IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ICEK BENZ a/k/a IKE BENZ,
and LAUREN BENZ,

Plaintiff,

vs.

Ct. of Appeals No. 31,669
BCDC No. CV-2009-00184

TOWN CENTER LAND, LLC, a New Mexico Limited Liability Company, CENTRAL MILLENIUM PARTNERSHIP, a New Mexico Limited Non-profit corporation, CENTRAL CORRIDOR INVESTORS, LLC, a New Mexico Limited Liability Company, MARTIN D. BLANC and DAVID BLANC,

Defendants.

ICEK BENZ a/k/a IKE BENZ,
and LAUREN BENZ,

Plaintiffs/Appellants,

vs.

Ct. of Appeals No. 32,031
BCDC No. CV-2009-00184

TOWN CENTER LAND, LLC, a New Mexico Limited Liability Company, CENTRAL MILLENIUM PARTNERSHIP, a New Mexico Limited Non-profit corporation, CENTRAL CORRIDOR INVESTORS, LLC, a New Mexico Limited Liability Company, MARTIN D. BLANC and DAVID BLANC,

Defendants/Appellees.

APPELLEES' ANSWER BRIEF

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I. SUMMARY OF PROCEEDINGS

A. Nature Of The Case, Course Of Proceedings And Disposition Below.

Appellants and Appellees are members of Town Center Land, LLC ("Town Center"). Appellants Icek and Lauren Benz brought this action against Appellees seeking dissolution of Town Center Land LLC ("Town Center") and bringing claims for dissolution, accounting and declaratory judgment, against all defendants and fraud and breach of fiduciary duty against David Blanc, Central Millennium and Central Corridor fraud and misrepresentation. (RP 001-0015). Appellees filed a Counterclaim, but abandoned the Counterclaim at trial. (TR-57 to 58.)

B. Course of Proceedings and Disposition in the Court Below

Appellant had advance notice of Appellees' reliance on the release. Twelve days before trial, on February 16, 2011, Appellees filed and served "Defendants' Pretrial Proposed Findings of Fact." (RP 433) Proposed Fact No. 76 stated: "Icek Benz sued David Blanc in relation to BCB demanding his investment be returned with interest. Benz v. Baptist Convention Building et al, No. Civ. 2008-02937, Second Judicial District. Icek Benz signed a **release of 'all claims'** in exchange for payment to settle Benz v. Baptist Convention Building et al." [Emphasis added.]

Twelve days before trial, on February 16, 2011, Appellants filed and served Defendants' Proposed Conclusions of Law. (RP ___) Conclusion No. 48 states: "Plaintiffs previously **released** Defendants from any and all claims known and unknown as of June 16, 2006." [Emphasis added.]

Counsel for Appellant acknowledged that she was not surprised by Exhibit 43. "I would propose that certainly these documents have been known about by all of the parties. It was an actual deposition exhibit." (TR I-14)[1] Counsel for Appellee informed Counsel for Appellant of his intent to add Exhibit 43[2] to Appellees' list of trial witnesses on the weekend before the trial started. (TR I-12)

The District Court held a trial on the merits of this case from February 28, 2011 to March 2, 2011. Counsel for Appellant presented an oral motion in limine on day one of the trial, seeking to exclude Exhibit 43, which was the only pre-marked exhibit that was not stipulated to by the parties. (TR I-10). The Court found that because all parties had the exhibit previously, the Court would not grant the motion in limine. (TR I-15). The Court stated that it would allow Appellant to renew her objection when Exhibit 43 was offered into evidence. (TR I-15-16).

[1] TR-I-14 refers to Trial Transcript, Volume I, page 14.
[2] For consistency with the opening brief, trial exhibits are referred to by trial exhibit number.

Exhibit 36, a May 9, 2006 letter from David Blanc to Appellant, discussed Appellants' complaints concerning their investment in Town Center Land, LLC, among other things. (TR-I-131-133). Exhibit 36 was admitted by stipulation. David Blanc testified at trial that the issue regarding Town Center Land, LLC had become an issue between the members by June 16, 2006, before the date of the release contained in Exhibit 43. (TR-I-133-134)

Exhibit 43 stated: "...Icek Benz, a married man ("Benz") for and on behalf of himself and his heirs, successors and assigns, ... hereby fully releases and discharges ... David W. Blanc ("Blanc") and their predecessors and successors in interest, heirs agents, employees, officers, directors, partners and assigns, (collectively the "released parties") from any and all known and unknown claims and causes of action of every nature, character and description which Benz has or may have against the released parties, including claims arising out of the prior or present construction ...of "Central Market.""

On the first day of trial, before opening statements, and before any witness was sworn, Counsel for Appellee made an oral motion to amend the answer to add the affirmative defense of "release." (TR-I-12.) The Court did not explicitly rule on the motion to amend the answer, but allowed testimony and Exhibit 43 which relate to the defense of release. (TR-I-16, 135)

David Blanc read the language of the release into the record and the Court admitted Exhibit 43over objection of counsel for Appellant. (TR-I-134-135) Appellant admitted that the word "all" in connection with "all claims" in the release meant "everything." (TR-I-149)

Exhibit 17, which was admitted by stipulation, showed that as of May 24, 2005, less than a month before the time of the Release, Appellee had engaged legal counsel in connection with his dealings with Appellants, specifically to obtain his money back from their investment in Town Center Land, LLC. (TR-I-52, 106) Appellant acknowledged that he hired an attorney, David Cohen, in 2006 in part to address questions about Town Center, LLC. (TR-I-166) Exhibit 17, a letter from Appellants' lawyer, David Cohen, to David Blanc, specifically addressed the then pending dispute regarding Town Center Land, LLC, including the specific claim that became the subject of this lawsuit—that David Blanc had failed to make adequate capital contributions, that he failed to account, and that he failed to provide access to corporate books. See ¶ 5 of Exhibit 17.

Moreover, Appellant simply failed to prove critical elements of each of their causes of action. Therefore the judgment should be affirmed.

II. ARGUMENT

A. SUBSTANTIAL EVIDENCE SUPPORTED THE FINDING THAT THE RELEASE APPLIED TO THE TOWN CENTER TRANSACTION.

Appellants argue that substantial evidence did not support the Court's finding that the release applied to the Town Center transaction. Courts apply the following standards to substantial evidence challenges: (1) substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) on appeal all disputed facts are resolved in favor of the successful party, with all reasonable inferences indulged in support of a verdict, and all evidence and inferences to the contrary disregarded; and (3) although contrary evidence is presented which may have supported a different verdict, the appellate court will not weigh the evidence or foreclose a finding of substantial evidence. Toltec International, Inc. v. Village of Ruidoso, 95 N.M. 82, 84, 619 P.2d 186, 188 (N.M. 1980). Thus, Appellant bears a heavy burden.

Because settlements conserve judicial resources, and prevent re-litigation of resolved disputes, New Mexico courts have a strong interest in enforcing settlement agreements and releases unless they violate public policy. Berlingieri v. Running Elk Corp., 134 N.M. 341, 347, 76 P.2d 1098, 1104 (N.M. 2003). A

release is presumed to create an accord and satisfaction. Vidal v. American General Companies, 109 N.M. 320, 324, 785 P.2d 231, 234 (N.M. 1990).

1. There Was Substantial Evidence that the Release Applied to the Town Center Dispute

There is substantial evidence that the release at issue applied to the dispute in this case. Exhibit 17, the 2006 letter from Benz's attorney, David Cohen, which was followed closely by the release, expressly discusses the Town Center transaction and describes exactly the central disputes at issue in this case—whether Blanc adequately contributed capital to the LLC. Appellants' description of the letter in their Brief in Chief unfairly minimizes the last two full paragraphs of the Cohen letter, which begin with "With respect to the Town Center Land...." (see Exhibit 17). Clearly, the Town Center dispute was at issue shortly before the release was executed by Appellant. Moreover, the letter refers to David Blanc as shorthand for the entities of which he is the managing member.

Appellants accurately state that the release referred to "the Project," which was defined as the Central Market Project. However, the release applied not only to "the Project" but *also* to "any and all known and unknown claims and causes of action of every nature, character and description which Benz may have against the released parties, including...[the Central Market Project]." This expansive and general language is substantial evidence that the parties intended to include all

disputes known and unknown, including the Town Center dispute which was already at issue.

Additionally, Appellant points to prior deposition testimony of Mr. Blanc that he believed the release applied to Central Market. Brief in Chief at 13. However, that testimony did not exclude application to other disputes, including Town Center. Mr. Blanc was not asked in his deposition whether the release applied to other disputes.

At trial, David Blanc testified that the release included the Central Market dispute "among other things." Brief in Chief at 14. Mr. Blanc testified at trial that the dispute regarding Town Center Land, LLC *had* become an issue between the members by June 16, 2006, before the date of the release which was admitted as Exhibit 43. (TR-I-133-134). Finally, as Appellant points out, Blanc testified that he believed the release "had to do with everything" (TR 1-228, cited at Brief in Chief p. 13.) Even Appellant Mr. Benz admitted that the word "all" in connection with "all claims" in the release meant "everything." (TR-I-149). This understanding is consistent with the expansive language of the release and is substantial evidence that the release covered all disputes among the parties.

Appellants' argument that the defense and settlement of the Baptist Convention Center lawsuit (this was the second of three disputes between the

Appellants and Appellees) did not raise the release as a defense is inapposite. This fact has no relevance to the case at issue here. Substantial evidence supported the Trial Court's findings regarding the release.

2. Extrinsic Evidence Regarding the Release Was Allowed Despite the Lack of Ambiguity

Appellant argues that a person without legal training should be allowed to testify as to the meaning of a release. This argument ignores the fact that Appellant was represented by counsel (Mr. Cohen) at the time of the writing of the release and that Mr. Benz *was* allowed to testify to his understanding of the release. The letter from Mr. Cohen to Appellees (Trial Exhibit 17) was dated several weeks before the release (Exhibt 43). Thus, clearly Benz had representation. Moreover, Mr. Benz was a "sophisticated businessman" (TR-II-75) who had been involved in several real estate investments before. (TR-II-76-81)

Mr. Benz was permitted to testify to his understanding that the release applied only to the Central Market project despite the use of the words "all." (TR-II-149) Thus, Appellants' argument that they were unfairly denied the opportunity to use parol evidence fails, because Appellants were permitted to introduce this parol evidence of Mr. Benz's understanding which varied wildly from the words on the paper. Clearly the Trial Court was unconvinced by Benz's oral testimony which contradicted the words of the release.

B. SUBSTANTIAL EVIDENCE SUPPORTED THE FINDING THAT THE RELEASE APPLIED TO ALL DEFENDANTS

Appellant argues that substantial evidence did not support applying the release to all defendants in the case.

1. Appellant Failed to Preserve the Issue of the Scope of the Release

This argument was not preserved in the record. The issue regarding whether Lauren Benz was a party to the release was not raised until the filing of the Brief in Chief in this appeal. The issue of whether the corporate entities were released when Mr. Blanc was released was not raised until after trial, in Appellants' "Proposed Supplemental Findings of Fact and Conclusions of Law, fact No. 116." At the time this document was filed, it was too late to admit additional evidence. To preserve an error, the trail court must be alerted to it at a time when correction is possible. Allsup's Convenience Stores, Inc. v. North River Insurance Co., 127 N.M. 1, 976 P.2d 1, ¶22. (1998). In order to preserve an issue for appeal, it is essential that a party make a timely objection that specifically apprises the trial court of the claimed error and invokes an intelligent ruling thereon. State v. Janzen, 142 N.M. 638, 641, 168 P.3d 768, 771 (N.M. 2007). In trial court, parties must assert a legal principle upon which claims raised on appeal are based, and must also develop facts, primarily for two reasons: (1) to alert trial court to claim of error so that it has opportunity to correct any mistake, and (2) to give opposing

party fair opportunity to respond and show why the court should rule against objector. Id. See also NMRA, Rule 12-216(A).

In this case, raising the arguments regarding the identity of the released parties in post-trial briefing is not sufficiently timely to give the court the opportunity to correct the alleged error and is too late for the opposing party to have a fair opportunity to respond. This Court addressed an identical preservation issue in Gutierrez v. City of Albuquerque, 121 N.M. 172, 909 P.2d 732 (N.M. App., 1995) (reversed on other grounds), and held that the Defendant had failed to preserve arguments related to the applicability of a release where the issue was not raised until the post-trial requested findings of fact and conclusions of law. Id. at 174, 734. Similarly, despite having notice of the release issue from the Appellees' pretrial findings of fact and conclusions of law, and despite having used the release as an exhibit to Appellants' deposition, Appellant made no argument regarding the scope of the release until after the trial concluded. Therefore, the issue was not preserved.

2. The Release Did Include All Defendants In this Action

Even if the alleged error regarding the scope of the release had been preserved, the facts and applicable law show that the release did apply to the

corporate defendants, Town Center Land, LLC, Central Mellinium Partnership, Inc., a non-profit corporation, and Central Corridor Investors, LLC.

Appellants conceded that the lawsuit did not bring any claims against defendant Martin D. Blanc, and that he was named as a defendant only because of his interest in the LLC. See Trial Court's Findings and Conclusions, footnote 1, which was not appealed from. Counsel for Appellant made it clear at the beginning of the trial that Appellant sought no relief from Martin Blanc, who is the father of David Blanc and who contributed significant cash and loans to the purchase of the land at issue. (TR-I-8). Thus, it does not matter whether Martin Blanc was released.

All other defendants were released. As Appellant points out, the definition of the released parties in the release was quite broad: "Central Market, Ltd., David W. Blanc and their predecessors, and successors in interest, heirs, agents, employees, officers, directors and assigns (collectively 'the released parties')." The record shows that David Blanc is the managing member of the two entities, Central Corridor Investors and Central Millenium Partnership, which are, in turn, the managing members of Town Center, LLC. (TR-I-31). Mr. Blanc is a director of Central Millennium Partnership. (TR-I-34). Mr. Blanc is a 95 percent shareholder of Central Corridor Investors and is a director of the non-profit

corporation. (TR-I-34). Blanc and his wife are the sole shareholders in Central Market, Ltd. (TR-I-33). Thus, Blanc is clearly an owner or employee of each of the corporate entities.

3. The Release of Blanc Operated as a Release of Corporate Defendants

Under both agent-principal and master-servant concepts, any release of Blanc would also apply to the corporations in which he was involved. Appellant cites Harrison v. Lucero, 86 N.M. 581, 525 P.2d 941 (Ct.App. 1974). In that case, the plaintiff was injured by defendant's agent. Plaintiff settled with and released the agent, and the defendant, as principal, raised the agent's release as a defense to vicarious liability. The case established that under the doctrine of respondeat superior, liability of master is derivative and secondary and, absent any delict of the master other than through the servant, the exoneration of the servant removes the foundation on which to impute negligence to the master. *Id.* at 584. Additionally,

> "In regard to a release of the servant as releasing the master, it has been said that the same rule should apply when the question of a servant's liability is finally determined by a release as when it is determined by a verdict. One view expressed is that because the basis of liability on the theory of respondeat superior is that the master is liable only for the act of his servant, and not for anything he himself did, therefore, when the servant is not liable, the master for whom he was acting at the time should not be liable." 53 Am.Jur.2d *Master and Servant* § 408 (1970). Id.

Because the liability of Town Center Land, Central Corridor Investors and Central Milleneum Partnership must be based on the acts of its agents, the release of its agent (David Blanc) operated to release Central Corridor Investors and Central Mellenium Partnership under the doctrine of respondeat superior and its corollaries as described above. See also Valdez v. R-Way, LLC, 148 N.M. 477, 237 P.3d 1289, 2010-NMCA-068 (N.M.App. 2010) (release of the employee releases the claims of the employer.).

David Blanc was the Managing Member of Central Corridor Investors and was a director of Central Millennium Partnership and, indirectly, manager of Town Center Land. Thus, he was the servant of both, especially in connection with the dispute that Mr. Cohen's letter raised regarding the Town Center transaction. As such, the release of Mr. Blanc operated to release Central Millennium Partnership, Inc. and Central Corridor Investors LLC and Town Center Land. Moreover the Cohen letter uses Mr. Blanc's name as a shorthand for Central Corridor Investors, LLC and Central Millennium Partnership.

4. Lauren Benz Was A Relesor

Even if Appellant had preserved the issue of whether Lauren Benz was a party to the release, the release by Icek Benz, identified in the release as "a married man," operated to release any claims of his wife, Lauren Benz. A husband and a wife

each have complete authority to sue for and release claims belonging to the marital community. Amador v. Lara, 93 N.M. 571, 603 P.2d 310 (1979). Moreover, Lauren Benz, as the lawful spouse of Icek Benz, is an "heir" of Mr. Benz.

The Amador opinion found that the release of the husband did not release claims of the wife, with no explanation, and in a single sentence. However, the facts make it clear that the wife sustained physical, personal injuries of her own in the case. In this case, Ms. Benz's alleged injuries were part of the same injury suffered by her husband. She did not suffer separate or distinct alleged injuries and there was no evidence to this effect.

C. THE LANGUAGE OF THE RELEASE WAS NOT AMBIGUOUS AND PAROL EVIDENCE WAS NOT WARRANTED

Appellants concede that the release was not ambiguous. (Brief in Chief at page 18.) Their argument is that the Court improperly interpreted the release's plain language. Id. However, Appellant argues that extrinsic evidence should have been allowed, despite the release's non-ambiguity.

In fact, extrinsic evidence was admitted to explain the parties' intent. Appellant points out that Mr. Benz was permitted to testify to his understanding that the release applied only to the Central Market project despite the use of the words "any." Thus, Appellants' argument that they were unfairly denied the opportunity to use parol evidence fails because Appellants were permitted to

introduce this parol evidence of Mr. Benz's understanding which varied wildly from the words on the paper.

There was unrebutted extrinsic evidence that the release was intended by the parties to apply to the parties who owned Town Center Land, as well as Central Market. The Cohen letter makes it clear that the settlement negotiations that preceded the release explicitly encompassed the Town Center dispute. "I have been retained by Mr. Icek Benz...to terminate his business relationship with you in the Town Center Land, LLC.... Mr. Benz desires an amicable and prompt resolution of these matters but is prepared to resolve these matters through litigation if necessary." (Exhibit 17, ¶1).

The Court did allow impeachment testimony by Mr. Blanc, over the objection of Blanc's attorney, relating to the circumstances of the release. TR-I-225-228. The court allowed Mr. Benz to testify at length as to his understanding of the release and about the failure by Baptist Convention to raise the release as a defense in the earlier lawsuit. TR-II-54-57.

Appellant argues that the fact that Blanc failed to raise the release as an affirmative defense in the Baptist Convention case should have been admitted. In fact, this evidence was admitted over objection of Blanc's counsel. (TR-I-227). Blanc testified that he did not know whether the defense of release was pled. Id.

Extrinsic evidence may be used to show that a contract is ambiguous, or to explain an ambiguous term. However, where a contract is unambiguous, extrinsic evidence has no role. Montoya v. Villa Linda Mall, Ltd., 110 N.M. 128, 129, 793 P.2d 258, 259 (1990) ("It is black letter law that, absent an ambiguity, a court is bound to interpret and enforce a contract's clear language and cannot create a new agreement for the parties."). Appellant concedes that the release is unambiguous. "[I]n examining extrinsic evidence we will not give effect to a party's undisclosed intentions. 'As a matter of law, one party's subjective impressions, innermost thoughts, or private intentions, do not create an ambiguity.' Ponder v. State Farm, 2000-NMSC-033, ¶ 13, 129 N.M. 696, 12 P.3d 960, citing Hoggard v. Carlsbad, 1996-NMCA-003, ¶ 15, 121 N.M. 166, 909 P.2d 726. Additional evidence as to what the parties silent expectations were would not be relevant.

D. APPELLANTS HAD ADEQUATE NOTICE OF APPELLEES' INTENT TO RELY ON THE RELEASE

Appellants argue at Section II.A. of their Brief in Chief that the court erred in admitting the release because it was first disclosed the weekend before trial. This is not true. In fact, the release was produced by Appellant at his deposition taken on July 17, 2009. Appellees specifically described the release in their pre-trial proposed findings of fact on February 16, 2011. Appellees relied on the

defense of release in their pre-trial proposed conclusions of law filed on February 16, 2011, twelve days before trial began.

E. THE PLEADINGS WERE PROPERLY AMENDED TO ADD THE DEFENSE OF RELEASE

It is axiomatic that under Rule 1-015, amendments to pleadings should be freely granted in the absence of unfair prejudice to the other party. See, e.g. Schmitz v. Smentowski, 109 N.M. 386, 390, 785 P.2d 726, 730 (N.M. 1990) (court should allow amendments freely as justice requires). "There is no question that amendment of the pleadings at trial may be allowed at trial." Running Bear Rescue, Inc., v. City of Las Vegas, Memorandum Opinion, NMCA No. 30,687 (July 2, 2012), citing Bombach v. Battershell, 105 N.M. 625, 626, 735 P.2d 1131, 1132 (1987).

NMRA 1-015(B) states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as having been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. **If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice** him in maintaining his action or defense upon the

> merits. The Court may grant a continuance to enable the objecting party to meet such evidence. [Emphasis added.]

Rule 1-015(A) is clear that amendments to pleadings are favored and should be liberally permitted as justice requires.

Thus the law is clear that a party may raise issues not stated in a pleading by requesting that the pleadings be amended to conform to the evidence of an affirmative defense presented at trial. Posey v. Dove, 57 N.M. 200, 208-209, 257 P.2d 541, 546 (1953) (addition of affirmative defense is warranted when opposing party did not object); Western Farm Bureau Insurance Co. v. Lee, 63 N.M. 59, 62, 312 P.2d 1068, 1070 (1957) (trial testimony supported post trial motion to amend pleadings to raise defense of waiver); Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962) (affirmative defense of limitations may be raised upon a motion to amend the answer at trial)[3].

In this case, Appellees did affirmatively request to amend the pleadings. Although the trial court did not expressly grant the motion, the court allowed the evidence relating to the release and based its judgment on the amended defense. Thus, the motion to amend was essentially and impliedly granted.

[3] Even though the trial court did not explicitly rule on the Motion to Amend the Answer in this case, a formal motion and ruling are not necessary to allow the Court to consider the additional affirmative defense. See Apodaca v. Unknown Heirs of Owners, 98 N.M. 620, 623, 651 P.2d 1264, 1267 (1982).

F. APPELLANT WAS NOT PREJUDICED UNFAIRLY BY THE EVIDENCE OF RELEASE

NMRA 1-015(B) explicitly states that an objecting party must show he or she was prejudiced by the amendment in order to justify denying the amendment and the evidence supporting it. In the absence of surprise or prejudice, the failure to allege an affirmative defense in the answer may not constitute waiver of the defense. Elec. Supply Co. v. United States Fidelity and Guaranty Co., 79 N.M. 722, 725, 449 P.2d 324, 327 (1969). In this case, the Appellant was not surprised, as the release had been described in the pre-trial findings of fact and the pre- trial conclusions of law filed by Appellees. The trial court noted the absence of surprise (the release had been a deposition exhibit) and gave Appellant the opportunity to present evidence to rebut the release.

Appellant made no argument at trial and makes no argument in its Brief in Chief that it was prejudiced by the manner in which the defense of release was raised. Thus, Appellants' objection is without merit. See Lovato v. Crawford & Co., 2003-NMCA-88, ¶ 6, 134 N.M. 108, 73 P.3d 246 ("Amendments should be denied only where the motion is unduly delayed or where the amendment would unduly prejudice the non-movant.")

The test of prejudice is whether the party had a fair opportunity to defend and whether it could offer additional evidence on the new theory. Schmitz v.

Smentowski, 109 N.M. 386, 391, 785 P.2d 726, 731 (1990). Here, Appellant could not have offered and did not offer additional evidence on the new defense theory: Appellant did not argue that the release was not genuine. Appellant *did* have the opportunity to argue that the release was not intended to apply to this dispute, but those arguments were rejected by the trial court. The fact that Appellant was able to argue that the release did not apply, and did not request a continuance under Rule 15(B) to support such an argument, shows that Appellant was not prejudiced.

G. THE DISTRICT COURT DID NOT ERR IN FAILING TO ORDER A DISSOLUTION

Appellants make a substantial evidence attack on the District Court's conclusions H and I that dissolution was not in order. Appellants had the burden to prove the elements of a dissolution and failed to do so.

Appellants argue that the mere fact that there is a 50 – 50 split in voting rights between the parties means that the company is deadlocked, and it must be dissolved. Appellant points to no law to support this conclusion. Such a conclusion would be absurd. If it were the law that any company with 50-50 ownership is "hopelessly deadlocked" and deserves dissolution, then thousands of small corporations and companies would be automatically subject to dissolution. There are alternative strategies for the frustrated 50 percent owner under the Town

Center Operating Agreement at issue in this case, including buying out the other owners or selling shares to a third party. See Operating Agreement (Exhibit 19). For a discussion of the prevalence of 50-50 companies, and non-dissolution strategies for exit, see e.g. Using Corporations Code § 2000 to Resolve 50-50 Shareholder Deadlocks in Privately Held Corporations , 27 *California Business Law Reporter* 5 (March 2006) reprinted with permission at http://www.sflaw.com/PDFs/AShartsis-California-Business-Law-Reporter-Mar-2006.pdf.

Dissolution of an LLC under New Mexico law is appropriate only where it has become not reasonably practicable for the company to carry on its business in conformity with its articles of organization or operating agreement. NMSA 1978 §53-19-40. No New Mexico cases illuminate this standard. However, cases from Delaware and New York are instructive because their dissolution statutes are similar. See: e.g 6 Del.C.§18-802. As the "fountainhead of American corporations," Delaware is considered by New Mexico courts to be "expert" in the law relating to business entities. McMinn v. MBF Operating Acquisition Corp., 2007-NMSC-040, ¶ 42,142 N.M. 160, 164 P.3d 41 (2007). In Fisk Ventures, LLC v. Segal, 2009 WL 73957*4 (Del. Ch. 2009) the court held that the following factual circumstances might support dissolution if proved: 1) the members vote is

deadlocked at the Board level; 2) the operating agreement gives no means of navigating around the deadlock; and 3) due to the financial condition of the company there is effectively no business to operate. Given its extreme nature, judicial dissolution is a limited remedy that courts grant sparingly. In re Arrow Investment Advisors, LLC, 2009 WL 1101682 *2 (Del.Ch. 2009). The standard for dissolution of an LLC is higher than that of a corporation. In the Matter of 1545 Ocean Ave., LLC, 72 A.D.3d 121, 893 N.Y.S.2d 590 (2010); Widewaters Herkimer Co. v. Aiello, 28 A.D.3d 1107, 1108 (2006) (defendants did not plead the requisite grounds for dissolution of an LLC by pleading "oppressive conduct."); Matter of Horning v. Horning Constr. LLC, 12 Misc.3d 402, 413, 816 N.Y.S.2d 877 (N.Y. Sup. Ct., 2006) (standard for dissolution of LLC is more stringent than standard for partnerships or corporations.)

Applying these standards to this case, the record is clear that Appellants failed to meet their burden of proof for dissolution.

The business of Town Center Land is "the acquisition, ownership, development, operation, leasing, holding for investment and disposition of real estate..." (Articles of Incorporation, Trial Exhibit 9) It is undisputed that the LLC acquired and owns the land at issue. (Trial Exhibit 20) The property is clearly being offered for sale by the LLC, as it has been listed in the Board of Realtors

multiple listing service. (TR-I-109). The LLC sends tax reporting documents to the investors each year showing gains and losses. (TR-II-110). The LLC has expended significant amounts of money to begin the development and planning process for the land. (TR-II-147-149). Thus, there is significantly more than "substantial evidence" that the LLC is able "to carry on its business in conformity with its articles of organization." NMSA §53-19-40. David Blanc testified unequivocally that the LLC is able to carry out the functions listed in the Articles of Organization despite the dispute among the members. (TR-II-162-163; TR-I-68). Appellant offered no proof to dispute this testimony.

It is not clear that under NMSA §53-19-40, the mere existence of a deadlock alone is enough to justify dissolution. Nevertheless, there is more than "substantial evidence" that no deadlock exists. Appellants never called for a vote of the members to remove the managers. (TR-II-131.) Appellants never took advantage of their right to audit the books of the LLC. (TR-II-134.) The Operating Agreement provides that a member may exit the LLC by having the property appraised and selling his interest to a third party or the other members at the price set by an appraiser. (Operating Agreement, Art. 7, Trial Exhibit 19) Appellant requested that the LLC engage an appraiser, but Appellant never signed the proffered engagement letter to begin the appraisal, and never sent the check to pay

for the appraisal as required by the Operating Agreement. (TR-II-144.) Thus, Appellants chose not to use the contractual method for exit.

None of the contractual events of dissolution, listed in Article 8 of the Operating Agreement (Trial Exhibit 19) have occurred and Appellants offered no proof to the contrary. (TR-II-161- 163). In fact, Appellants' brief in chief contains no reference to any testimony or exhibits showing that the company is "dysfunctional."

H. THERE WAS SUBTANTIAL EVIDENCE OF A WRITTEN MEMORIAL OF THE PARTIES' CONTRIBUTIONS

Appellants make a substantial evidence attack on the Trial Court's finding No. 16 that there is no clear written memorial of the parties' agreement regarding whether work by David Blanc could constitute contribution. First, it is not clear how the absence of this finding, or a different finding, would have changed the outcome of this case. Nevertheless, there was, in fact, more than substantial evidence that the parties agreed and knew that Blanc's contribution would be primarily in the form of work.

Appellant admitted that David Blanc's work in connection with acquiring and marketing the land was to equalize Appellants' cash investment. (TR-II-137.) Appellants did no work. (TR-II-138.) The evidence is clear that Blanc performed

many dozens of hours of work to acquire and prepare the land, which constituted part of his contribution to the LLC. See, e.g. (TR-II-152-154.)

The New Mexico Limited Liability Company Act provides specifically that non-cash contributions may be used as capital contributions. See, e.g. NMSA §53-19-20(A) "A membership interest in a limited liability company may be issued in exchange for a contribution of cash or property received by the limited liability company or **services rendered to the limited liability company** . . ." [Emphasis added.]

Schedule 1 to the Operating Agreement (Trial Exhibit 19) clearly states that "Cash and services" would constitute contributions for Central Millennium Partnership and Central Corridor Investors, LLC. Article 2 of the Operating Agreement clearly provided that Schedule 1 would show the capital contributions. While the exact value of the services was not established at the beginning, there can be no doubt that Mr. Benz agreed that services could be considered valuable contributions to the LLC.

Central to Appellants' case theory is the assumption that David Blanc agreed to contribute additional cash to the LLC in addition to the work he contributed through his companies. Trial Exhibit 4, the October 10, 2002 "Sources and Uses" summary, shows clearly that the parties did not intend any additional cash

contributions by Mr. Blanc or his companies. (TR-I-156-157) This document was sent twelve days before the Operating Agreement was executed. The Trial Court properly concluded that there was no clear agreement that David Blanc or his companies would contribute additional cash to the LLC. Mr. Benz's testimony to the contrary is simply inconsistent and entirely contrary to the documents surrounding the transactions.

Appellants contend that David Blanc's testimony and one sentence in Exhibit 36 is the only evidence which supports the contention that Appellees could contribute services for capital. (Brief in Chief at 28.) In fact, there is much more evidence as shown above. Nevertheless, simply put, given the substantial evidence standard articulated above, and giving the trial court proper deference to weigh facts, that's enough.

I. THE TRIAL COURT PROPERLY AWARDED ATTORNEY'S FEES

Appellants' argument regarding attorneys' fees relies entirely on the potential that the trial court is reversed, and at re-trial, Appellant is either the prevailing party or there is no prevailing party. Appellant makes no argument regarding the amount of fees or whether they were properly apportioned pursuant to the Operating Agreement. Because the possibility of Appellant becoming the

prevailing party, or there being no prevailing party, is remote, there is no factual grounds to attack the Trial Court's award of fees.

J. EVEN IF THE RELEASE WERE NOT DISPOSITIVE, APPELLANTS FAILED TO MEET THEIR BURDEN OF PROOF

NMRA §12-201(C) provides that a party may show that even if there are valid grounds for an appeal that there are other independent reasons why the trial court should be sustained. In this case, even if the release were not dispositive, Appellants failed to introduce evidence to support critical elements of their causes of action, and on that additional ground the judgment should be sustained. Moreover, Appellants claims were

1. Appellants Failed to Prove the Elements of Dissolution

As shown above, Appellants failed to prove the necessary elements of dissolution. Therefore, even absent a release, the judgment should be sustained on the cause of action for dissolution.

2. Appellants Failed to Prove Entitlement to an Accounting

Even if the claim for accounting had not been released, the uncontroverted facts at trial showed that 1) Appellant was given the opportunity to conduct an independent accounting and abandoned the effort, and 2) Town Center properly responded to Appellants' request for accounting. Appellant put on no evidence of a failure to

respond to a request to account. To the contrary, the trial exhibits contain several annual accounting reports.

3. Appellants Failed to Establish a Breach of Fiduciary Duty.

The Fiduciary Duty claim applies only to David Blanc. Thus, even if the Court were to hold that the release applied only to David Blanc, the release would dispose of the Fiduciary Duty issue. However, there was no evidence at trial that Blanc breached his fiduciary duty.

4. Appellants Failed to Establish the Grounds for a Declaratory Judgment to Reapportion the Membership Interests.

Even if the release did not dispose of the Appellants' Declaratory Judgment request for a reapportionment of membership interests, Appellants failed to place in evidence any testimony or exhibits that would show a failure by the members to contribute to the LLC. The evidence was clear that Blanc contributed all of the work to prepare the Town Center property for development. Appellant failed to prove that the parties had agreed that Blanc would contribute additional cash. In fact, Benz admitted that the documents by which the corporation was formed were contrary to any intent by Blanc to contribute additional cash. The corporate documents clearly provide that Blanc's contributions could be in the form of cash and services. Courts may not rewrite obligations that the parties have freely bargained for themselves in the absence of fraud, unconscionability, or other

grossly inequitable conduct. United Properties Ltd. Co. v. Walgreen Properties, Inc, 2003-NMCA-140, ¶ 10, 134 N.M. 725, 82 P.3d 535.

5. Appellants Failed to Prove the Elements of Fraud or Misrepresentation.

The specifically named target of the Fraud and Misrepresentation claim was David Blanc, so even if the release did not include the other defendants, the Fraud claim would only apply to David Blanc. However, Appellants failed to prove the elements of fraud by clear and convincing evidence. The elements of a fraud claim are that the defendant made an untrue statement, which he knew was untrue, which he intended the Plaintiff to rely on, and on which the Plaintiff did rely reasonably, and that the Plaintiff suffered damages as a result of the fraud. Cain v. Champion Window Co. of Albuquerque, 2007-NMCA-85, ¶ 22, 142 N.M. 209, 164 P.3d 90. Appellant failed to prove any false statement by Mr. Blanc. Moreover, there was no evidence that Mr. Benz "reasonably" relied on such a false statement. To the contrary, the written documents indicated clearly that Mr. Blanc was contributing labor and would make no further contributions of cash. Mr. Benz is a sophisticated real estate investor. (TR-II-75-77.) Mr. Benz understood that David Blanc did not have additional cash to invest in Town Center. Mr. Benz understood from the beginning that he was investing most of the money and that others were investing something other than money. (TR-II-93.) Mr. Blanc never promised to invest

additional cash in writing. (TR-II-94.) Mr. Benz was aware of the substantial work Mr. Blanc invested in developing the property as far back as 2007, from Mr. Blanc's letters. (TR-II-96.) Mr. Benz acknowledged that Mr. Blanc's request for reimbursement of funds spent on Town Center development costs was inconsistent with an alleged oral promise to invest more cash. (TR-II-97.) Therefore, the Appellant failed to prove the elements of fraud and there are independent grounds to uphold the district court's judgment.

6. Appellants' Claims Were Barred by the Statute of Limitations.

The statute of limitations for non-contract claims, including dissolution, accounting and breach of fiduciary duty is three years. NMSA §37-1-8. The limitation for fraud is four years. NMSA §37-1-4. The period of limitations begins to run when the Plaintiff learns of the fraud or should have learned by reasonable diligence.

In this case, Appellant became aware that Appellees were not going to contribute additional cash to the LLC, which was inconsistent with the alleged oral representation that additional cash would be contributed. (TR-II-97-98.) This action was filed in 2009, seven years after Appellant must have known no additional cash would be contributed. This is beyond any potentially applicable statute of limitations. Moreover, any fraud in the inducement of the creation of the

LLC in 2002, occurred significantly more than six years, or four years, or three years before this action was filed in 2009.

For the foregoing reasons, the entire action was barred by the applicable statutes of limitations, and the Trial Court should be affirmed.

III. CONCLUSION

For the reasons set out above, Appellees request that the judgment of the Trial Court be affirmed.

Respectfully submitted,

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I hereby certify that on August 7, 2012, I have cause a true and correct copy of the Answer Brief to be served by Regular U.S. Mail to the following:

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