IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO
Court of Appeals No. 32,973

FIDENCIO (LENCHO) VILLALOBOS
Plaintiff – Appellee

vs.

NICHOLAS (NICK) VILLALOBOS and
VILLALOBOS CONSTRUCTION CO., INC.
Defendants – Appellants

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COUNTY OF DONA ANA

Third Judicial District No. CV-2010-1360
THE HON. JAMES T. MARTIN

ANSWER BRIEF

Respectfully submitted

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Statement of the Facts

Two brothers decide to go into business for themselves

Lencho Villalobos and his older brother, Nick Villalobos, both worked for Reiman Corporation, a company specializing in highway construction. After 30 years in the business, Nick[1] retired from Reiman in February, 2007. Tr. Vol. 1, p. 36. Nick and Lencho had many discussions about opening their own construction company. Tr. Vol. 1, p 43. Lencho, who had children at home, was unwilling to resign from Reiman without knowing that he and his brother would have a contract to perform construction work, so the two brothers began to look for opportunities for a project they could bid on while Lencho continued to work for Reiman. Tr. Vol. 1, p. 114.

The State of New Mexico let a Request for Proposal for a project near Mora, New Mexico. Nick and Lencho decided to bid the project. Nick had, years before, created a company called Nick Villalobos Construction Co. (though it was inactive until 2007). Tr. Vol. 1, pp. 114 – 116; Vol. 2, p. 128. They agreed that the project would be bid in the name of Nick Villalobos Construction Co., and that if the

[1] Since the two principal parties in this case – Nicholas Villalobos and Fidencio Villalobos – share the same last name, it would simply cause confusion to refer to them as Mr. Villalobos and would cause awkwardness to refer to them as Mr. Nicholas Villalobos and Mr. Fidencio Villalobos. To be clear, and not out of any sense of disrespect, this brief will refer to them by their common names – Nick and Lencho.

project were awarded to it, then Lencho would quit his job, and the two of them would go into business together. Tr. Vol. 2, p. 297.

Both Nick and Lencho worked on the preparation of the bid for the Mora project, working on the bids at night and on weekends; they spent hours on the phone together and with others, soliciting bids; they met with a Department of Transportation representative, visited the job site and attended a pre-bid meeting for the project. Tr. Vol. 1, pp. 43, 116 -117, 179; Vol. 2, pp. 179, 305.

The bid which Nick and Lencho submitted was the lowest responsive bid, and the State of New Mexico in fact awarded the project to Nick Villalobos Construction Co; so Nick and Lencho went forward with their business venture. Tr. Vol. 1, p. 41. They specifically agreed that they would be 50-50 owners of the business. Tr. Vol. 1, p. 112; Vol. 2, p. 142. They believed that company would need $500,000 in startup money, so they agreed that each brother would contribute $250,000 into the venture. Tr. Vol. 1, pp. 112, 135 – 136. Each of the brothers would also bring into the company the construction equipment that they had acquired over a lifetime in the construction trades. Tr. Vol. 1, p. 117.

Nick put $200,000 into the company's account in December, 2007, and another $50,000 into the account in January, 2008. Tr. Vol. 1, p. 14; Lencho did not have the cash needed for his contribution to the company, so he borrowed the money from a bank, and mortgaged his home as security for the loan. Tr. Vol. 1,

p. 138. Nick instructed his lawyer to prepared the various documents concerning the business venture, including documents to amend the name of the company to Villalobos Constructions Company, a formal offer to sell shares of stock to Lencho, minutes of a meeting reflecting that the offer was made to Lencho, minutes of meeting showing that Lencho had become a shareholder and that Lencho and his wife were elected directors (Nick was president and Lencho was Vice President) and made officers of the company, and a buy-sell agreement. Tr. Vol. 1, p. 50; Vol. 2, pp. 282, 287. See Exhibit 4.

The brothers agreed that to build the company up, neither would take any salary for a time. Lencho needed to ensure that he would have money to live on, so he cashed in $100,000 of his retirement accounts, paying a substantial tax penalty as a result, and sold his stock in Reiman. Tr. Vol. 2, pp. 288 – 290.

In February, 2008, Lencho and his wife drove from their home in Rio Rancho to Las Cruces, where Nick and his wife lived, to meet with Nick's lawyer. Nick signed the documents which amended the name of the company from Nick Villalobos Construction Co. to Villalobos Construction Co., as well as documents which included a formal offer to sell Lencho 1,000 shares of stock in the company. Tr. Vol. 1, p. 16- 17; Ex. 4. Lencho signed the offer, noting his acceptance. Tr. Vol. 1, p. 16- 17; Ex. 4.

After signing the papers, the two brothers and their wives went to the company's bank. After learning that the company had $252,632.22 in its account, Lencho wrote a check for the exact same amount. Tr. Vol. 2, p. 215. Nick explained that there would be a tax advantage if the money was seen as a loan, so Lencho wrote "loan" in the memo portion of the check. Tr. Vol. 1, p. 140.

In March, 2008, Lencho and his wife and Nick and his wife again met with Nick's attorney. The name of the company had been changed to Villalobos Construction Company. Nick's lawyer presented a buy-sell agreement, which both Nick and Lencho signed. Ex. 5.

And then Nick and Lencho began working on the project in Mora. The papers filed with the State identified Nick as the Project Manager and Lencho as the Superintendent. As Project Manager, Nick was over Lencho. Tr. Vol. 2, p. 153; Vol. 3, pp. 30 – 32.

Lencho is frozen out of the company

From the outset of the project, there was friction between the brothers. Tr. Vol. 1, p. 187, Vol. 2, p. 169. At one point, Lencho had authority to sign checks, but Nick took that power away from him. Tr. Vol. 1, p. 149. Lencho had been ordering supplies for the company, but Nick made some phone calls and sent some emails, telling vendors to stop taking dealing with Lencho. Tr. Vol. 1, p. 149, Vol. 2, pp. 33. 56. 87. Lencho tried to get a credit card to be used by the foreman on

the project; the bank refused, saying that Lencho did not have authority to act on the company's behalf. When Lencho explained that he was a 50% owner, the bank asked for proof. Lencho arranged with Nick to meet at the bank. Lencho then drove to Las Cruces from northern New Mexico to meet with Nick and the banker, but Nick did not show up for the meeting. Tr. Vol. 1, p. 148. Later, Nick told Lencho that instead of going to the bank, he was hiring a lawyer. Id.

On several occasions, Nick told Lencho that he did not want to be involved with Lencho, and did not want Lencho to be involved in the management of the company. Tr. Vol. 2, p. 298. Lencho was so concerned about the future of the business relationship with his brother that he went to him and specifically asked if they were going to bid additional projects together. Nick said that they were not. He specifically told his brother to "get the f#%* out of here." Tr. Vol. 1, p. 162. Nick then engaged counsel, and shortly thereafter the attorney wrote a letter to the company's accountant, telling her that a decision had been made to terminate the business relationship between Nick and Lencho. Plaintiff's Ex. 8. Although the attorney used the passive voice (i.e., "a decision has been made"), Lencho did not make that decision, so it must have been made by Nick.

Lencho went to his own attorney, and ultimately formed his own construction company. Tr. Vol. 2, p. 299. Lencho told his brother that if they were not going to work together, then he would bid projects on behalf of his new

company. Nick said that he did not care. T. Vol. 2, pp. 49 – 50. So Lencho did bid for work in the name of his new company.

Lencho stayed working on the Mora project until it was substantially complete, and the project closed for the winter. T. Trans. Vol. 1, pages 162, 163, 201. Because there was no future for him there, he then left to earn a living for his family – and to earn money with which to repay the loan he took out to invest in the company.

Nick denies that Lencho was a shareholder

From the outset of Lencho's investment, until September or October, 2009, the records kept by the company accountant clearly reflected that Lencho was a shareholder. Tr. Vol. 1, pp. 85 – 86. The financial statements showed that both Nick and Lencho held 1,000 shares of stock. The tax returns for 2008 showed that they were both shareholders.

But in September or October, 2009, that changed. After Nick told Lencho that he would not bid other projects together with Lencho, the records were changed retroactively to show that Lencho was not, and had never been, a shareholder. His payment of $252,632.22 no longer showed as an equity contribution, but as a loan to the company. *See, e.g.*, Ex. 30; Tr. Vol. 3, pp. 139. 163. 169. Nick steadfastly maintained that Lencho was not a shareholder, and that

he would not become a shareholder until they reached agreement on the amount of his contribution to the company, and until he was issued shares of stock.[2]

The company continued in operation, with Nick acting as the sole owner of the company. Nick kept records including meetings of the shareholders (with Nick showing as the sole shareholder) and meetings of the board of directors (with Nick and his wife showing as the sole directors). Plaintiff's Exhibits 39 and 40.

When Nick and Lencho first agreed to work together, they agreed that neither would draw a salary while the business built up capital. Tr. Vol. 2, p. 163. And while Lencho worked with the company, neither Nick nor Lencho (nor Lencho's wife, who also worked for the company) received any pay. Tr. Vol. 2, p. 45. In 2009, however, Nick began to draw a salary. In 2009, he paid himself $100,000, and paid his wife a salary of about $30,000. Tr. Vol. 2, pp. 45, 306. Further, Nick used company monies to pay approximately $200,000 for Nick's personal income taxes for 2010, characterizing the payment from the company as a loan to a shareholder.[3] Tr. Vol. 2, pp. 28, 54, 61; Vol. 3, pp. 147 – 149.

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[2] At trial, Nick admitted that the fact that formal shares of stock had not been issued was not on his mind until his attorney pointed out to him that certificates reflecting Lencho's shares had not been issued. Tr. Vol. 2, p. 32. He also stated that he never considered Lencho to be a shareholder. Tr. Vol. 2, p. 77.

[3] As discussed below, the trial court found that Lencho was a shareholder, and had been since his investment in the company. At that point, the amount the company paid for Nick's personal income taxes was recast from a loan to a shareholder to salary to a shareholder. Tr. Vol. 3, p. 148.

The company showed a loss in 2009. The entire loss (the corporation was a sub-S corporation) was attributed to Nick, so he got the sole tax advantage of the loss. Plaintiff's Ex. 35. To add insult to injury, the company sent Lencho a 1099, in which it showed interest to Lencho for which he had to pay taxes. Tr. Vol. 3, p. 145. In point of fact, NO interest was paid to Lencho, but having recast Lencho's investment in the company as a loan, the company decided to falsely impute interest to Lencho.

Lencho took steps to protect himself from oppression

Lencho filed suit, invoking § 53-16-16 NMSA, which authorizes a court to dissolve a corporation under certain circumstances. R.P. 20. The complaint alleged that Lencho was a shareholder. R.P. 21 (¶ 6). Both Nick and the company denied that Lencho was a shareholder. R.P. 40 (¶ 3). The trial court bifurcated the proceedings, first holding a trial to decide whether Lencho was a shareholder, and reserving the question of what relief, if any, Lencho was entitled to until the trial court had determined whether Lencho was a shareholder.

After the first phase of the trial, the trial court concluded that Lencho was a shareholder, and that he had been a shareholder from the time that he invested $252,632.22 in the company. R.P. 474 – 478.

After the first phase of the trial, Lencho's counsel petitioned the trial court to appoint a Rule 706 expert to value the company. Counsel noted that the trial court

had broad equitable powers, and suggested the trial court would be guided by an informed opinion as to the company's value. R.P. 132 – 133. Appellants opposed the motion, pointing out that they already had obtained their own expert to evaluate the company. R.P. 136 – 137. The trial court granted the motion, and appointed Randy Travis as the trial court's 706 Expert. R.P. 175.

The second phase of the case was tried in three days, including two days in August and a third day in December, 2012. After the close of evidence, the trial court found that Lencho had been frozen out of the company, that Nick did not keep Lencho advised of corporate activities, and prohibited – in a substantial way – Lencho from participating in the company's affairs. R.P. 75.

The trial court found that it was authorized to act pursuant to § 53-16-16 NMSA, but that the remedy of dissolution was drastic, and that it would invoke its equitable power to order the company to purchase Lencho's stock. R.P 751 – 752.

The parties had introduced differing opinions as to the value of the company at various times. The trial court reasoned that the relationship between the parties was akin to a joint venture for the single project in Mora, and that December 31, 2008 was both close to the date when the company finished the Mora project and was the first accounting period after Lencho was no longer actively working with the company. R.P. 752. The trial court found that the value of the company on December 31, 2008, was $1,119,165. It determined that the company should

purchase Lencho's 50% interest in the company for 50% of that amount, or $599,082.50. It also concluded that the company should also pay interest, compounded annually, on that amount from the date of Lencho's investment, at the rate of 9.375%.[4] R.P. 752.

Argument

I. The trial court properly ordered Villalobos Construction Company to purchase Lencho's shares of stock as it was a remedy authorized under § 53-16-16 NMSA

The New Mexico legislature, like the legislatures of every state in the country, has recognized that there will be occasions when a shareholder, or group of shareholders, is treated so unfairly that the courts should be authorized to step in and dissolve the corporation. This power is embodied in § 53-16-16 NMSA, which empowers the courts to dissolve a corporation under certain circumstances.

Although captioning the argument in Issues 2.A, 2.B, 2.C, and 3 of its Brief in Chief as substantial evidence issues, Appellants do not dispute that there was evidence from which the trial court could conclude that the circumstances required by § 53-16-16 NMSA were present. Instead, they repeat their arguments

[4] Both the 706 Expert and Appellants' expert testified that a commercially reasonable rate of interest at the time was 3.5%. Lencho had borrowed the money he invested at the rate of 6.125%; he was still paying on the loan at the time of trial. The 706 Expert testified that someone investing in a business should expect to recover both their cost of capital (6.125%) plus a reasonable rate of return (3.5%). Tr. Vol. 4, p. 141 – 142. The rate awarded by the judge was the rate paid by Lencho to his bank, plus 3.5%, giving Lencho the same rate of return on his investment that both experts testified was reasonable.

concerning the claimed effect of the Buy-Sell Agreement, discussed in Section II, infra.

A. The trial court properly exercised its authority under § 53-16-16 NMSA

To be sure, the trial court properly found that it was authorized to act under § 53-16-16 NMSA. The statute provides multiple circumstances that authorize a court to dissolve a corporation; the trial court found that the requisite circumstances were present. Finding of Fact #2 (R.P. 751 - 752).[5] The trial court's finding was justified from at least three different perspectives.

- **Section 53-16-16(A)(1)(a)**

Section 53-16-16(A)(1)(a) allows the trial court to dissolve a corporation if (i) the shareholder are deadlocked in the management of the corporate affairs, (ii) the shareholders are unable to break the deadlock and (iii) irreparable injury to the company is being threatened or suffered as a result.

The directors were deadlocked in the management of the corporate affairs. There were four directors, the appellant and his wife, and the appellee and his wife. The shareholders were unable to break the deadlock since Nick held 50% of the

[5] The Appellants do not challenge the trial court's finding. Rule 12-213(A)(4) NMRA provides that the brief in chief "shall set forth a specific attack on any finding, or such finding shall be deemed conclusive." Since the appellant has not made a specific attack on the finding, the finding is conclusive. Indeed, the Appellants do not challenge ANY finding made by the trial court.

shares and Lencho held 50% of the shares. Irreparable injury to the corporation was threatened as a result of the deadlock, since Nick announced that the company would not bid any more projects with Lencho's involvement.

- **Section 53-16-16(A)(1)(b)**

Section 53-16-16(A)(1)(b) allows a court to dissolve a corporation if the acts of the person in control were oppressive, fraudulent or illegal. The acts of the person in control – Nick - were oppressive. Nick stripped Lencho of at least some of his power. He announced that the company would not bid further projects with Lencho's involvement. He unilaterally decided that the relationship between the shareholders was being terminated, and that Lencho was being forced to sell his shares. In the words of the trial court, Nick "froze" Lencho out of important decisions concerning the company, did not keep Lencho advised of corporate activities, and prohibited, in a substantial way, Lencho from participating in corporate affairs. Finding of Fact #1 (R.P. 751).[6]

The acts of the person in control were also fraudulent and illegal. By treating Lencho's investment as a loan, and not as an investment, Nick was able to take substantial tax advantage (by filing tax returns in which 100% of the company's losses were attributed to Nick) and cause Lencho to suffer an additional

[6] Again, the appellant does not challenge the trial court's finding, and the finding is therefore conclusive. *See* Rule 12-213(A)(4) NMRA.

tax liability (by submitting a 1099 showing imputed interest to Lencho for the "interest" on the "loan" even though no interest was paid to Lencho). Further, Nick acted illegally by loaning himself $200,000 from the company to cover his personal taxes.[7]

- **Section 53-16-16(A)(1)(c)**

Section 53-16-16(A)(1)(c) allows a court to dissolve a corporation if its shareholders are deadlocked in voting power, and they have failed for a period that includes at least two annual meeting to elect successors to directors whose terms have expired, or whose terms would have expired upon election of their successors.

The evidence show that the shareholders were deadlocked in voting power (each having 50% of the voting power), and that they failed, for a period which included at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors. Indeed, from March, 2008, until the trial court made its decision in February, 2013, there was a never a meeting of the shareholders or of the board of directors.[8]

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[7] The bylaws expressly prohibited a loan to anyone unless authorized by a resolution of the Board of Directors. Appellee's Ex. 42, p. 12.

[8] Appellants claimed that such meetings took place, but admitted that was because they were claiming that Nick was the sole shareholder and Nick and his wife were

B. The court had authority to fashion an equitable remedy, other than dissolution of the company.

While § 53-16-16, NMSA empowers the court to dissolve the corporation, this Court, in *McCauley v. Tom McCauley & Sons,* 1989-NMCA-065; 104 N.M. 523; 724 P.2d 232, also noted that dissolution of a corporation is a drastic remedy, and a court should first consider other alternative forms of relief. This Court expressly approved the trial court's recognition of remedies not specifically stated in the oppressive conduct statute, and ultimately approved the trial court's decision to force one party to purchase the other party's shares at a judicially set price. Necessary in this Court's decision is that if the circumstances which justify the dissolution of a corporation are present, the trial court necessarily has jurisdiction to order such equitable relief as is appropriate under the circumstances.

Appellants do not challenge the trial court's finding that the circumstances described in § 53-16-16 NMSA were present. Instead, Appellants suggest that the trial court improperly granted relief other than dissolution based on what they characterize as "an eleventh hour amendment." The characterization is inaccurate and unfair for three reasons.

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the sole directors. Lencho was never given notice of the purported meetings (notice to all shareholders and directors was required by the bylaws for both annual and special meetings of the shareholders, and without Lencho at such meetings, there was no quorum, and therefore there could be no meeting. *See* Appellee's Ex. 42, ¶ 2.3.

1. Lencho's complaint clearly put the Appellants on notice that he was seeking either dissolution or such other equitable relief as the trial court found appropriate.

With regard to the claim under § 53-16-16 NMSA, the original complaint asked only for dissolution of the company. On February 16, 2011, however, Lencho filed an amended complaint. With regard to the claim under § 53-16-16 NMSA, he claimed that the company should be dissolved and its assets liquidated, "or the Court should otherwise use its equitable powers to achieve fairness and equity." R.P. 163. The prayer for relief in the complaint was identical. Id.

Perhaps Appellants mean to complain that the complaint did not specifically ask for the relief that was granted. A complaint, however, does not have to plead every specific theory. *Schmitz v. Smentowski*, 1990-NMSC-002; 109 N.M. 386; 785 P.2d 726. It is enough that the defendant has a fair idea of what the action is about. *Id.*

The Appellants were on notice that while Lencho was seeking dissolution of the company, all involved recognized the possibility that the court would fashion an equitable remedy in lieu of dissolution. Indeed, at the close of the first phase of the trial, Appellants' counsel specifically pointed out that if the trial court found that Lencho was a shareholder, it would be necessary to value the interests of the company "as an alternative to the remedies requested." Tr. Vol. 1, p. 230. And on the second day of trial, almost four months before the close of evidence in the case,

counsel for Lencho expressly noted that while the action was for dissolution, the court could use its equitable powers under McCauley. Tr. Vol. 2, p. 293. And during the next day of trial, Appellants' counsel specifically acknowledged that the complaint sounded in equity. Tr. Vol. 3, pp. 65 – 67.

2. Both parties were aware that the trial court might order one party to purchase the other parties' interest; the trial court could therefore properly allow the complaint to be amended to conform to the evidence.

Clearly, both parties anticipated that if the trial court ruled in favor of Lencho on the issue whether he was a shareholder, a likely result would not be the dissolution of the company, but instead an order of the court requiring one party to purchase the interests of the other party. In fact, in December, 2011 (more than a year before the trial on this issue), Lencho's counsel requested that the trial court appoint a Rule 706 to value the company. In support of the motion, Lencho specifically noted that "in this equitable action the Court has substantial power to provide relief between the parties, and the Court will be guided by knowing the value of the company." Appellee's Motion to Appoint Rule 706 Expert (R.P. 132).

In responding to the motion, Appellants made clear that they were aware that the value of the company would be important (which it would not be if the only issue were whether to dissolve the company). Appellants protested the use of a 706 expert not because the value was irrelevant, but because they had retained an expert for that purpose (and later retained yet another).

When an issue that is not framed in a pleading is tried without objection, a trial court clearly has the right to allow the complaint to be amended to conform to the evidence. *See Citizens Bank v. C&H Construction Co.*, 1976-NMCA-063; 89 N.M. 360; 552 P.2d 796, *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976)(where an issue is tried by consent of the parties, the trial court does not abuse its discretion to allow the pleadings to be amended to conform to the evidence). Since Appellants did not object to the evidence concerning the value of the company – which would have relevance only in considering a forced purchase by one party or the other – the issue of having the trial court force one party to purchase the interest of the other was tried by consent.

3. The complaint did not need to ask either generally for equitable relief or specifically for the forced purchase of Lencho's stock; the trial court had jurisdiction to enter such a ruling as a matter of law.

In any event, the amendment of the complaint was superfluous. Regardless whether the complaint specifically asked for one party to buy out the other, that was within the authority granted to the trial court in the action under § 53-16-16. *See McCauley v. Tom McCauley & Sons,* 1989-NMCA-065; 104 N.M. 523; 724 P.2d 232 (nothing in the opinion suggests that the plaintiff asked for any relief other than dissolution, yet this Court held it was within the trial court's right to fashion the equitable remedy of having one party buy out the other party at a judicially established price).

II. The trial court did not err in refusing to order the sale of stock on the terms described in the Buy-Sell Agreement

After the close of a four day trial, spread over the course of more than a year, the trial court found that Nick froze Lencho out of important decisions, that he prohibited Lencho from participating in a substantial manner from participating in corporate affairs, and that the company should purchase Lencho's interest, leaving Nick as the sole shareholder. R.P. 75.

Neither the company nor Nick dispute the trial court's findings. Instead, they argue that the price for the buyout of Lencho's shares should NOT be one-half of the fair value of the company when the two brothers stopped working together, but should instead be a price to be somehow determined from a Buy-Sell Agreement prepared by a lawyer representing Nick and the company.

The Buy-Sell Agreement should not be the basis for the purchase price for a variety of reason, each discussed below.

A. The Buy-Sell Agreement is wholly inapplicable because there was no triggering event.

There is nothing in the Buy-Sell Agreement that makes it applicable in the present case. In their Brief in Chief, Appellants makes a bold – and erroneous – assertion that appears to flavor their appeal on this issue:

> By entering into the Buy-Sell Agreement, the parties expressly agreed to waive any compulsory, involuntary, statutory corporate dissolution, and contractually agreed to assure the survival of the Company in the event of a termination of a shareholder.

Appellants' Brief in Chief, page 15. Although the Appellants have chosen to use strong rhetoric ("the parties expressly agreed to waive ...."), the record does not support the claim.

The Buy-Sell Agreement does NOT expressly waive the right to a statutory dissolution. Quite to the contrary, the Buy-Sell Agreement anticipates that the company might be dissolved without triggering the Buy-Sell Agreement: "This Agreement shall terminate upon ... dissolution of the Corporation." Appellants' Ex. A, p. 12.

Far from stating that an action to dissolve the company triggers the Buy-Sell Agreement, the agreement provides that in certain events, a shareholder may have the duty to sell his stock. An action to dissolve the company is NOT listed as a triggering event. The simple fact of the matter is that none of the events that trigger a duty to sell stock are present in this case.

Elsewhere in their brief, Appellants appear to recognize their duty to prove a triggering event, and argue that two separate triggering events were present; (1) they argue that Lencho triggered a duty to sell his stock when he stopped working for the company and (2) they argue that Lencho triggered a duty to sell his stock when he filed this action. Neither point is well taken.

1. Lencho did not trigger a duty to sell his shares of stock when he stopped working for the company.

Paragraph 7 of the Buy-Sell Agreement imposes on a shareholder a duty to sell his stock "upon termination ... of the Corporation's employment of a Shareholder ...." This section, therefore, only applies to someone who is both a shareholder and an employee of the company.

Nothing in the Buy-Sell Agreement describes Lencho as an employee. Nothing in the Buy-Sell Agreement defines what an employee is. Without a contractual definition, the court "may look to that term's 'usual, ordinary, and popular' meaning, such as found in a dictionary." *Davis v. Farmers Ins. Co. of Ariz.*, 2006-NMCA-99, ¶ 7; 140 N.M. 249; 142 P.3d 17.

Dictionary.com defines an employee as "a person working for another person or a business firm for pay." Cambridge Dictionaries on-line defines an employee as "a person who is paid to work for someone else." Collins Complete and Unabridged Dictionary defines an employee as "a person who is hired to work for another or for a business, firm, etc., in return for payment". The common thread is that an employee is someone who is paid for his labor.

The simple fact of the matter is that Lencho was not an employee. While he obviously provided services to the company, he was not paid for his services. He provided his services without payment, and without expectation of payment, because he hoped that his free labor would increase the value of the company, and

thus increase the value of his shares. Since he was not an employee, the fact that he stopped working with the company does not trigger the Buy-Sell Agreement.

2. Lencho did not trigger a duty to sell his shares by filing this action.

Although Appellants claim that the Buy-Sell Agreement "expressly" waives statutory dissolution, the simple fact of the matter is that no such language exists in the Buy-Sell Agreement. Apparently, Appellants are actually arguing that initiating the action amounts to an attempt to dispose of Lencho's shares, which is a triggering event. Note, however, that Lencho did not file an action in which he sought to force either Nick or the company to purchase his shares; he filed an action to have the company dissolved.

The real thrust of Appellants' claim is the suggestion that anytime someone brings an action for dissolution, they are effectively seeking to sell their shares, and thus trigger an obligation under a buy-sell agreement. Stated another way, Appellants suggest that anyone who has agreed to a buy-sell agreement has implicitly waived their statutory right of dissolution.

Appellants do not cite to any authority in support of this proposition. The overwhelming weight of authority is directly contrary to their position; courts have consistently held that a stock repurchase agreement is not necessarily triggered when there is a suit filed seeking dissolution based on oppression. *See, e.g., Anderson v. Clemens Mobile Homes, Inc.*, 214 Neb. 283, 333 N.W.2d 900 (Neb.

1983); *Redstone v. National Amusements, Inc.*, 2006 MDBT 12; 2006 Md. Cir. Ct. LEXIS 10 (2006)(unpublished); *Baylor v. Beverly Book Co.*, 216 Va. 22, 216 S.E.2d 18 (1975).

If a shareholder brings an action to dissolve a corporation simply because he does not want to be shareholder any longer, and is seeking to avoid the terms of a buy-sell agreement, then the shareholder's request for dissolution should be denied; the anti-oppression statutes should not be used to allow end runs around an agreement. *See Brynwood v. Schweisberger*, 393 Ill. App. 3d 339 (Ill. App. Ct. 2d Dist. 2009). But Lencho was not merely disillusioned with the continued operation of the company; he had been frozen out by Nick. Moreover, Nick then denied that Lencho was even a shareholder!

Professor Thompson (a full professor at Washington University School of Law) wrote directly on the subject. He expressed concern for enforcing the true expectations of the shareholders, and noted that while a disillusioned shareholder should not be able to rely on anti-oppression statutes to avoid a buy-sell, neither should one shareholder be allowed to squeeze out a shareholder by oppressive conduct, and then rely on the buy-sell to obtain the maltreated shareholder's interest at a discount:

> A general, purportedly all-inclusive agreement regulating transfer of a corporation's stock may well not have been intended to apply in dissolution proceedings, in court-ordered buyouts, or to other remedies for oppression of minority shareholders. A controlling shareholder

> should not be able to engage in conduct prejudicial to a minority shareholder and then force the minority shareholder to sell out at a price set in an agreement entered into when relations where harmonious and intended only to govern share transfers in other circumstances.

R. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations,* 66 Wash. U. Law Rev., 193, 227 – 228 (1988) (footnotes omitted).

The quoted language necessitates two clarifications, one dealing with the fact that Lencho was not a minority shareholder, but was an equal shareholder, and the second dealing with the possibility that parties to a buy-sell agreement may actually intend for it to apply under circumstances such as envisioned by Prof. Thompson.

- **Nick was in control of the company**

Although Lencho was an equal shareholder, Nick was clearly in control of the company, as was evidenced by the fact that he was the superintendent, and Lencho was but the project manager, by the fact that Nick was the President, and Lencho was but a vice president, by the fact that the company lawyer took his instruction from Nick and not from Lencho, by the fact that the company accountant and banker took their instructions from Nick and his wife, and not from Lencho, by the fact Nick's house was the company's registered office, and perhaps most importantly by the fact that Nick had the ability – an ability which he exercised – to freeze Lencho out of the company.

- **The parties did not envision the use of the buy-sell under these circumstances.**

Prof. Thompson leaves open the possibility of a shareholders' agreement that might be applicable when he speaks only of a "general, purportedly all-inclusive agreement regulating transfer of a corporation's stock". But there is NO evidence in this case that the parties intended their buy-sell as anything other than a general agreement. In fact, the evidence shows that they never discussed the buy-sell before it was drafted.

Moreover, the plain language of the buy-sell agreement itself makes it clear that it was NOT intended to have application in the event that a party sought dissolution of the company, as the buy-sell expressly provides that the agreement would "terminate automatically" upon the dissolution of the company. Lencho's Ex. A, page 12, ¶ (g). Lencho filed this action in an effort to dissolve the company, which would terminate the buy-sell agreement.

B. Appellants have waived any right to rely on the Buy-Sell Agreement

Assuming, arguendo, that there was a triggering event, then Appellants have waived any right to rely on the Buy-Sell Agreement in at least two distinct ways.

1. By their silence and inactions, Appellants waived any right to rely on the Buy-Sell Agreement if Lencho triggered an obligation to sell when he stopped working for the company.

Even assuming, arguendo, that Lencho triggered the Buy-Sell Agreement when he stopped working for the company, he became obligated to sell his stock on the terms and conditions in the Buy-Sell Agreement. If he had such a duty, then it follows that the Appellants had a right to purchase the stock. Appellants, however, cannot sleep on their rights.

Pursuant to the Buy-Sell Agreement, Nick Villalobos would have had an option to buy the stock if there were a triggering event. If he did not elect to buy the stock, the company would have had the right to buy the stock. Nick, however, never made an election (presumably because he did not believe that a triggering event had occurred). In any event, the Buy-Sell Agreement expressly provided that the closing on the sale of the stock, by either the other shareholder or by the company, had to occur within 90 days of the termination of the shareholder's employment. That date came and went without either Nick or the company seeking to exercise its rights. The Appellants, by allowing the 90 window to go by without seeking to exercise their rights, waived any rights they might have had to buy the stock.

While Appellants have consistently claimed that this action is limited by the Buy-Sell Agreement, neither filed a counterclaim seeking to enforce their claimed

right. They did not file a separate action seeking to force Lencho to sell his shares. They did not file a claim in arbitration seeking to enforce this alleged right.

2. By their actions and inactions, Appellants waived any right to rely on the Buy-Sell Agreement if Lencho triggered an obligation to sell when he filed a lawsuit seeking to dissolve the company.

Even assuming, arguendo, that Lencho triggered the Buy-Sell Agreement when he filed an action seeking to dissolve the company, he became obligated to sell his stock on the terms and conditions in the Buy-Sell Agreement.

According to the Buy-Sell Agreement, if the initiation of an action to dissolve the company triggered an obligation to sell stock, then Lencho should have formally offered Appellants an opportunity to buy his stock. Obviously, Appellants do not believe that their rights are dependent on the formal offer to sell the stock; they claim that the right exists as a matter of law. If that were true, then the right existed as a matter of law when the action was filed in 2009. Rather than exercise that purported right, Appellants instead claimed that Lencho did not own any stock. Again, they did not file a counterclaim seeking to enforce this alleged right, did not file a separate action to enforce this alleged right, and did not seek to arbitrate the issue.

C. Appellants should be estopped to rely on the Buy-Sell Agreement

Again, assuming arguendo that there was a triggering event, the Appellants are estopped to rely on the Buy-Sell Agreement.

Lencho first filed this action in 2009. During the pendency of the case, and through the first phase of the trial in November, 2010 - for more than a year during the course of this litigation - Appellants have denied that Lencho was a shareholder. During that time, they necessarily were claiming that Lencho was not bound by the Buy-Sell Agreement.

Prior to the dispute, the company's financial records reflected that Lencho was a shareholder. After the dispute arose, the company changed its financial records to show that Lencho was NOT a shareholder, to show that his $252,632.22 investment was a loan to the company, and to show that his work for the company should have been compensated, booking $65,000 as unpaid wages to Lencho.

But even when it did that, it offered no money to Lencho. It did not offer to repay the supposed loan, and did not offer to pay him for the sweat equity he invested in the company.

Because they have taken a position that is necessarily inconsistent with the position they now take, the Appellants should be found to be estopped to exercise their purported rights under the Buy-Sell Agreement. Equity must not allow the Appellants to continuously claim that the Buy-Sell Agreement was not viable because Lencho was supposedly not a shareholder, and so very much later to claim to the contrary.

D. Enforcement of the Buy-Sell Agreement would be unconscionable

Assuming that there was a triggering event, assuming that Appellants did not waive their rights, and assuming that Appellants should not be estopped to enforce the Buy-Sell Agreement, the price set by the Buy-Sell Agreement is still unenforceable because it is unconscionable.

The trial court expressly found that "it would be inequitable and unconscionable to strictly apply the terms of the Buy-Sell Agreement to determine the purchase price." Finding of Fact #7 (R.P. 753). The Appellants do not specifically challenge this finding. *See* Rule 12-213(A)(4) N.M.R.A.

In February, 2008, Lencho borrowed against his house to invest in the company, and both he and his wife cashed out retirement funds to live on, in expectation of a long-term relationship with his brother. From the inception of their time together, however, there was friction. Nick limited Lencho's authority, and when questioned, Nick responded by saying that he would not bid additional jobs with Lencho, and that Lencho should "get the F@#% out".

The trial court found that Lencho was frozen out. A freeze-out and a squeeze-out are the same thing. F. Hodge O'Neal & Robert B. Thompson, *O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members*, § 1:1, n. 2. And the dissolution statute is designed to protect a shareholder from a squeeze-out. *See McMinn v. MBF Operating Acquisition Corporation*, 2007-NMSC-040;

142 N.M. 160; 164 P.3d 41. The trial court properly concluded that allowing Nick to enforce the Buy-Sell Agreement would be unconscionable, as it would not only allow him to squeeze his brother out, but would allow him to profit in the process.

Lencho invested $252,632.22, plus a great deal of sweat equity. Through the contributions of both Nick and Lencho, the company went from a value of just over $500,000 at the beginning of the Mora project to a value of $1,119,165 at the end of the Mora project. Tr. Vol. 1, p. 83; R.P. 752. Rather than agree that Lencho should receive one-half of the gain in value, Nick would have Lencho receive LESS than his original investment.

According to the Buy-Sell Agreement, the purchase price for a forced sale is $0.00.[9] Tr. Vol. 3, p. 232. The trial court's 706 Expert testified that if the formula in the Buy-Sell Agreement were to apply, then Lencho would be entitled to nothing for his shares of stock. Tr. Vol. 3, p. 232. The trial court obviously accepted his testimony, as it noted that "application of the Buy-Sell Agreement would result in a negative return to Lencho Villalobos. R.P. 753 (¶ 7).

Appellants shrug off the unfairness of it all by saying that a court cannot relieve a party of a bad bargain. But that overlooks the unconscionability of the situation. There is a difference between striking a bad bargain, and one person

[9] If there is a triggering event under the Buy-Sell Agreement, the shareholder must sell his shares at "adjusted" book value. Adjusted book value is the book value of the company less cash and cash equivalents, less accounts receivable, less work-in-progress. Appellants' Ex. 9, pp. 4 – 5.

using his position of control and influence to secure an investment of more than a quarter of a million dollars from his own brother, force the brother out of the company months later, and then seek to pay his brother nothing for the investment.

Appellants note that to avoid a contract on the grounds of unconscionability, a party must show that the agreement (i) unreasonably favors one party and (ii) precludes the other party any meaningful choice. *See Rivera v. Am. Gen. Fin. Servs.*, 2011-NMSC-033, p 43; 150 N.M. 398, 411; 259 P.3d 803, 816.

i. The agreement unreasonably favors Appellants

As the trial court found, the result Appellants advocate would unreasonably favor Nick. If Nick succeeds, he goes from owning one-half of a company worth $1,19,165, to owning all of the same company, at no cost whatsoever, and is rewarded for freezing his brother out. In contrast, Lencho will lose his one half of the company and receive nothing in exchange. That the contract appears to treat the parties the same is of no moment, since it was Nick who used his position as the president of the company to freeze Lencho out, something that Lencho could not do.

ii. Appellants deprived Lencho of any meaningful choice

Lencho was frozen out of the company. Nick, the president of the company, told him that he would no longer bid projects with Lencho. Lencho's only choices were to leave the company and find income elsewhere to support his family, or to

sit home and do nothing, waiting for his inevitable financial ruin. This Hobson's choice is no choice at all.

Rivera, *supra*, notes that a contract is substantively unconscionable if it is grossly unreasonable and against public policy under the circumstances. Certainly, letting Nick not only freeze his brother out, but then reaping such a financial windfall at Lencho's expense is grossly unreasonable. The public policy at issue is found in § 53-16-16 NMSA, which is designed to protect innocent shareholders who have been frozen out; to allow Nick to gain this windfall would violate the public policy embodied in the dissolution statute.

III. The trial court's decision with regard to the date that interest began to accrue must not be disturbed on appeal

A. Appellants failed to preserve this issue because they did not raise it with the trial court.

Appellants have waived any right to complain about the date on which interest began to accrue on the amounts to be paid for Lencho's shares of stock. Although Appellants claim to have preserved the issue, the simple fact of the matter is that they failed to raise this issue with the trial court.

In their brief, Appellants claim to have preserved the issue at several points. In fact, none of the references to which they cite deal with the issue[10]. In fact, they are – improperly – raising the issue for the first time on appeal.

This failure to preserve an alleged error is governed by Rule 12-216(A) of the New Mexico Rules of Appellate Procedure, which imposes a clear duty on an appellant to first raise issues in the trial court, not on appeal:

> A. Preserving questions for review. To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review. Further, if a party has no opportunity to object to a ruling or order at the time it is made, the absence

[10] This table shows the places in the record where Appellants claim they raised the issue, and the subject matter actually covered in that place in the record:

R.P. 258	Neither Appellants' motion for summary judgment nor the memo in support of that motion (R.P. 260) discuss the date from which interest could run.
T. 300 - 303	Appellants' oral renewal of its motion for summary judgment does not mention the date interest should begin.
R.P. 721	Appellants' Requested Findings of Fact and Conclusions of Law mention what they believe is the appropriate rate of interest that should be assessed from 2008 to 2012, but do not say when in 2008 they believe the interest should run from. The trial court's award does award interest from 2008.
R.P. 763	Appellants' motion for reconsideration challenges the interest rate that was used by the court, but does not challenge the date from which interest began to accrue.
R.P. 775	Appellants' motion for new trial does not raise an issue concerning interest.
R.P. 826	Appellant's reply concerning a motion challenging the trial court's grant of leave to file an amended complaint does not raise an issue concerning interest.

of an objection does not thereafter prejudice the party.

B. Exceptions. This rule shall not preclude the appellate court from considering jurisdictional questions or, in its discretion, questions involving:

(1) general public interest; or

(2) fundamental error or fundamental rights of a party.

This rule "is intended to alert the trial court to the error, so that it is given an opportunity to correct the mistake, and give the opposing party a fair opportunity to meet the objection." *Harbison v. Johnston*, 2001-NMCA-051; 130 N.M. 595; 28 P.3d 1136. Appellants, however, did not give either the trial court or Lencho such an opportunity, and should be estopped to pursue this issue on appeal.

Appellants clearly had the opportunity to raise the issue. In fact, they filed a number of pleadings after the trial court made its findings, raising a myriad of issues, but failing to raise this issue.

B. Appellants should be estopped to pursue this issue because they have taken advantage of a parallel ruling.

In the same Findings of Fact and Conclusions of Law adopted by the trial court that the Appellants now challenge, the trial court made a parallel finding that benefitted the Appellants. The Appellants have taken full advantage of that ruling, and should be estopped to complain that the principal which advantaged them has also been applied against them.

Lencho sold his truck to the company when the Mora project began. Afterwards, he kept the truck. Appellants counterclaimed against Lencho for the value of the truck. The trial court agreed that Lencho should return the value of the truck, with interest at the rate of 9.375% (the same interest rate assessed against the Appellants). R.P. 753 (¶ 8). Under the Appellants' theory, Lencho should have paid interest on that amount from December 31, 2008, because up until that point he was still part of what the trial court alluded to as the joint venture between Lencho and Nick. Instead, however, the trial court ordered him to pay interest from April 3, 2008, the date when he first was paid for the truck.

Lencho timely paid the judgment, in full. The Appellants accepted the full amount, with accrued interest. After taking that money, however, Appellants argue that a different rule should be applied to them. They should be estopped to challenge the very rule that has advantaged them. *See Santa Fe Pac. Trust, Inc. v. City of Albuquerque,* 2012-NMSC-028; _____ N.M. _____; 285 P.3d 595.

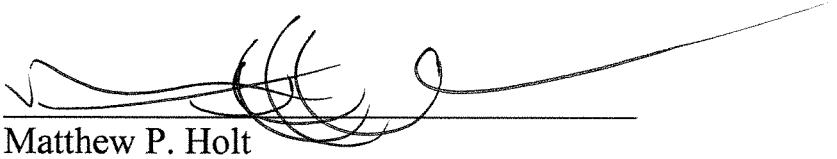
Conclusion

The trial court properly exercised the equitable powers available to it under § 53-16-16 N.M.S.A. Its findings were supported by the evidence and its rulings consistent with the law. The decision of the trial court should be affirmed.

Statement concerning oral arguments

While Appellee's counsel will, of course, participate in oral arguments if they are scheduled, Appellee does not believe that oral arguments are necessary. The facts supporting the trial court's decision are clear, and the law is neither unsettled nor complicated.

Respectfully submitted



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Certificate of Service

I hereby certify that on January 7, 2015, a true and correct copy of the foregoing was sent via U.S. Mail, postage prepaid, to:

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