the irrigation system materials were not delivered or used in the Unser Project. Appellee met its burden of proof, as shown by the unchallenged findings of the District Court, and Appellant's interpretation of the District Court's ruling is in error. The Court should affirm the judgment of the District Court.

Issue C: The District Court did not err in awarding pre-judgment interest to Neumark against Liberty, based on the open account credit agreement between Neumark and Desertscapes.

Standard of Review: Statutory interpretation is an issue of law, which courts review *de novo*. Maes v. Audubon Indem. Ins. Group, 2007-NMSC-46, ¶ 11, 142 N.M. 235, 164 P.3d 934.

Contentions of Appellee: The District Court did not err in awarding pre-judgment interest to Appellee. The District Court correctly ruled Appellant is liable as a surety on the bond for the Unser Project for sums justly due Neumark under its credit agreement with Desertscapes.

Argument on Issue C

The District Court correctly awarded Neumark pre-judgment interest at the rate of 18% per annum pursuant to the open account agreement between Desertscapes and Neumark based on the Little Miller Act and NMSA 1978, Section 56-8-5 (1983). Appellee acknowledges that the Little Miller Act does not use the word "interest" in providing for an award of interest. However, Section 13-4-19(A) provides:

> Every person, firm or corporation who has furnished labor or material in the prosecution of work provided for in such contract . . . shall have the right to sue on such payment bond for the amount of the balance thereof unpaid at the time of the institution of such suit, and to prosecute such action to final execution and judgment *for the sum or sums justly due him* . . . [.]"

(Emphasis added).

Appellant makes only two arguments to support its position that the District Court erred: 1) there was no privity of contract between Salls and Neumark, and 2) federal "Miller Act case law . . . does not award attorney's fees unless there is privity of contract." Those positions are contrary to the general thrust of New Mexico and federal law on the issue and the District Court correctly reasoned that,

under New Mexico's Little Miller Act, Appellant was liable "for sums justly due to Neumark under its credit agreements with Desertscapes . . . " [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law, ¶ 9] and that "[i]nterest of 18% was justly due to Neumark and part of the balance unpaid on the Unser Project . . . ." [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law, ¶ 10].

Appellant cites a number of cases in its Brief-in-Chief purportedly supporting its arguments. Most of those cases are not on point factually. Those that are, have been questioned in light of later developments in the law. A number of courts, interpreting identical language in the federal Miller Act have held that interest and attorney's fees are part of what is justly due to a successful claimant under the Miller Act. The Little Miller Act adopted in New Mexico, is modeled after the federal Miller Act[6]. See Nichols, 100 N.M. at 446, 671 P.2d at 1157.

In F. D. Rich Co. v. Indus. Lumber Co., 417 U.S. 116, 126 (1974), the Court noted that the federal Miller Act does not expressly provide for an award of attorney's fees to any party. Id. Importantly, there was no contractual provision concerning attorney's fees in that case and it is therefore distinguishable. Id. Here, the credit agreements contain provisions for attorney's fees and interest. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶¶ 8, 9; Conclusion of Law ¶ 10].

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[6] See n.3 above regarding amendments to the Miller Act.

In Moody, 835 F.2d at 749, the court merely noted that "[u]nder the Miller Act, attorney's fees are not recoverable in the absence of a provision in the contract between the parties authorizing attorney's fees to the party prevailing in litigation." However, the court did not address issue of attorney's fees in general because the subcontractor conceded the issue. Id. Likewise, the court in United States ex rel. C.J.C., Inc. v. Western States Mech. Contractors, Inc., 834 F.2d 1533, 1543 (10th Cir. 1987) merely noted "[a]bsent a provision *in the contract* or payment bond awarding attorneys' fees, a Miller Act plaintiff may only recover under one of the federally recognized" exceptions to the general principle that each party should bear the costs of its own legal representation." (Emphasis added). Those cases generally recite the "American Rule" and are not at all instructive on the issue in this case.

Appellant also relies on Krupp, 831 F.2d 978. Krupp does appear to be on point factually. However, the court noted that because it reversed the summary judgment at issue, the attorney's fees issue was moot. Id. at 983. Thus, the discussion regarding fees there was mere dictum. Although Appellant relies on Krupp, it failed to inform the Court that the apparent language relied on by Appellant has been repudiated by the Eleventh Circuit, the court which issued the Krupp opinion. In 1989, the Eleventh Circuit revisited Krupp in United States ex

rel. Southeastern Mun. Supply Co. v. Nat'l Union Fire Ins. Co., 876 F.2d 92 (11th Cir. 1989), acknowledging that the Krupp discussion was mere dictum:

> It is true that language in [Aetna] appears to reach the opposite conclusion. That language, however, is merely dictum: words addressed to a question suggested by the case before the court, but not necessarily involved in the case or essential to its determination. . . . A case is authority only for what it actually decides, and Krupp did not decide the question before us today.

Id.

United States, ex rel. L.K.L. Assoc. v. Crockett & Wells Constr., Inc., 730 F. Supp. 1066 (D. Utah 1990), cited by Appellant, at first glance also appears to address the issue. However, that case too has been subject to criticism and, as noted by United States, ex rel. Trustees of Colorado Laborers Health & Welfare Trust Fund v. Expert Envtl Control, Inc., 785 F. Supp. 895, 898 (D. Colo. 1992), "the continued vitality of Crockett & Wells, which takes its direction from Krupp I, is dubious."[7]

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[7] Trustees of Colorado Laborers Health & Welfare Trust Fund also notes that "[t]he Eleventh Circuit has subsequently abandoned this reasoning and has adopted the rule that a general contractor and its surety must pay attorney fees when there is an agreement between a subcontractor and the claimant providing for such fees. See Southeastern Mun. Supply Co., 876 F.2d at 93 (adopting rule), reh'g denied, 886 F.2d 1322 (11th Cir. 1989); United States ex rel. Krupp Steel Prod., Inc. v. Aetna Ins. Co., 923 F.2d 1521, 1527 (11th Cir. 1991) (expressly repudiating "the suggestion in Krupp I that a contractual provision between a supplier and a subcontractor for the recovery of attorney's fees is not enforceable under the Miller Act against the general contractor or its surety"). A majority of courts also follow this approach. See, e.g., Gergora v. R. L. Lapp Forming, Inc., 619 F.2d 387, 391 (5th Cir. 1980) (state law case looking to federal law under Miller Act); United

Lastly, Appellant relied on Goodmans, 102 NM 22, 690 P.2d 1016. Goodmans did not directly address the issue before the Court: "Goodman's argues that the district court erred in denying them prejudgment interest and attorney's fees." Id. at 23. Goodmans claimed that the district court erroneously found and concluded that neither interest nor attorney's fees could be awarded under New Mexico's Little Miller Act. Id. The New Mexico Supreme Court noted Goodman's misinterpretation of the district court's findings, clarifying that the district court merely acknowledged that the Little Miller Act does not expressly provide for an award of interest. Id. The court noted "[i]nterest, even if allowed by statute, is still a matter within the discretion of the district court," confirming it was not discussing the issue of whether pre-judgment interest was appropriate under the Little Miller Act as a matter of law Id. The District Court here more eloquently reasoned that "[i]nterest was justly due to Neumark and part of the balance unpaid on the Unser Project at the time of the institution of the suit" [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law, ¶ 10] and the discussion in Goodmans is of little assistance. Apparently, the plaintiff there did not raise the argument raised by Neumark here, i.e. that pre-judgment interest is part of what is "justly due" Neumark under the Little Miller Act.

States ex rel. Carter Equip. Co. v. H. R. Morgan, Inc., 554 F.2d 164, 166 (5th Cir. 1977); Travelers Indem. Co. v. United States ex rel. Western Steel Co., 362 F.2d 896, 899 (9th Cir. 1966); Ibex Indus., Inc. v. Coast Line Waterproofing, 563 F. Supp. 1142 (D. D.C. 1983)." 785 F. Supp. at 897-98.

The language regarding entitlement to judgment for the sum or sums justly due, under the Little Miller Act, permits a court to award a judgment for both attorney's fees and interest. See United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332 (4th Cir. 1996). "The Miller Act does not, by its own terms, provide for attorney's fees or interest. Several circuits have held, however, that interest and attorney's fees are recoverable if they are part of the contract between the subcontractor and supplier." Id. at 336.

The United States Supreme Court, in United States ex rel. Sherman v. Carter, 353 U.S. 210 (1957) explained the principle when it ruled that "[a] surety's liability on a Miller Act bond must be at least coextensive with the obligations imposed by the Act if the bond is to have its intended effect." Id. at 215. The Supreme Court focused on, among other things, the identical language in the Federal Miller Act which provides that a claimant "shall have the right to sue on such payment bond . . . for the sum or sums justly due him . . . . " Id. Carter involved a claim by trustees of an employee health and welfare fund against the contractor and its surety for contributions owed to the fund. Id. at 214. The Court held that the "trustees' claim for . . . attorney's fees . . . and other related expenses of litigation has equal merit." Id. at 220.

In Southeastern Mun. Supply Co., the Eleventh Circuit relied on the Carter rationale when it held that a supplier was entitled to attorney's fees where there

was a contractual provision between the supplier and subcontractor for recovery of the same:

> The question presented is whether, in an action where there is a contractual provision between a supplier . . . and a subcontractor . . . for the recovery of attorney's fees, that provision is enforceable under the Miller Act . . . against the contractor . . . and its surety . . . . This court answered the question in the affirmative in United States f/u/b/o Carter Equipment Co., Inc. v. H. R. Morgan, Inc., 554 F.2d 164 (5th Cir. 1977). And, we follow that holding.

876 F.2d at 93.

New Mexico's Court of Appeals relied on the Carter rationale in Nichols, 100 N.M. 440, 671 P.2d 1151. In that case, the New Mexico Court of Appeals analyzed the issue of attorney's fees under the Little Miller Act. "Reasonable attorney's fees should be included where the written terms of the contract sued upon expressly provided for the allowance of attorney's fees." Id. at 446. The plaintiff in that case, a lessor, brought suit against a contractor and surety for failure to pay amounts due under equipment leases. Id. at 442. Each of the leases, between the lessor and contractor, contained attorney's fees provisions. Id. at 445. Nichols relied on Sherman and explained:

> The rationale adopted by the Court in United States ex rel v. Carter is applicable to construction of § 13-4-19 and the allowance of reasonable attorney's fees where, as here, the lease contracts expressly provide for the collection of attorney's fees. The obligations of a surety under its bond are construed strictly in favor of the beneficiaries.

Nichols, 100 N.M. at 446.

The credit agreement was a "contract sued upon" here [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 7]. The District Court correctly concluded that "[Appellant] is liable as a surety on the bond issued pursuant to the Little Miller Act for sums justly due to Neumark under its credit agreements with Desertscapes (not including attorneys fees[8]) for materials supplied for the Unser Project." [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law ¶ 9). The District Court also correctly concluded that "[i]nterest of 18% was justly due to Neumark and part of the balance unpaid on the Unser Project at the time of the institution of the suit." [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law ¶ 10]. The District Court correctly applied the reasoning of the Supreme Court in Carter, as incorporated into New Mexico law in Nichols, in awarding Appellee pre-judgment interest. There is no basis to treat a supplier to a subcontractor differently under either the Little Miller Act or the Miller Act when a supplier is also entitled to "sums justly due." Nor does the language of the Little Miller Act distinguish between a supplier providing materials to a subcontractor and one providing directly to a general contractor, for purposes of determining the

[8] Neumark has field a cross-appeal in this matter regarding the District Court's denial of its claim for attorney's fees and post-judgment interest at 18% per annum, the rate provided in the credit agreement between Neumark and Desertscapes.

sums justly due. The judgment from the District Court awarding pre-judgment interest should be affirmed.

Issue D: The District Court did not err in ruling that the notice was timely and that Neumark substantially complied with the requirements of NMSA 1978, Section 13-4-19(A).

Standard of Review: Statutory interpretation is an issue of law, which courts review *de novo*. Maes, 2007-NMSC-46, ¶ 11. If the Appellant had challenged the findings relevant to Appellant's Issue Four or D, the standard of review as to those findings would be substantial evidence. However, as noted above including with respect to Issue One or A, Appellant did not do so and its transcript and exhibit references are irrelevant to this appeal.

Contentions of Appellee: The District Court correctly ruled that the notices were timely, they stated the amounts of the claims with substantial accuracy, and that they substantially complied with the Little Miller Act.[9]

Argument on Issue D

Appellant's Issue Four or D is in substantial part a non-issue. Appellant

[9] Neumark also notes that, in addition to failing to preserve those issues by contending that findings were unsupported by substantial evidence, Appellant failed to appeal the District Court's August 7, 2009, order granting Neumark's Motion for Partial Summary Judgment on its compliance with the requirements of Section 13-4-19(A) as to manner and place of sending notice. [RP 746, Order Granting Mot. for Partial Summ. Judgment]. Appellant filed its Notice of Appeal on November 12, 2009 [RP 836, Notice of Appeal] and did not attach the August 7, 2009, order.

includes in its statement of the issue allegations of fact contrary to, or irrelevant in view of, the District Court's unchallenged findings of fact. Appellant argues that: 1) the amount claimed in the Little Miller Act notice was incorrect; 2) it was not timely; 3) it was not served by registered mail; and 4) it was not served on Salls at its place of business. Those are all factual issues which, Appellant appears to argue, relate to whether Neumark substantially complied with the Little Miller Act. The District Court found:

1. Neumark provided irrigation materials for the Unser Project each consecutive month from November 2006 to May 3, 2007. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact ¶¶ 27, 30, 34];
2. "On May 22, 2007, Neumark mailed its notices . . . of the claims on the bonds for the . . . Unser Project[] to Salls by certified mail, return receipt requested, to each of Salls['] addresses reported by Salls to the New Mexico Public Regulation Commission as shown by its online records" [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 37];
3. "The Notices to Salls stated the amounts of the Unser claims with substantial accuracy" [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 38]; and
4. "Salls actually received the Notice to Salls of the Unser Project Claim." [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact, ¶ 9].

The District Court concluded as a matter of law that "Neumark's notice of its claim on the bond for the Unser Project, mailed to Salls on May 22, 2007, substantially complied with the notice requirements of New Mexico's Little Miller Act, NMSA 1978, § 13-4-19(A)" [RP 806, Findings of Fact & Conclusions of

Law, Conclusion of Law, ¶ 7]; and that "Neumark's notice to Salls of its claim on the bond for the Unser Project was timely." [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law, ¶ 8]. Appellant's discussion about a purported agreement between Desertscapes and Salls Brothers Construction regarding the purchase of, and payment for, the materials is irrelevant. See Naylor Pipe Co. v. Murray Walter, Inc., 421 A.2d 1012, 1013 (1980) ("The fact that the subcontractor . . . has been fully paid is no defense."). The remainder of the Appellant's evidentiary discussion on this issue concerns findings of fact not challenged by the Appellant or the District Court's choice not to make certain findings of fact which Appellant has also not preserved on appeal.

Appellant argues that because Plaintiff sent the notices to Salls via certified mail rather than registered mail, Plaintiff failed to comply with Section 13-4-19(A). Certified mail is acceptable and "the manner of notice specified in the Act is merely 'to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received.'" Moody, 835 F.2d at 747. With respect to Appellant's claim that the material in the last two invoices was "clearly for repair or corrective work," Appellant fails to cite to any finding by the District Court supporting that claim. There is absolutely no factual support to credit Appellant's argument that those invoices were for repairs, replacement parts

or corrective work. That argument does not warrant further discussion or consideration by this Court. It is contrary to the District Court's unchallenged findings on Neumark's having supplied materials for the Unser Project each month through May 2007. Furthermore, "on appeal, the evidence is to be viewed in the aspect most favorable to the action of the court which is being appealed" and "[e]very reasonable intendment and presumption will be resolved against appellants in favor of proceedings in the trial court." Lopez, 107 N.M. at 146, 754 P.2d at 523; see also Allen, 2005-NMCA-115, ¶ 13 ("We resolve all disputed facts and indulge all reasonable inferences in favor of the trial court's findings.").

Appellant relies on Komac Paint & Wallpaper Store v. McBride, 74 NM 233, 393 P.2d 577 (1964) in support of its argument that Plaintiff failed to comply with the notice requirements. Komac is distinguishable from the case at bar. In Komac, no written notice was given to the general contractor until more than ninety days after furnishing the last of the materials supplied. Id. at 234. Here, Plaintiff provided the written notices within ninety days after the last of the materials were supplied to Unser Project. [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law ¶ 8]. Further, Komac noted specifically that "the pertinent language of New Mexico statute is identical with that of the [Federal] Miller Act," id. at 235, and that the federal courts . . . all agree that the notice provision should be liberally construed, but . . . they have nevertheless

uniformly held that there must be substantial compliance with the notice requirement." Id. at 236. Komac concluded that the statute "should be liberally construed to effectuate [its] intent . . . to protect the supplier of . . . materials." Id. As also noted in Komac, "there has been liberality as to the manner of communicating the written notice to the contractor." Id. at 237.

More specifically, Green-Wald Suppon, Inc. v. Gramercy Contractors, Inc., 433 F. Supp 156 (S.D. N.Y. 1977) provides that "[a]lthough the precise words of [the Miller Act] require *notice by registered mail*, it has been held that the technical provisions of the Miller Act regarding notice do not bar recovery if in fact timely notice of some sort is given . . . . Accordingly, we *hold that notice by unregistered* mail is sufficient if received in time." Id. 163 (internal citations omitted). Here, the District Court found that the written notices were actually received by Salls on May 23, 2007. [RP 806, Findings of Fact & Conclusions of Law, Findings of Fact, ¶ 39]. Appellant's reliance on Tabet Lumber Co. v. Baughman, 79 N.M. 57, 439 P.2d 709 (1968), is misplaced. That case is based on the mechanic's and materialman's lien statute which provides that a lien must be filed "within 90 days after completion of any building, improvement, or structure." The issue in that case was whether "substantial completion" of a building had occurred, for the purposes of determining the timeliness of filing a claim of lien. The Little Miller Act provides that written notice be provided within ninety days

after the last of the materials or labor provided and has, on its face, nothing to do with substantial completion of the project. In any event, Appellant has not challenged on appeal the District Court's choice not to make findings on substantial completion of the Unser Project, which in any event would have to be after that Court's unchallenged findings that materials were supplied for the project as late as May 3, 2007. The Court should affirm that the notice at issue was timely and substantially complied with the Little Miller Act.

Issue E: The District Court did not err in granting judgment to the supplier because the supplier provided notice to the obligee more than thirty days before the entry of the judgment.

Standard of Review: Statutory interpretation is an issue of law, which courts review *de novo*. Maes, 2007-NMSC-46, ¶ 11

Contentions of Appellee: The District Court granted judgment in compliance with the notice provisions of the Little Miller Act. The District Court concluded that "failure by the plaintiff to notify the obligee of this action until July 2009, does not bar the plaintiff's claims, as no judgment was entered within thirty (30) days after giving notice." [RP 806, Findings of Fact & Conclusions of Law, Conclusion of Law ¶ 18]. The District Court correctly interpreted the applicable provision of the Little Miller Act.

Argument on Issue E

NMSA 1978, Section 13-4-19(B) (1975) provides in substantial part:

> Claimant . . . shall notify the obligee named in the bond *of* [not "at"] the beginning of such action . . . *and no judgment shall be entered* in such action *within thirty days after giving such notice.* The obligee and any person, firm, corporation or the state having a cause of action on such bond may be admitted on motion as a party to such action, and the court shall determine the rights of all parties thereto. If the amount realized on such bond be insufficient to discharge all claims in full, such amount shall be distributed among the parties entitled thereto pro rata.

(Emphasis added).

NMSA 1978, Section 13-4-19(C) provides in substantial part:

> Except for suits by the state with respect to taxes . . . every suit instituted under this section shall be brought in the name of the state of New Mexico for the use of the person suing in the district court in any judicial district in which the contract was to be performed . . . but no such suit . . . shall be commenced after the expiration of one year after the date of final settlement of such contract. The date of final settlement herein shall be that date set by the obligee in the final closing and settlement of payment, if any, due the contractor . . . .

The judgment in this case was entered on October 16, 2009, in excess of thirty days after the notice provided to the City of Rio Rancho. [RP 816, Judgment on Compl. to Recover Payment for Materials Supplied; RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 41]. Neumark provided written notice to the City of Rio Rancho on July 23, 2009 [RP 806, Findings of Fact & Conclusions of Law, Finding of Fact ¶ 41; Pl.'s Trial Ex. P]. Appellant's argument at 25 that "no judgment could be entered in favor of Neumark because it failed to provide notice of [sic] the beginning of the lawsuit to Rio Rancho within the one-year statute of limitations" is absurd. While Neumark did not provide

written notice to Rio Ranch **at** the beginning of the lawsuit, that is not what the statute requires. The statute's time requirement is only the lapse of thirty days after notice to the obligee before judgment.

The City of Rio Rancho was well aware of the Unser Project and, presumably, was also aware of any claims that it may have had as obligee under the bond. Nothing prevented it from filing suit on any such claims on a timely basis. Notice of Neumark's suit was provided to the City of Rio Rancho and, if it chose to do so, Rio Rancho could by statute have been "admitted on motion as a party" to the already pending action. The statute does not even require that it have a cause of action on the bond in order to be admitted. Additionally, Appellant fails to cite any part of the record establishing what was "the date of final settlement of such contract," and did not appeal from any denial of a finding of fact on that subject even if it requested one. The statement that "Rio Rancho could not file any action pertaining to Neumark's action, because the one year statute of limitations had run" is both irrelevant to this action and without merit.

Equally absurd, and lacking any rational analysis, is the statement that the District Court lacked jurisdiction to issue a judgment. That statement seems premised on the unfounded allegation that, because the one-year statute of limitations on claims by the City of Rio Rancho against the bond had run by the time it received written notice of Neumark's action from Neumark, the District

Court was prohibited from asserting jurisdiction over the timely claim of Neumark under the Little Miller Act. Although no authority is cited by Appellee in support of this argument, New Mexico courts "have indicated that time limitations contained in statutes which establish a 'condition precedent to the right to maintain the action' are jurisdictional and not subject to waiver." See Wilson v. Denver, 1998-NMSC-16, ¶ 9, 125 N.M. 308, 961 P.2d 153; see also Garza v. W. A. Jourdan, Inc., 91 N.M. 268, 270, 572 P.2d 1276, 1278 (N.M. Ct. App. 1977) ("Under our Workmen's Compensation Act, the limitation of time for filing is a condition precedent to the right to maintain the action, and as this limitation provision is jurisdictional, it may not be waived."). That rational, however, does not apply to this case. The statute requiring notice to the obligee is not a condition precedent to jurisdiction to enter judgment, but only a restriction on the time of entry of such judgment. The statute of limitations defense is not and cannot be raised by Appellant as to Neumark's claim. Instead, it is being raised as to an unfiled, undefined, hypothetical claim by the City of Rio Rancho. As such, the argument is entirely without merit and the judgment should be affirmed.

III. CONCLUSION

The Court should affirm the judgment of the District Court in all respects, excepting those matters addressed separately in Neumark's Brief-in-Chief on Cross-Appeal.

IV. REQUEST FOR ORAL ARGUMENT

Neumark requests oral argument in this matter only to the extent that may be required to address Appellant's irrelevant references to any alleged facts that are contrary to the District Court's findings, purporting to warrant a different conclusion than that reached by the District Court, despite Appellant's failure to challenge any of those findings.

Respectfully Submitted,
KELEHER & McLEOD, P.A.

By _____
James L. Rasmussen
Justin Breen
P.O. Box AA
Albuquerque, New Mexico 87103
Telephone: (505) 346-4646
Facsimile: (505) 346-1370
Attorneys for Neumark Irrigation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered on July 16, 2010 to the following:

Attorneys for Defendant:
Lillian G. Apodaca
Bingham, Hurst & Apodaca, P.C.
3908 Carlisle Blvd. NE
Albuquerque, New Mexico 87107
Telephone: (505) 881-4545
Facsimile: (505) 889-0988

_____
Justin Breen