No. 29,911 consolidated with
No. 30, 069

ORIGINAL

IN THE COURT OF APPEALS FOR
FOR THE STATE OF NEW MEXICO

BOARD OF EDUCATION FOR THE
QUESTA INDEPENDENT SCHOOL DISTRICT,

Appellant,

vs.

ARTESANOS DE QUESTA, a non profit corporation, and NANCY GONZALES, in her individual capacity as owner and operator of the Carinos Day Care Center, her private business,

Appellees.

APPELLANT'S BRIEF IN CHIEF

On Appeal from the Eighth Judicial District Court
for the State of New Mexico The Honorable Sam B. Sanchez

ORAL ARGUMENT IS REQUESTED

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Statement Regarding Transcript Citations

The official trial transcript is an audio recording consisting of two compact discs. Citations to the trial transcript are included in the following form: [CD 1, date, x:y:z], and [CD 2, date, x:y:z], where "x:y:z" refers to the specific counter at which the recording can be located.

Statement of Compliance

Pursuant to Rule 12-213(G), NMRA, this complies with the type-volume limitation set forth in Rule 12-213 (F)(3), NMRA, because it is prepared in 14 point Times Roman, and the body of the brief contains 10,810 words, according to Microsoft 2007.

TABLE OF AUTHORITIES

NEW MEXICO CASES

NEW MEXICO STATUTES

NEW MEXICO RULES

I. Nature of the Case and Course of Proceedings

This appeal involves two substantive issues that pertain to the District Court's decision to render a judgment against Appellant Board of Education for the Questa Independent School District ("Appellant") after trial, in addition to a post-trial award of attorney fees. On October 19, 2007, Appellant filed a civil action, pursuant to NMSA 1978, § 35-10-1 (1968), against Appellee Nancy Gonzales ("Gonzales"), who served as a QISD School Board member, for forcible entry and unlawful detainer as an unapproved subtenant of Artesanos. **[RP/NG 9]**[1] Plaintiff filed a concurrent civil action also based on Section 35-10-1 against Appellee Artesanos de Questa ("Artesanos" or "Appellee"), for forcible entry and unlawful detainer. **[RP/A 5]**[2] The actions were premised upon a lease of La Cienega Elementary School. Based on the two complaints, the District Court held a hearing on November 26, 2007. The District Court refused to rule, and set the matter for trial on the merits. **[RP/A 102]**

During the pendency of litigation, Appellant learned of significant damage, maintenance and safety issues on the property. It was concerned about the

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[1] Record Proper from Board of Education for the Questa Independent School District v. Nancy Gonzales, CV-2007-438; hereinafter RP/NG. On November 26, 2007, defense counsel verbally requested a consolidation of the two lawsuits. An order was never submitted to the Court to confirm the consolidation. It wasn't until May 12, 2008 that the Court ordered that CV 2007-485 be consolidated with CV 2007-438,. Accordingly, there are two Record Propers.

[2] Record Proper from Board of Education for the Questa Independent School District v. Artesanos de Questa, CV-2007-485; hereinafter RP/A.

dangerous conditions and the liability it could possibly encounter in the event of an injury. Accordingly, Appellant made a demand to have Artesanos removed from the property based on the fact that the property was not insured. Appellees responded by filing a Motion for Temporary Restraining Order on November 8, 2008. **[RP/NG 165]** On December 04, 2008, the restraining order was granted and a hearing was set for a preliminary injunction on December 16, 2008. **[RP/NG 217]**

Prior to trial, Appellant also sought to enforce provisions set forth in the lease agreement. Appellants attempted to exercise its right to terminate the lease agreement since repairs of the damaged property were in excess of $5,000. It made a written demand to terminate the lease. Appellees responded by filing a Second Motion for Temporary Restraining Order on February 16, 2009. **[RP/NG 235]** The motion was granted ex parte on February 17, 2009 without a hearing. **[RP/NG 278]** The Order granting the temporary restraining order stated that a hearing for injunctive relief would be held on March 2, 2009, which was also the first scheduled day of trial. [**RP/NG 278**]

A bench trial occurred over a period of four days: March 2, 2009, March 3, 2009, April 20, 2009 and May 12, 2009. **[RP/NG 312, 330, 389, 410]** On June 30, 2009, the District Court issued a brief letter opinion which adopted nearly all of Appellees' proposed findings of facts and conclusions of law without specifically

ruling on any further injunctive relief. **[RP/NG 455]** A final judgment was entered on August 17, 2009 in favor of Defendants. **[RP/NG 457]** Plaintiff filed a timely Notice of Appeal on September 15, 2009. **[RP/NG 475]**

On September 16, 2009, Appellees filed a Motion for Attorney Fees Pursuant to Rule 11. **[RP/NG 495]** Appellee opposed the Motion and filed a response brief on October 6, 2009. **[RP/NG 512]** The District Court held a hearing on November 3, 2009. **[RP/NG 527]** On November 12, 2009, the District Court issued an order without any facts or conclusions of law, granting the Defendant's motion. **[RP/NG 556]** A Notice of Appeal was timely filed by Plaintiff on November 13, 2009. **[RP/NG 559]**

An Unopposed Motion to Consolidate Appeals was filed on February 12, 2010 and subsequently granted on April 15, 2010. A summary reversal was proposed on April 7, 2010. The case was then assigned to the general calendar.

II. Summary of Facts Relevant to Issues Presented for Review

A. The Parties

Appellant is the governing body of the Questa Independent School District ("QISD") and is authorized to acquire, lease and dispose of property. NMSA 1978, § 22-5-4(D) (2005). Appellee Artesanos de Questa (hereinafter "Artesanos" or "Appellee") is a non-profit corporation doing business in the Village of Questa, New Mexico. In organizational background documents filed with the State

Corporation Commission, it was stated that *"Artesanos de Questa was formed in 1996 with a vision to develop cultural tourism, to supplement the income of local artists, and to engage the greater Questa community in the artistic traditions of our area."* **[Def. Ex. Z]**

Gonzales was a member of the Board of Education, but also a member of Artesanos who in 2007 began to run a private day care center by the name of Carinos Day Care Center (hereinafter "Carinos"). Gonzales said that after initially starting Carinos as a for-profit day care center because of poor advice, she then shifted it to become part of an umbrella of Artesanos.

B. <u>Origination of the Lease</u>

La Cienega Elementary School was no longer in use by Appellants as a public elementary school in 1999 when Marcus Rael, President of Artesanos de Questa, wrote a May 12, 1999 letter to then-Superintendant Nelson Lopez stating his organization would be interested in using the property. **[Def. Ex. B]** He described Artesanos as "helping the youth of Questa with art school, and after school programs." **[Def. Ex. B]** There was no mention of operating a day care center. On August 20, 1999, Lopez advised Rael that there was general approval to lease the La Cienega Elementary to the Artesanos de Questas, but that a contract would need to be developed. **[Def. Ex. E]**

A file in the District's Business Office reveals that attorney Bruce Kelly represented Appellant in the development and execution of this lease. Kelly advised QISD in a letter that the lease required approval from the State Department of Education (SDE) and the State Board of Finance, since the term of the lease exceeded 5 years. **[Pl. Ex. 33]** The SDE granted approval of the lease after several letters between Lopez and Steve Burrell, SDE Capital Outlay, about whether the consideration in the proposed lease was sufficient to meet fair market value of the property. **[Pl. Ex. 7; Def. Exs. G, H, I, J]**

During trial testimony, Lopez testified that it was his belief that the Department of Education was be responsible for seeking any other necessary approval of the lease, if they felt another level of approval was required. **[CD 1 & 2, 04/20/09, 11:14:38–11:15:40]** Lopez testified that he was not aware of a statute requiring lease approval by the Board of Finance. **[CD 1 & 2, 04/20/09, 11:16:58–11:17:30]** When questioned about communications with the QISD Board attorney about the need to obtain Board of Finance approval, Lopez stated it was school procedure to go through the Department of Education. **[CD 1 & 2, 04/20/09, 11:17:31–11:18:22]** Lopez stated that it was his belief that if, in fact, the Department of Finance needed to approve the lease, and "all the loops were not covered," then the lease was not be valid. **[CD 1 & 2, 04/20/09, 11:22:57–11:23:43]**

C. Real Estate Lease Between QISD and Artesanos

The parties entered a Real Estate Lease on February 1, 2000 with a 24-year term beginning on June 1, 2000 and terminating on September 30, 2020. **[Pl. Ex. 3; RP/A 5-64]** The consideration for the lease was $1.00 per year with "in-kind contributions" by Artesanos to QISD valued at $34,588.00 per year. The "in-kind contributions" were specifically listed in Attachment A. **[Pl. Ex. 3; RP/A 5-64]**The Real Estate Lease explicitly stated it contained the entire agreement of the parties and could be only be modified in writing, if the writing was signed by the party obligated under the amendment. **[Id.; CD 1 & 2, 04/20/09, 11:32:51 – 11:33:06]**

The lease contained a number of relevant provisions including:

- The premises are to be used "only to provide cultural opportunities for the citizens of Questa," other uses must be approved by the QISD Board, and the premises may not be used for any program(s) that will be in direct competition with the functions of QISD.
- Artesanos could conduct construction or remodeling as may be required to use the premises. However, written consent from QISD Board is required for such construction.
- Artesanos shall also have the responsibility to
    - maintain the premises in good repair at all times,
    - pay for the utilities and services connected with the premises,
    - maintain liability insurance with personal injury limits of at least $500,000 for injury to one person, and $1,000,000 for any one accident, and a limit of at least $250,000 for damage to property,

- pay personal taxes associated with use of the facility, and
- give notice to any contractors, subcontractors or suppliers of goods, labor, or services that mechanic liens or liens of any kind on the premises are not permitted.

- Artesanos shall be in default of the lease, if Artesanos fails to fulfill any lease obligation or term.
- Artesanos may not assign or sublease any interest in the premises without the prior written consent of the QISD Board.

Def. Exh. 3; RP/A 5-64

Artesanos previously sought and received approval to sublease part of the facility to the U.S. Forest Service for office space. The amount of space leased to the U.S. Forest Service is approximately the same size as the space being used by Carinos Day Care Center. Def. Exh. 3. Artesanos contended it had no obligation to inform Appellants of the use of the property for a day care center even though they had done so with the U.S. Forest Service. **RP/A 5-64**

Appellees did not dispute the terms of the lease. However, at trial, they contended that the written requirement for insurance was orally modified. Finally, Appellees claimed that the Appellants interfered with their ability to use the facility which disallowed them from making proper repairs. **RP/NG 425-434.**

D. <u>Board Members Learn of Irregularities</u>

Board Members Gonzales and David Zimmerman served on the Board's Budget Committee which reviews the District's bills. **[Def. Ex. 6.]** In November

or December 2006, Zimmerman noticed invoices from Questa Lumber and Hardware signed by Ms. Gonzales. **[Def. Ex. 6]** When Mr. Zimmerman saw the invoices signed by Ms. Gonzales, he believed that Ms. Gonzales was a member of Artesanos and may have been signing under the belief that she could sign for Artesanos. **[Def. Ex. 6]**

Board member Herman Medina testified that Zimmerman expressed concern to him about a fellow board member Gonzales, signing invoices for projects and repairs at La Cienega Elementary School. **[CD 1, 03/02/09, 2:43:58 – 2:45:06; CD 1, 03/02/09, 2:54:17–3:04:31]** Along with that concern, confusion arose over the issue of a private day care center being operated at the La Cienega Elementary property. **[CD 1, 03/02/09, 2:45:12–2:48:17]** As Board president, Medina wanted to find out more about what was going on. **[CD 1, 03/02/09, 2:48:33–2:49:48]**

Zimmerman's testimony expressed the concerns about Gonzales venture which led to an investigation of the matter. He testified, "I think it's a big conflict of interest for a school board member to make a deal to where she could have little or no rent, have the building fixed up by the school district's money, little kid's money, so she could run a private business. I think it was wrong then, I think it's wrong today." **[CD 1, 03/03/09, 3:44:06– 3:44:42]**

The matter was turned over to the District Attorney's office. While it chose not to pursue any criminal charges, Eight Judicial District Attorney Donald

Gallegos did state that "...Ms. Gonzales' conduct could certainly give one the appearance of impropriety..." **[Def. Ex. TT]** Medina testified at trial that Ms. Gonzales made a statement at a Board meeting that "she forgot to cross a few T's and dot a few I's but things could be fixed." **[CD 1, 03/02/09, 3:04:52–3:06:07]**

Appellees argued that proceeding with a civil action was evidence of bad faith, although the District Attorney did identify issues which he felt were civil in nature, including violations of the anti-donation clause of the New Mexico Constitution and the New Mexico Procurement Code. **[CD 1, 03/02/09, 3:04:52-3:06:07; RP/NG 445, Def. FOF 55; RP/NG 449, Def. COL 18]**

E. Investigation and Report by Attorney Ramon Vigil

Concerns expressed by Board members Zimmerman and Medina led to a thorough investigation conducted by the School District's counsel, Ramon Vigil. **[Pl. Ex. 6; CD 1, 03/02/09, 10:59:19–10:59:51]** Ramon Vigil was not only an experienced attorney, but an individual who also had years of experience as a former educator, school administrator and superintendant. **[CD 1, 03/02/09, 10:52:07–10:53:28]** Mr. Vigil contacted Mr. Medina, the Board President, and began making arrangements to interview numerous individuals. **[Pl. Ex. 7; CD 1, 03/02/09, 10:56:46–10:58:08]** The process involved four days of interviews and an extensive review of claims from both sides. **[Pl. Ex. 7; CD 1, 03/02/09, 10:56:46-10:58:08]**

Ramon Vigil authored an investigatory report in a 16-page report sent to the Board of Education members on August 28, 2010. **[Pl. Ex. 6; RP/A 5-64; CD 1, 03/02/09, 11:00:43–11:02:43]** The report covered six issues including, 1) the Lease between QISD and Artesanos for La Cienega Elementary School, 2) the 2006 Legislative Appropriation for Capital Improvements at La Cienega, 3) the Carinos Day Care Center, 4) the "Incubation" Rental Agreement between Artesanos and Carinos Day Care Center, 5) hiring Ms. Gonzales daughter in law, and 6) Applicable Laws, Regulations and Policies. **[Pl. Ex. 6; RP/A 5-64 ; CD 1, 03/02/09, 11:10:58–11:13:10; CD 1, 03/02/09, 11:13:12–11:14:45]** Ramon Vigil noted that while there was evidence that the State Department of Education (SDE) approved the lease, there was no evidence of approval from the State Board of Finance. He indicated that under NMSA 1978, Section 13-6-2.1 (2003) a lease of property owned by a school district "shall not be valid unless it is approved by the [State Board of Finance]." With no approval, he opined the lease was invalid. **[Pl. Ex. 6; RP/A 5-64]**

Secondly, Ramon Vigil's report stated that even if the lease were found to be valid, Appellees had violated a number of the provisions of the lease including 1) Use of the premises for purposes other than cultural opportunities, 2) Failure to seek prior written consent for different use of premises, 3) Failure to maintain the premises in good repair, 4) Failure to pay for all utilities and services, 4) Failure to

provide the "in-kind" services as required by the lease, and 5) Failure to seek prior written approval of sublease with Carinos. **[Pl. Ex. 7; CD 1, 03/02/09, 11:42:52–11:44:42]** In essence, there was one legal issue with regard to the lease's validity, and many other issues regarding whether the terms of the lease were violated.

F. Correspondence with Artesanos to Renegotiate Lease

Ramon Vigil then contacted with Cynthia Rael-Vigil, the Director of Artesanos on September 5, 2007 to advise that the lease did not comport with state law and there were numerous violations of its terms. **[Pl. Ex. 4; CD 1, 03/02/09, 11:46:41–11:48:32]** The letter also set out certain conditions to renegotiate a new lease. He added that all subleases entered into by Artesanos without Board approval were invalid and directed all sublessess to vacate the premises. Finally, the letter required that Artesanos provide copies of property and liability insurance policies. **[Pl. Ex. 4; CD 1, 03/02/09, 11:46:41–11:48:32]**

In a separate letter on September 5, 2010, Ramon Vigil wrote to Nancy Gonzales in her capacity as owner and operator of Carinos Day Care Center with similar assertions about the lease's validity. **[Pl. Ex. 27; [Pl. Ex. 6; RP/A 5-64; CD 1, 03/02/09, 11:51:52– 11:53:22]** In addition, Ramon Vigil noted the Board never an approved of the sublease between Artesanos and Carinos. **[CD 1, 03/02/09, 11:36:44–11:40:23]** Gonzales was given notice that she needed to vacate the premises. Id. Neither Artesanos nor Gonzales esponded to this correspondence.

Ramon Vigil then sent additional correspondence to Rael-Vigil and Gonzales on September 21, 2007. **[Pl. Ex. 5]** In the letter to Rael-Vigil, Ramon Vigil reminded her of his previous request for copies of insurance policies. **[Pl. Ex. 5; CD 1, 03/02/09, 11:53:45–11:56:39]** An additional letter of September 21, 2007 requests similar insurance information from Ms. Gonzales on behalf of Carinos Day Care Center. **[Pl. Ex. 26]**

Ramon Vigil testified that there was never any insurance policy provided to him in response to his requests. Rather, he received an insurance proposal dated May 16, 2008 from Carinos which did not demonstrate any coverage whatsoever and came months after the request for insurance was made. **[CD 1, 03/02/09, 11:56:53–11:57:33; Pl. Ex. Y]** Finally, on October 18, 2007, Ramon Vigil wrote to Roberto Vigil who was the President of Artesanos de Questa setting forth a deadline of November 1, 2007 and six certain conditions to enter into negotiations on a new lease. **[Pl. Ex. 25; CD 1, 03/02/09, 11:58:54–12:01:53]** Appellees were advised that if they choose not to enter into negotiations with the listed requirements, then the Appellants have authorized court action to enforce an eviction from the premises. **[Pl. Ex. 25; CD 1, 03/02/09, 11:58:54–12:01:53]**

Roberto Vigil and four members of Artesanos responded by saying it had a valid lease agreement. **[Pl. Ex. 24; CD 1, 03/02/09, 11:58:54–12:01:53]** Appellees broadly referenced "labor hours and materials" to satisfy the in-kind

contributions which were not specifically identified in the lease agreement. **[CD 1, 03/02/09, 12:01:53–12:04:31]** They claimed that "the current property insurance and liability meet state requirements", although they still provided no such proof of insurance. **[CD 1, 03/02/09, 12:01:53–12:04:31]** Although Appellees had an "incubation rent agreement," it also said there were no current sub lessees. **[Pl. Ex. 24]** It did not provide bylaws for Artesanos, asserting they "are public information available from the NM PRC." **[Pl. Ex. 24]**

G. Invocation of Right to Terminate Lease Agreement

During the pendency of the litigation, Appellants attempted to exercise a right under the lease with regard to the condition of the property. There is a section of the lease agreement is entitled, "Destruction Or Condemnation of Premises" in which that provision states:

> "If the Premises are partially destroyed in a manner that prevents the conducting of Tenant's use of the Premises in a normal manner, and if the damage is reasonably repaired within sixty days after the occurrence of the destruction, and if the cost of repair is less than $5,000, Landlord shall repair the Premises and lease payments shall abate during the period of the repair. However, if the damage is not repairable within sixty days, or if the cost of repair is $5,000 or more, or if the Landlord is prevented from repairing the damage by forces beyond Landlord's control, or if the property is condemned, this Lease shall terminate upon 20 days written notice of such event or condition by either party."

Three separate assessments of severe damage to the property were made, and Appellant attempted to exercise its basic right to terminate the lease. **[Pl. Ex. 19]**

Concerns over the condition of the building originated with an inspection and subsequent May 5, 2007, letter from Ted Maestas, a senior risk manager with Poms and Associates who provides loss prevention services for the New Mexico Public Schools Insurance Authority for 89 school districts and 70 plus charter schools. **[Pl. Ex. 8; CD 1, 03/02/09, 5:39:44–5:40:13]** Maestas inspected areas from a loss/risk prevention perspective because he was told by his supervisors of concerns that there were children in the building. **[CD 1, 03/02/09, 5:41:37–5:42:09]**

Maestas' May 5, 2007 letter outlined water damaged floor tile, electrical concerns, possible asbestos concerns, ADA compliance issues, mold issues and negative fire marshal reports. **[Pl. Ex. 8; CD 1, 03/02/09, 5:43:36–5:44:23]** Maestas' letter had three attachments including loss prevention, photographs of the building in disrepair and a fire marshal report that sets forth various concerns. **[Pl. Ex. 8; CD 1, 03/02/09, 5:47:44–5:50:30]** Maestas concluded that the Carinos Day Care facility may have some issues with asbestos and fire code violations and constituted a "critical hazard." **[Pl. Ex. 8; CD 1, 03/02/09, 5:47:44–5:50:30]** Maestas made five recommendations and recommended an inspection to get to the bottom of the asbestos issue.

In testimony during trial, Maestas stated the building, in his opinion, was not uninhabitable. It was not a building recommended for occupancy and noted the

liability concerns for QISD. **[CD 1, 03/02/09, 5:50:56–5:53:06]** The testimony was supported by evidence digital photographs taken during his inspection. **[Pl. Ex. 9; CD 1, 03/02/09, 5:55:00-10:30:22]** Maestas felt there were serious health hazards other occupants and that he would recommend that the authority remove coverage from the property. Unless hundreds of thousands of dollars were spent to bring the building into compliance, the building was uninsurable.

On July 8, 2008, QISD superintendent Eric Martinez called Richard Serna, New Mexico Division Manager for Southwest Hazard Control, a company that primarily conducts asbestos abatement, demolition hazards, and material cleanup such as mold. **[CD 1, 03/03/09, 11:18:57–11:20:32; CD 1, 03/03/09, 11:15:07–11:15:30]** Serna then conducted an inspection of the property on July 14, 2007. **[Pl. Ex. 10; CD 1, 03/03/09, 11:21:54–11:24:36]** He noted moderate to significant damages on some of the asbestos containing building material (ACBMS). He recommended a comprehensive asbestos and lead paint inspection be performed in strict compliance with the federal AHERA Act which govern asbestos inspections and sampling targeted public/private schools K-12. **[Pl. Ex. 10; CD 1, 03/03/09, 11:21:54 – 11:24:36]**

Serna provided estimates for repairs needed to be done to wholly or partially to abate the asbestos. The total for such work was $300,000. **[Pl. Ex. 10; CD 1, 03/03/09, 11:36:53–11:39:27]** In trial testimony, Serna emphasized that the law

requires hire contract professionals to remove asbestos as opposed to allow people to do it on their own. **[CD 1, 03/03/09, 11:42:37–11:47:44]** Defendants conducted no cross examination upon Mr. Serna.

A professional asbestos inspection from Cissy Puma of Havona Environmental confirmed Serna's concerns that the facility had some damaged Asbestos Containing Materials (ACM). **[Pl. Ex. 14]** Mr. Maestas made the recommended the building be vacated immediately. **[CD 1, 03/02/09, 5:50:56 – 5:53:06; CD 1, 03/03/09, 10:29:39 – 10:30:22]**

Appellants then formally notified Appellees of the findings and the concerns. **[Pl. Ex. 13]** Artesanos disputed the condition of the building, insisting it had a valid lease and requiring a court order to force it to vacate. It also demanded to be placed in another building. **[Pl. Ex. 15]** Appellants, through Martinez then sent a second letter to Mr. Roberto Vigil of Artesanos on August 25, 2008 stating that property constituted an imminent hazard and asked that the buildings be vacated citing safety concerns. **[Pl. Ex. 16; CD 1, 03/03/09, 10:29:39 – 10:30:22]**

On October 29, 2007, Martinez received a letter from Kevin Balkier, an architect with the firm of Soleil West, who had visited the La Cienega Elementary School building to review ADA compliance, code violations and any health and safety issues. **[Pl. Ex. 18; CD 1, 03/02/09, 4:11:19–4:13:33]** Superintendant

Martinez testified the report was basically an assessment of what it would cost to bring the facility into compliance. **[Pl. Ex. 18; CD 1, 03/02/09, 4:11:19–4:13:33]** The estimate was $615,947. Martinez testified that the estimate from Soleil West validated Mr. Maestas' initial concerns about the building being an imminent hazard. **[Pl. Ex. 18; CD 1, 03/02/09, 4:11:19–4:13:33]**

Based on the estimated costs from Mr. Serna and Soleil West, Appellants were well within their right to cancel the lease agreement under the provision of the lease entitled, "Destruction Or Condemnation of Premises." The Board notified Artesanos' counsel of their decision to terminate the lease on January 29, 2009. **RP/NG 235-277.**

In response, Defendant sought an ex parte temporary restraining order preventing Plaintiff from exercising the right it had in the lease to terminate based on necessary repairs of the property which were well in excess of $5,000. **[RP/NG 235]** The Court issued a temporary restraining order without scheduling a hearing and scheduled a hearing of a preliminary restraining order for the first day of trial. **[RP/NG 278]**

III. Argument

A. <u>The District Court Erred in Finding the Lease Valid Because Section 13-6-2.1 required Pre-Approval of the Lease by the State Board of Finance</u>.

The lease at issue in this matter was signed in June 2000. **[RP/NG 463, ¶ 32]** The term of the lease commenced on June 1, 2000 and terminated on September 30, 2024. **[RP/NG 460, ¶ 17]** During the relevant time period, a state statute was in effect which required that the parties obtain approval of the lease in order for it to be legally valid. There is no dispute that the statute in question was in effect at the time the agreement was signed by the parties. The relevant statute, Section 13-6-2.1, went into effect on June 18, 1989, well over ten years before the lease agreement was executed by the parties.

Specifically, state law required that any lease agreement entered into by a public entity be approved by the State Board of Finance. Section 13-6-2.1, the relevant statute, provided as follows:

> Any sale, trade or *lease* for a period of more than *five years* but less than twenty-five years in duration of real property belonging to any state agency, local public body, *school district*, or state educational institutional or any sale, trade or lease of such real property for a consideration of more than twenty-five thousand dollars but less than one hundred dollars *shall not be valid* unless it is approved prior to its effective date by the state board of finance.

(Emphasis added).

It has been undisputed that approval of the lease by the State Board of Finance was not obtained. **[RP/NG 437, ¶ 16]**[3] Ramon Vigil, an attorney for

[3] See RP/NG 455-56 wherein the Court noted in its "Decision" that it adopted Plaintiff's Findings of Facts Nos. 1, 2, 12, 13, 15, 16, 23, 25, 31, 32, 34, 35, 36, 38, 39, 40 and 41. The

Appellant, conducted an investigation into the validity of the lease. In an August 27, 2007 report, Ramon Vigil concluded that "there was no evidence that the New Mexico State Board of Finance approved the lease pursuant to Section 13-6-2.1 NMSA 1978 which states a lease of property owned by a school district 'shall not be valid unless it is approved by the [State Board of Finance]'." **[RP/NG 437, ¶ 16]**

Appellees only were able to establish that the lease was approved by the New Mexico Public Education Department. **[RP/NG 460, FOF 15, 16; RP/NG 469, COL 4, 5]** § 13-6-2.1. However, the statute does not simply require that the Public Education Department approve leases involving a public school. Thus, Appellees' reliance on the fact that the underlying lease was approved by the Public Education Department has no bearing upon whether the lease was in fact legally valid.

A district court's decision to grant equitable relief, under either the doctrine of estoppel or laches, is reviewed for an abuse of discretion. *See Continental Potash, Inc. v. Freeport-McMoran*, 115 N.M. 690, 858 P.2d 66 (1993) (stating the abuse of discretion standard of review is applied in the context of an estoppel claim); *Village of Wagon Mound v. Mora Trust*, 2003-NMCA-035, 133 N.M. 373,

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Court also adopted Plaintiff's Conclusions of Law Nos. 1 and 3. Plaintiff's Findings of Facts and Conclusions of Law can be found in the Record Proper for the Nancy Gonzales matter (CV-2007-000438) at pages 435-451.

62 P.3d 1255 (noting the same standard of review is applied when the doctrine of laches is at issue). A trial court abuses its discretion when its decision is "clearly untenable or contrary to logic and reason." *Continental Potash,* 115 N.M. at 697, 858 P.2d at 73. Likewise, a trial court abuses its discretion if it "exceeded the bounds of reason, all circumstances before it being considered." *Wagon Mound*, 2003-NMCA-035, ¶ 25 (internal quotation marks and quoted authority omitted).

1. Section 13-6-2.1 is Mandatory and Intended to Protect Public Property.

The language in Section 13-6-2.1, requiring pre-approval of leases entered into by school districts, contains the word "shall" and, therefore, is mandatory. NMSA 1978, Section 12-2A-4(A) (1997), the statute governing statutory construction, states that "'shall' and 'must' express a duty, obligation, requirement or condition precedent." When "shall" is used in a statute, the courts have uniformly held that the language is generally mandatory. *See State ex rel. Deschamps v. Kase*, 114 N.M. 38, 834 P.2d 415 (1992) ("shall" is a mandatory term and for that reason a district court did not have discretion to depart from the mandatory language set forth in the statute at issue); *see also N.M. Dep't of Health v. Compton,* 2000-NMCA-78, ¶ 11, 129 N.M. 474, 10 P.3d 153 (stating that "when

the language of a statute is clear and unambiguous[4], it must be given effect by the courts" and noting that use of the word "shall" imposes a requirement that is mandatory) (footnote added); *Gandy v. Wal-Mart Stores,* 117 N.M. 441, 442, 872 P.2d 859, 860 (1994) (noting that under the rules of statutory construction the words "shall" and "will" are mandatory).

As noted above, during the underlying litigation, Appellant brought to the Court's attention that the lease needed to be approved by the State Board of Finance. Nonetheless, the district court simply ignored the mandatory language contained in Section 13-6-2.1. Because of the mandatory language set forth in Section 13-6-2.1, the trial court did not have discretion to conclude that Section 13-6-2.1 was not binding. State Board of Finance approval was an absolute

[4] To date, there has been no argument presented by Appellees regarding whether the statute is vague or ambiguous. Assuming that Appellees may raise this issue in their Response Brief, Appellant states that any such proposition is without merit.

When the language of a statute is clear and unambiguous, it absolutely must be given effect by the courts. *See V.P. Clarence Co. v. Colgate*, 115 N.M. 471, 473, 853 P.2d 722, 724 (1993). Courts generally look to the plain language of the statute, and give the words set forth therein their ordinary meaning. *See Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Reg. Comm.*, 2010-NMSC-13, ¶ 52, __ N.M. __, 229 P.3d 494, 512. Only in those limited circumstances where ambiguity exists will the courts proceed further by engaging in a statutory construction analysis. *See Marbob Energy Corp. v. N.M. Oil Cons. Comm.*, 2009-NMSC-13, ¶ 9, 146 N.M. 24, 206 P.3d 135.

The language set forth in Section 13-6-2.1 can hardly be considered ambiguous. The requirements pertaining to State Board of Finance approval are clearly delineated therein. There has been no dispute throughout the course of the litigation that the statutory language of Section 13-6-2.1 is plain. The statute should be given effect because the underlying lease involved (1) a term of more than 5 years, (2) the real property of a school district, (3) consideration of more than twenty-five thousand dollars and (4) was not approved prior to its effective date by the State Board of Finance. As such, since the language in Section 13-6-2.1 is plain and unambiguous, it must be given effect and the lease should be deemed legally invalid.

requirement. In the absence of such approval, the lease between Appellant and Appellees was legally invalid and, thereby, unenforceable.

Here, the mandatory requirement at issue could hardly be considered perfunctory and is, by no means, discretionary. In sum, since the language in Section 13-6-2.1 is mandatory, this Court should not entertain Appellee's argument that equitable doctrines, such as estoppel or laches, should require any outcome other than a conclusion that the statute should be enforced, as written, and the lease, which did not comply with the statutory requirements set forth herein, should be rendered legally invalid.

The State Board of Finance was created by an act of the New Mexico Legislature and the board consists of seven members including the governor, lieutenant governor, state treasurer and four members appointed by the governor with the advice and consent of the senate. NMSA 1978, § 6-1-1(A) (1989). The Board of Finance, in addition to other powers and duties provided by law, has general supervision of the affairs of the state, including political subdivisions such as school districts. NMSA 1978, § 6-1-1(E) (1989). In mandating Board of Finance approval of certain sales and leases of publicly-owned property and facilities, the legislature furthered the sound public policy of oversight and accountability over public property. Appellees can provide this Court with no

compelling argument as to why this public policy, and the mandatory language set forth in Section 13-6-2.1, should be ignored.

The state legislature clearly intended to require Board of Finance approval at the time the parties entered into this specific lease agreement. For this reason alone, this Court should reverse the district court's decision wherein the trial judge gave no consideration to the significant public policy considerations involving Section 13-6-2.1.

2. Applicable case law mandates Board of Finance approval to have a valid sale of property

While there is no case law interpreting Section 13-6-2.1, a nearly identical, companion statute pertaining to the sale of property by state agencies or local public bodies, NMSA 1978, Section 13-6-2 (1984, prior to amendments through 2007), has been addressed under very similar circumstances by the New Mexico Court of Appeals in *State of New Mexico ex rel. Madrid v. UU Bar Ranch Ltd. P'ship*, 2005-NMCA-079, 137 N.M. 719, 114 P.3d 399, *cert. denied*, 2005 N.M. LEXIS 286 (N.M. June 6, 2005). The case is dispositive to the issue at hand. *UU Bar Ranch* recognizes the nondiscretionary statutory mandate that the Board of Finance have the final say on whether to approve a real estate transaction, regardless of doctrines of estoppels and laches.

In *UU Bar Ranch*, the plaintiff, New Mexico State Game Commission, sought to quiet title to a 2.6 mile stretch of dirt road ("Road"). The Defendant contended the Road was part of a larger road that the State Highway Department had executed a quitclaim deed and abandoned back in 1985. In quieting title to the Road in Defendant, the district court held that the Road had been abandoned and that waiver, acquiescence, equitable estoppel, and laches precluded Plaintiff form asserting any claim to the road. *Id.* ¶ 9.

The Court of Appeals reversed the district court and held the need for Board of Finance approval was dispositive. It found that the State Highway Department and a private landowner did not have a legally enforceable agreement for abandonment of the Road. *Id.* The Court concluded that Section 13-6-2 contained mandatory language that absolutely required the state to obtain Board of Finance approval in order to have a valid sale of property. The statute in *UU Bar Ranch* provided as follows:

> Any state agency or local public body is empowered to sell or otherwise dispose of real or personal property belonging to the state agency or local public body. No sale or disposition of real or personal property having a current resale value of more than two thousand five hundred dollars ($2,500) *shall* be made by any state agency or local public body unless the sale or disposition has been approved by the state board of finance.

§ 13-6-2 (emphasis added).

While this statute addresses disposition of property by a state agency or local public body, it mirrors the language from the statute at issue in this case, Section 13-6-2.1, in that prior approval by the Board of Finance is required. The Court of Appeals noted that "the lack of Board of Finance approval invalidated the attempted abandonment of the road since the language used in the statute was mandatory." *UU Bar Ranch,* 2005-NMCA-079, ¶ 19. Citing various cases, the Court recognized the importance of legislative intent and reiterated the well established statutory construction rule that the use of the word "shall" imposes a mandatory requirement. *Id.* (citing *Compton*, 2000-NMCA-78, ¶ 11).

Appellees in this case, like the private landowner in *UU Bar Ranch*, cannot persuasively offer any argument as to why the language in the pertinent statute is not mandatory. In light of the precedent set forth in *UU Bar Ranch*, this Court should not deviate from the guiding principles governing statutory interpretation and should, therefore, conclude that Section 13-6-2.1 should be enforced as intended by the state legislature.

B. The Doctrines of Equitable Estoppel and Laches are Inapplicable.

Appellees argue that the Appellant's failure to obtain state approval of the lease requires application of the equitable doctrines of estoppel and laches. At trial, Appellees encouraged the district court, as a matter of equity, to rule in their favor. The district court ultimately agreed concluding that Appellant's Complaint was

barred by the doctrines of estoppel and laches based on the Appellants failure to obtain approval from the State Board of Finance. **[RP/NG 469-470, ¶¶ 8, 9]**

Assuming for purposes of argument only that this Court does not rely on the rules governing statutory interpretation and moves forward with consideration of Appellees' argument pertaining to estoppel and laches, Appellant argues that both equitable doctrines are inapplicable. New Mexico case law and the facts developed in the underlying litigation simply do not support a finding that equitable doctrines should have been applied by the trial court.

1. Equitable Estoppel Generally Will Not Lie Against the State.

Equitable estoppel is generally disfavored against the State. *Waters-Haskins v. N.M. Human Servs. Dep't.*, 2009-NMSC-031, ¶ 16, 146 N.M. 391, 210 P.3d 817; *see also American Legion Post No. 49 v. Hughes*, 120 N.M. 255, 260, 901 P.2d 186, 191 (Ct. App. 1994) ("Estoppel against the state is a distinct legal theory, one that is used sparingly in New Mexico."). Appellees argued in their *Memorandum In Opposition to Summary Disposition* that, in other jurisdictions, equitable estoppel has been applied against school districts, which in other jurisdictions are considered to be akin to municipalities. **[MIO 9-12]** However, in New Mexico, there is no case law that supports that proposition. Rather, applicable case law states that courts in New Mexico "are reluctant to apply equitable estoppel to a *government entity*." *Gallegos v. Pueblo of Tesuque*, 2002-

NMSC-12, ¶ 24, 132 N.M. 207, 216, 46 P.3d 668, 377 (emphasis added); *see also Hanson v. Turney*, 2004-NMCA-69, 136 N.M. 1, 94 P.3d 1.

Although there are no cases which establish, in great detail, the applicability of equitable estoppel in New Mexico against school districts, the courts have suggested that school districts, like the Questa Independent Schools, are, only in the rarest of circumstances, subject to equitable doctrines. *See Gladden Motor Co. v. Eunice School Board*, 2007-NMCA-118, ¶ 11, 142 N.M. 483, 167 P.3d 931 (citing to case law noting what a party must establish in order to assert the equitable estoppel defense against the state). Under *Gladden Motor,* the New Mexico Court of Appeals has clearly indicated it is inclined to apply the same standard pertaining to equitable doctrines when a school district is involved in the underlying litigation. In sum, based upon New Mexico case law, Appellant encourages this Court to follow existing precedent which establishes that New Mexico courts are inclined to only rarely apply equitable estoppel against the State and governmental entities, including school districts.

2. Equitable Estoppel, Waiver and Laches Does Not Apply in Nondiscretionary Matters where the Statutory Language is Mandatory.

In *UU Bar Ranch*, the Defendant unsuccessfully raised a number of arguments based acquiescence, equitable estoppels and laches. These arguments included the Highway Department had not sought Board of Finance approval since

1980, ineffective abandonment of the Road and failure to negate disclaimers of interest from the Game and Fish and the Governor. The Court of Appeals rejected all of these arguments

Similar to the issue posed in this case, the Court of Appeals in *UU Bar Ranch* aptly noted that the doctrine of equitable estoppel cannot be used to circumvent those statutory requirements by relying on ostensible assurances to the contrary by government officials. Here, then-Superintendent Nelson Lopez, even in light of apparent communications with counsel about the need to submit the lease to the Board of Finance, operated under the wrong assumption that submitting the lease to the State Board of Education was sufficient to approve the lease agreement. The failure to submit the lease to the Board of Education merits the same result that the Court of Appeals arrived at in the *UU Bar Ranch* case. Without Board of Finance approval, the lease between these parties cannot be valid.

Moreover, where the act in question is non-discretionary, estoppel cannot be applied. As noted above, Section 13-6-2.1 did not permit any discretion in determining whether or not State Board of Finance approval should be obtained before the lease was entered into between the parties. The statutory language pertaining to board of finance approval was mandatory. The Supreme Court of New Mexico has long held that the doctrine of equitable estoppel is only available

to bar those rights or actions over which an agency has *discretionary* authority. "Estoppel cannot lie against the state when the act sought would be contrary to the requirements expressed by statute." *Rinaldi v. Pub. Emp. Ret. Bd.,* 115 N.M. 650, 658-59, 857 P.2d 761, 769-70 (1993); *see also Hanson,* 2004-NMCA-069, ¶ 19 (reiterating that courts in New Mexico will not allow estoppel as a defense where the act sought would run contrary to the requirements set forth in statute).

Although there are a few cases in which New Mexico courts have allowed equitable estoppel claims to proceed against a governmental entity, those cases did not involve a statute with mandatory language such as Section 13-6-2.1. For example, in *Waters-Haskins*, the New Mexico Supreme Court considered whether equitable estoppel applied to bar a state agency's claim against the recipient of food stamp benefits who had additional benefits erroneously issued to her. The Court determined that federal regulations mandated the collection of overpayments, but that the creation of policies to collect overpayment claims by state agencies was a "discretionary exercise." 2009-NMSC-031, ¶ 20. As a result, the Court held that equitable estoppel could apply to cases involving the over issuance of food stamp benefits. *See id.* ¶ 21.

In the present case, Section 13-6-2.1 does not provide such discretion as to whether the State Board of Finance could decide not to pre-approve the lease. Likewise, such discretion was not afforded to the school district. For the lease

with Artesanos to be valid, Section 13-6-2.1 clearly mandated Board of Finance approval. To hold otherwise would, in effect, give the lease validity and would be "contrary to the requirements expressed by statute." *Rinaldi,* 15 N.M. at 658-59, 857 P.2d at 769-70. Additionally, it would allow the school district to act outside of its authority by entering into a lease without state approval. Likewise, allowing the lease to remain in effect, in contravention to Section 13-6-2.1, would effectively remove State Board of Finance supervisory authority and oversight of the public property owned by Questa Independent Schools. Such action would run contrary to the statutory authority governing the State Board of Finance.

Finally, unless an agency has discretionary authority, there is no need for the courts to engage in a factual analysis or an analysis of the elements of estoppel in order to determine whether estoppel applies. *Waters-Haskins* supports this reasoning, as the Court's analysis initially focused on "the degree to which [the agency was] acting under its own discretionary authority." *Id.* ¶ 17. Only after determining that the case involved the agency's discretionary authority did the New Mexico Supreme Court turn to an analysis of the six basic elements of equitable estoppel. *See id.* ¶¶ 20-22. Because Section 13-6-2.1 imposes mandatory obligations on Appellant, and not discretionary authority, there is no need for this Court to engage in a factual analysis. As such, Appellant respectfully requests that this Court find that the lower court abused its discretion in concluding

that equitable estoppel could lie against Appellant where the act sought (e.g. validating the underlying lease) runs contrary to the requirements of Section 13-6-2.1.

C. Even if the Lease Is Found Valid, Substantial Evidence Did Not Support the Court's Findings that There Were No Lease Violations.

While Appellees claim the lease is valid without State Board of Finance approval, they failed to rebut substantial evidence that they violated terms and conditions of the lease identified through testimony, exhibits and the investigative report by Ramon Vigil. Throughout the trial, Appellees incorrectly argued that the Appellants main case was that the lease was not valid, while minimizing substantial evidence that the lease's terms and conditions were violated. The district court seemed to minimize the violations of the lease agreement in comments and actions before, during and after trial.

Appellees even admit in their own findings of fact they did not comply with the lease while blaming the noncompliance on actions of the defendants. The trial court's ruling ignored substantial evidence of breaches of lease agreement while allowing peculiar, insinuation-driven statements to somehow ignore a number of violations. The lease clearly stated that violation of any of the terms would nullify the lease.

Appellant specifically attacks the Court's adoption of Defendant's Finding of Facts Nos. 27 and 30 as it pertains to the allegation that the requirement for insurance in the rental lease agreement was orally modified in light of provisions that disallowed modifications which were not in writing, evidence submitted over the course of trial, and the fact that the State of New Mexico cannot enter into oral agreements.

The evidence is substantial that insurance was required and that no oral modification of that agreement to disclaim the need for insurance is proper. The district court simply ignored substantial evidence on this and other matters contained in its original complaint that the Appellees were in default of the lease.

If the trial court's decision is based on its conclusions about a party's conduct and intent, implicit in the standard of review is the question of whether the court's findings and decision are supported by substantial evidence. "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960 (internal quotation marks and quoted authority omitted). "Although it is not proper for [the appellate court] to disagree with a finding supported by substantial evidence, [it] can and must determine whether the evidence presented substantially supports a finding which has been properly attacked. Findings not supported by substantial evidence, and which have been

properly attacked, cannot be sustained on appeal, and a judgment dependent thereon must be reversed." *Getz v. Equitable Life Assurance Soc' y*, 90 N.M. 195, 199, 561 P.2d 468, 472 (1977) (internal citations omitted).

1. Appellees Acknowledge They Did Not Possess Insurance for the Property.

There is no dispute about two compelling facts regarding the lease: it required insurance and did not allow any oral modification of its terms. In fact, any such modifications were required to be writing. Appellees testimony was all over the board in terms of whether or not it did have insurance. Nevertheless, Appellees finally took the position in its proposed findings of fact that the written agreement to provide insurance was orally modified and did not provide insurance to the School District.

Appellant specifically attacks the Court's adoption of Defendant's Finding of Facts Nos. 27 and 30 as it pertains to the allegation that the requirement for insurance in the rental lease agreement was orally modified in light of provisions that disallowed modifications which were not in writing, evidence submitted over the course of trial, and the fact that the State of New Mexico cannot enter into oral agreements. "[A]ny enforceable contract with a governmental entity must be in writing." *Hoggard v. City of Carlsbad*, 121 N.M. 166, 170 n.1, 909 P.2d 726, 730 (Ct. App. 1995).

The evidence at trial demonstrates that Appellees initially ignored several requests to produce evidence of insurance. The record demonstrates time and time again, Appellants made the request for insurance and Appellees refused to produce any evidence of insurance. Notably, when the question of insurance for the property was brought to the attention of the Defendants back in the fall of 2007 through the investigation of Ramon Vigil, the Plaintiffs ignored several letters to produce such evidence. Vigil even testified about an insurance proposal that was later offered as evidence with no clear indication that insuance coverage was procured.

Faced with the prospect of litigation, Roberto Vigil wrote a letter to the Questa Board of Education stating, "The current property insurance and liability meet state requirements. We are also under the assumption that district as the owner of the property has insurance as well." **[Pl. Ex. 24]** Roberto Vigil did not say at that time that the lease was modified by anyone to suddenly rescind the requirement to insure the property.

Appellant's original information presented by Ramon Vigil was correct regarding the Appellee's failure to provide insurance on the property. Plaintiff did not have any property and liability insurance. They offered no factual finding that they complied with this provision. Rather, they took the position that Appellants

never asked for proof of insurance in years past, and somehow, that was consistent with a verbal understanding that insurance was not necessary. **RF/NG 425-434.**

Plaintiff did not plead oral modification of the lease as any type of affirmative defense. They did not offer any testimony which would have negated that section of the lease which required any modifications to be included in writing. Rather, the facts were compelling that insurance was required as part of the agreement. As landlords, the issue is equally important because of the liability the school district could face in the event of a claim or lawsuit.

It is illogical that a School District could in good conscience allow a group to run a day care in a school building with asbestos and a number of other problems, yet not require insurance. Appellees is harmful to the children it serves as well as to the taxpayers who fund the building. In essence, Appellees have unilaterally decided it could run a day care without the permission of the landlord, decide it does not have to insure it and, nevertheless, force the School District into a position of liability in the event of a severe personal injury. Such a proposition is untenable and the district court simply ignored the realities and ramifications of the evidence presented on this issue.

2. Appellee's Lack of Consent to Use La Cienega Elementary as a Day Care Center.

Appellants contended at trial that the creation and operation of a day care center violated provisions of the Real Estate Lease because it deviated from the originally planned use of the facility by Artesanos which was to be used "only to provide cultural opportunities for the citizens of Questa." **[CD 1, 03/02/09, 11:36:44 – 11:40:23; CD 1, 03/02/09, 11:44:43 – 11:45:24]** Appellants also argued that the tenants failed to seek consent for a different use of the facility and failed to seek prior written approval of a sublease. Id. Evidence and testimony was presented at trial that these three provisions of the Real Estate Lease were violated. **[RF/NG 435-451]**

The Court adopted Defendant's proposed findings of fact 40 to 50, 54, and 56 which address facts relating to the creation of Carinos and the decision not to prosecute Nancy Gonzales by the District Attorney's office. Appellants specifically challenge whether substantial evidence supported the court's finding that there was no breach of the lease agreement with the operation of day care center.

Appellees argued that the original creation of the daycare as a for-profit operation was a mistake which was corrected. In additional, they maintain the daycare center was operating under the Artesanos umbrella because it was "cultural opportunity" which was not a violation of the provision governing use of the premises.

The parameters of the projected use of the property were first articulated in a letter from Marcus Rael to Nelson Lopez. **[RP/A 5-64; Def. Exh. B]** Both Rael and Lopez admitted during trial that the projected use of the property had more to do with arts and crafts, and there was never any mention of using the property for a day care center. **[CD 1, 03/03/09, 5:51:58-5:53:35, CD 1 & 2, 04/20/09, 11:09:25-11:10:06, 11:24:18-11:24:23]** Obviously, the use of the property for a day care center would have enormous liability concerns for a school district, especially in an older building that was already in questionable condition.

As noted in pages 9 to 13 of Ramon Vigil's investigative report, there had been some discussion about starting a day care center between Mrs. Gonzales and Cynthia Rael-Vigil. **[Pl. Ex. 7; RP/NG 5-64]** Until January 7, 2010, those parties allegedly believed the property could be run as a program of Artesanos under their non-profit status. No evidence was submitted that the Appellants were consulted about the arrangements. Gonzales then met with a certified public accountant to discuss what to do with money collected by the day care. **[RP/NG 5-64]** Gonzales says she was advised her that Artesanos was in debt and decided it was best to run a for-profit day care which she would subsequently say was bad advice. **Id.**

Appellees never called the CPA to testify at trial. It is undisputed that Gonzales never advised the District or the Board that she would operate the day care as a private business. Artesanos and Gonzales as owner/manager/operator for

Carinos entered into an "incubation" rental agreement on March 1, 2007, stating among other things, the Carinos project "falls within our mission project." **[Def. Ex. K; RF/NG 5-64]** The agreement was also amended. Notably, the agreement stated that Carinos would pay $933 per month although Artesanos has charged $3,900 per month for similar space subleased to the U.S. Forest Service under a "reduced rental agreement." **[Def. Ex. K; RP/NG 5-64]**

At the time of this "incubation" rental agreement, it was clearly anticipated by these parties that their agreement would also have to comply with the lease agreement between the District and Artesanos. The lease agreement referenced in the first paragraph the need for a "legal rent agreement shall be drafted by Artesanos attorney" to meet provision of the Artesanso-School District agreement. **[Def. Ex. K; RP/NG 5-64]** Just as Artesanos has sought approval from the School District to sublease to the U.S. Forest Service, it should have done the same to seek approval of the use of the property for a day care center—especially since small children were now part of the equation. Yet, Mr. Ramon Vigil determined that the "incubation" rental agreement was not submitted to the QISD Board for approval as required by the lease between Artesanos and the District. **[CD 1, 03/02/09, 11:36:44 – 11:40:23]**

Mr. Roberto Vigil submitted an amendment to the agreement dated March 30, 2007, stating that Artesanos would reimburse Carinos or the School District for

any expenses toward the improvement of the permanent structure of the building. **[RF/NG 5-64]** So, in two circumstances within the "incubation" rental agreement, there are two references toward notice and approval of the arrangement with the School District.

Cynthia Rael-Vigil said she did not think about getting approval from the QISD Board although Artesanos had sought approval for the U.S. Forest Service lease. **[CD 1, 03/02/09, 11:36:44 – 11:40:23]**

There is no dispute that it did so. No evidence was introduced which demonstrates a termination of the agreement. In his October 30, 2007 letter to the QISD Board of Education, Roberto Vigil stated, "There are currently no sub lessees using La Cienega." **[Pl. Exh. 24]**

All activities housed at La Cienega are projects of Artesanos." **[Pl. Ex. 24]** Yet, in answer to Interrogatory No. 13, which asked Artesanos to identify any sublease issued for space within La Cienega Elementary, Appellees answered

> Artesanos de Questa subleased to the United States Government Forest Service with prior approval from the Questa School Board....Rental agreement misconstrued by Artesanos de Questa and the Carinos Child Development Center misconstrued as a lease. This was done based on the erroneous advice that was given to us by the CPA who was not legally trained. At all time relevant herein, Carinos Child Development Center has been one of the projects of Artesanos and not a private entity.

D. Appellant Can Terminate the Lease based on the "Destruction or Condemnation Clause of Premises" provision.

Appellees had a right to exercise the termination of the lease based on the damage discovered to property by Maestas, Serna and Havana Environmental in the spring and summer of 2008. CD 1, 03/03/09, 3:00:55 – 3:02:41 Damage estimates presented into evidence by Serna, and then by Soleil West demonstrated that the damage exceeded $5,000. **[CD 1, 03/03/09, Tr. 11:36:53 – 11:39:27; CD 1, 03/02/09, 4:11:19 – 4:13:33; CD 1, 03/02/09, 4:17:07 – 4:18:01]**

Appellees did not cross examine Serna at trial. Instead, they argued that the damage was or could have been addressed by them. **[RP/NG 425-534]** In essence, they felt that as tenants, they had the exclusive right to make decisions about necessary repairs to the property while arguing that Appellants had no such right.

Appellees admitted it violated the lease by not making necessary repairs to the property. **[RP/NG 441, Def. FOF 32]** Yet, again, it wants to decide on how to repair the damaged property while not even insuring the property.

While there were other dispute in the litigation, those disputes did not negate the entire lease agreement as well as a termination clause applicable for damages. The District Court's entry of the temporary restraining order and subsequent referral of the issue into the trial on the merits was improper.

Appellees, if they disputed the lease provision which does allow termination, have a right to assert a breach of contract and possess other legal remedies to address their concerns. The District Court's ruling, or non-ruling, on the matter has seemingly taken away this provision from Appellant, thereby allowing a damaged, uninsured piece of public property that poses liability concerns to the School District. Those rights should not be eradicated based on the loose manner in which the District Court determined the issues.

E. The Trial Court Abused Its Discretion by Awarding Attorney Fees.

The district court's award of attorney fees under Rule 11 had no factual or legal basis. Rather, it merely exemplified continued disregard for Appellant's well-reasoned legal position regarding the interpretation of a statute which was supported by the case law and a thorough pre-complaint investigation of facts by legal counsel. The district court's order for attorney fees seemed to have more of an *"I told you so"* element to it rather than articulating any legal standard to justify such an award.

Appellees were awarded attorney fees without citing to any clear legal authority. More importantly, the District Court's ruling is unclear and lacks a legal basis. The failure to articulate a *NARAL* exception is an abuse of discretion. In fact, the district court never states the basis of its ruling. However, the Court

repeatedly suggested that it would find it difficult to set aside the lease. **[CD 2, 11/03/09, 1:56:38-2:02:15]** The Court also found that it saw nothing in the Appellants' pleadings that would declare the lease null and void; but as a court of equity, there were issues of laches, equitable estoppel, and unclean hands on behalf of Appellant. **[CD 2, 11/03/09, 1:56:38-2:02:15]**

New Mexico has adopted the American Rule with reference to attorney fees. The rule being that each side has to pay their fees, absent an express provision. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-28, ¶ 9, 127 N.M. 654, 986 P.2d 450 (reiterating that New Mexico follows the American Rule, that absent statutory, contractual or other legal authority, parties are responsible for their own attorney fees); *see also Montoya v. Villa Linda Mall, Ltd.*, 110 N.M. 128, 129, 793 P.2d 258, 259 (1990) ("New Mexico adheres to the so-called American Rule that, absent statutory or other authority, litigants are responsible for their own attorney's fees"). This Court has allowed attorney fees in certain circumstances; however, those circumstances are limited and narrow. *NARAL*, 1999-NMSC-28, ¶ 15. The Court has divided these exceptions into three categories. *Id.* ¶ 15.[5]

[5] The second exception arises "from certain exercises of a court's equitable powers." *NARAL*, 1999-NMSC-28, ¶ 15. It does not apply because it has only been recognized in litigation involving trust funds and wrongful injunctions. *Id.* ¶¶ 19, 21. The third exception arises "simultaneously from judicial and legislative powers." *Id.*, ¶ 15. It does not apply because it involves litigation concerning divorce and child custody and breach of fiduciary duties. *Id.*, ¶ 24.

The first exception arises "from a court's inherent powers to sanction the bad faith conduct of litigants and attorneys." *Id.* The purpose being to deter the filing of frivolous lawsuits. *Id.* ¶ 18. In this case, the lawsuit was not frivolous, nor was it brought in bad faith. As indicated in trial and by trial exhibits, the preceding attorney, Mr. Ramon Vigil, prepared an investigative report addressing concerns raised by Board members. **[CD 1, 03/02/09, 10:54:59 – 10:56:36, 11:10:58 – 11:13:10]** This report detailed Mr. Vigil's thorough investigation. The report established that Mr. Vigil was of the opinion that the lease was not valid, and that the school district did not seek State Board of Finance approval as was required. **[CD 1, 03/02/09, 11:20:50–11:22:40]** *See UU Bar Ranch*, 2005-NMCA-079, ¶ 27 (holding that the State Highway Department and a private landowner did not have a legally enforceable agreement because the parties failed to obtain State Board of Finance approval of a land conveyance). Based on this report, there were legitimate concerns relating to the lease, and the Board had no other alternative but to file the lawsuit. Absent bad faith conduct on behalf of the Appellant, this exception is not applicable.

In fact, it is difficult to ascertain which exception, if any, is applicable in this case. The only authority that Appellees cite is Rule 1-011 NMRA, and there is no express grant of attorney fees in Rule 1-011 NMRA. However, a court may exercise its discretion and impose sanctions for willful violations of Rule 1-011

NMRA. *See Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 675, 808 P.2d 955, 960 (1991). Appellants did not willfully violate Rule 1-011 NMRA. There were legitimate concerns relating to the lease, and the Appellant lawfully and ethically prosecuted their claims.

The fact that the Court disregarded legal arguments in favor of equitable arguments cannot be understated. It demonstrates that the Appellant's claim had merit and, therefore, Rule 1-011 NMRA has no application. To award attorney fees in light of these facts is an abuse of discretion. The Court should reverse the attorney fee award and follow the American Rule. The Court of Appeals should reject Appellees' argument as there is no precedent authorizing an attorney fee award in this circumstance.

An award of attorney fees is reviewed for an abuse of discretion. *NARAL*, 1999-NMSC-28, ¶ 6. However, even when an appellate court reviews for abuse of discretion, "[the court's] review of the application of the law to the facts is conducted de novo." *Id.* ¶ 7. The court "may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *Id.* (internal quotation marks and quoted authority omitted).

Finally, it should be noted that at one point during trial, Appellant's counsel responded on the record to the District Court judge laughing or smirking at a comment by counsel. **[CD 1, 03/02/09, 4:57:14 – 5:02:13]** This segment of the

proceeding speaks for itself, but is indicative of the manner in which the court approached this case from beginning to end.

In summary, not many cases filed in New Mexico can demonstrate such a thorough factual and legal investigation prior to trial. Not many complaints can demonstrate exhibits attached to support the factual allegations as were contained in the complaint before the District Court. Accordingly, the District Court aptly did not grant Appellees' motion to dismiss filed before trial and their motion for directed verdict filed during trial. **[RP/NG 159-163; CD 1, 03/03/09, 4:16:45 – 4:17:17].**

These rulings, along with the evidence presented at trial do not support an award of attorney fees. Appellants respectfully request the award be reversed.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court to reverse the District Court's judgment in favor of Appellees as well as its award of attorney fees.

Respectfully submitted,

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By _____

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of
the foregoing pleading was mailed
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