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

BRIEF IN CHIEF

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ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

STATEMENT OF TRANSCRIPT CITATION FORMAT

The transcripts of the relevant hearings were stenographically transcribed. Citations are to the Transcript (Tr.), Volume number (Vol.) and page(s) where the information or testimony appears.

STATEMENT OF PAGE/WORD COUNT COMPLIANCE:

This Brief contains more than the permitted 35 pages. Counsel used the most recent version of Word Perfect with a proportionally spaced Times New Roman typeface in 14 point font. The body of the document consists of 9773 words total.

TABLE OF AUTHORITIES

New Mexico Case Law Authority

New Mexico Rules and Statutory Authority

Authority from Other Jurisdictions

Other Authority

Nature of the Case:

This appeal arises from a bench trial disposition of Plaintiff Fidencio Villalobos' complaint for dissolution of Defendant Villalobos Construction Co., Inc. (the Company), a New Mexico corporation, pursuant to NMSA 1978, Section 53-16-16, and Plaintiff's claim against Defendant Nicholas Villalobos for misappropriation of corporate assets. This appeal concerns the District Court's invocation of equitable jurisdiction to order that Plaintiffs' interest in the Company be purchased — as valued by the District Court contrary to the terms of the parties' written Buy Sell Agreement – in lieu of Plaintiff's Complaint for dissolution of the Company.

Relevant Facts and Summary of Proceedings:

History of the Company:

The Company is a duly authorized New Mexico corporation with its principal place of business in Dona Ana County. The Company was established by Defendant Nicholas Villalobos in 2001, *sub nom* Nick Villalobos Constructions Co. Inc. [RP 309] The Company was licensed to bid on and perform highway bridge and road constructions projects throughout New Mexico. [Tr. Vol I, p. 113] From the inception in 2001 to February 2008, Nicholas Villalobos was the sole owner and shareholder of the Company. [RP 309]

The parties discussed doing business together during 2007. [Tr. Vol. I, pp. 112 – 117] In February 2008, Nicholas Villalobos formally offered his brother, Plaintiff Fidencio Villalobos, a fifty percent (50%) interest in the Company. [RP

311] A corporate resolution was adopted by the Company, which offered 1,000 shares in the Company to Plaintiff. [RP 308] That month, Nicholas Villalobos had corporate articles of amendment adopted to change the name to Villalobos Construction Company, Inc., in anticipation of the new relationship between the brothers. [RP 309]

The February 2008 corporate resolution and a corresponding written offer of stock were both expressly conditioned upon the execution of a specified Buy-Sell Agreement between Plaintiff, Nicholas Villalobos and the Company. [RP 308; 311] Along with other corporate documents, the proposed Buy-Sell Shareholders' Agreement was drafted by an attorney representing all interests. [Tr. Vol. I, pp. 134 – 140] The proposed Buy-Sell Shareholders' Agreement was presented to Plaintiff, Nicholas Villalobos, and their respective wives, for consideration on February 22, 2008. Soon thereafter, Plaintiff and his wife executed a check for $252,632.22 payable to Nick Villalobos Construction Co., Inc. to match the funds then on deposit for the Company. [RP 304-307; 356; Tr. Vol. I, pp. 135-136]

On March 18, 2008, Plaintiff accepted the offer to purchase 1,000 shares of stock in the Company, which represented fifty percent of the issued stock. [RP 359] His acceptance was documented by minutes of a special meeting of shareholders and directors of the Company. [RP 309-313] That day, the Company and Plaintiff executed an agreement respecting the issuance of common stock in the Company. [RP 314]

On March 18, 2008, both Nicholas Villalobos and Plaintiff signed the Villalobos Construction Buy-Sell Agreement, individually and in their representative capacities on behalf of the Company. [RP 53-71; 266- 282; Defendants' Trial Exhibits (Binder) A - A9] Adoption of the Buy-Sell Agreement was expressly deemed part of the consideration for the offer and sale of stock in the Company to Plaintiff. [*Id.*]

Contractual Terms of the Buy-Sell Agreement:

The Buy-Sell Agreement provided the means to preserve and insure the viability and continuity of the Company in the event of a death, disability, termination from employment, or bankruptcy of any shareholder, or the involuntary disposition or intention of a shareholder to sell Company stock. [RP 53-71; 266- 282; Defendants' Trial Exhibits A - A9] The terms and conditions of the Buy-Sell Agreement applied equally to any shareholder who intended or attempted to dispose of Company stock. [*Id.*] No shareholder was distinguished or favored over another with respect to application of the Buy-Sell Agreement.

The Buy-Sell Agreement provided that a shareholder seeking to dispose of his stock must first offer his stock for sale to Company, and must do so in a prescribed manner. [*Id.*] The Buy-Sell Agreement provided that, if the stock was not timely purchased by the Company, the stock must then be offered to the other shareholders, again, in a prescribed manner. [*Id.*] If the stock was not timely pur-

chased either by the Company or by another shareholder, the stock could then be offered for sale by the disposing shareholder to others outside the Company. [*Id.*]

By its express terms, application of the Buy-Sell Agreement was triggered not only by an intended disposition of stock, but also by any "attempted disposition" of stock. [*Id.*] An "attempted disposition" of stock was defined by the Buy-Sell Agreement as any act by a shareholder to dispose of his stock in the Company other than in accordance with all of the terms and conditions set forth in the Buy-Sell Agreement. [*Id.*]

The Buy-Sell Agreement was also triggered upon termination from employment of a shareholder. [*Id.*] A shareholder terminating employment was required to commence the procedure for disposition of stock by offering the stock first to the Company and then, absent purchase by the Company, to other shareholders. [*Id.*]

The Buy-Sell Agreement prescribed the method by which stock in the corporation was to be valued in the event of any "disposition" or "attempted disposition". [*Id.*] The Buy-Sell Agreement prescribed a formula for valuation of stock to establish a defined "purchase price" for the shareholder's stock. [*Id.*] The Buy-Sell Agreement expressly provided for an alternate formula for computing the valuation of stock in the Company in the case of a disposition or attempted disposition other than by an offer for sale. [*Id.*]

The Buy-Sell Agreement specified how payment would be made to a shareholder for the disposition of his stock. [*Id.*] The Agreement provided for defined "payment terms" and established at a specified rate of interest linked to the locally applicable commercial prime rate. [*Id.*] The Buy-Sell Agreement allowed for a term of five (5) years for payment in full for the stock, in equal annual installments. [*Id.*]

The Buy-Sell Agreement contained restrictions on competition by a shareholder, precluded any shareholder from directly or indirectly participating in any competitive business against the Company. [*Id.*]

The Mora Project:

In the autumn of 2007, immediately prior to the changes in corporate ownership and governance described above, Nicholas Villalobos submitted a bid for a highway bridge construction project near Mora, New Mexico (the Mora Project). The Company was awarded the Mora Project in February 2008, when Nicholas Villalobos was still the sole owner and shareholder of the Company. There was testimony that Plaintiff was the qualified licensed contractor during a period of time relevant to the bid and contract for the Mora Project. [Tr. Vol. I, pp. 133-134]

In March or April 2008, construction on the Mora Project began, and Plaintiff commenced working as a superintendent or project manager at that time. [Tr. Vol. I, pp. 141 - 142] During construction in the summer and early fall 2008, Plaintiff had access to the Company's checking account maintained for payment of

expenses related to the project, and Plaintiff was authorized to write checks from that account to pay for construction expenses; Plaintiff received bank statements for all accounts established for the Company. [Tr. Vol. I, pp. 142- 143]

Over the period between April and August 2008, discord and arguments arose between Plaintiff and Nicholas Villalobos concerning the management of the Company. [Tr. Vol. I, p. 142 – 150; 160 - 162] The shareholders were unable to agree on material terms and conditions for management and operations or for their respective roles. [*e.g. id.*] In August 2008, attorneys for Plaintiff and Nicholas Villalobos exchanged correspondence regarding termination of the business association.

In October 2008, while still working as a superintendent/project manager for the Mora project, Plaintiff began to bid and contract for highway construction work for his own company, El Terrero Construction, LLC, which was awarded in December. [Tr. Vol. I, pp. 166 – 169; 170 - 174] Beginning in October 2008, El Terrero was awarded construction work, but Plaintiff did not inform either Nicholas Villalobos or the Company. [*Id.*]

In mid-August 2008, Nicholas Villalobos initiated a process to buy out Plaintiff's interest, if any, in the Company. [Tr. Vol. II, p. 298 – 299; Plaintiff's Exhibit 8; RP 324-325] By October 2008, Plaintiff's had abandoned the Mora Projectand any role in construction work bid upon, awarded to, or performed by the Company. [Tr. Vol. II, pp. 300 – 301; 305 - 306] After October 2008, Plaintiff did

not exercise or attempt to exercise any continuing role in the management, finances, or labors of the Company. [Tr. Vol. II, pp. 312 - 313] Plaintiff did not receive or request any meeting notices of the shareholders, officers, or directors. [Tr. Vol. II, pp. 301 – 302] He did not request any corporate records or financial information about the Company. After October 2008, Plaintiff made no attempt to communicate with Nicholas Villalobos or the Company for any reason.

After terminating his working relationship with the Company, Plaintiff retained certain corporate assets, including a company vehicle, business equipment, software and other property that belonged to the Company.

Plaintiff's Sandoval County District Court Action

In April 2009, only six months after abandoning his relationship with the Company, Plaintiff filed a district court action in Sandoval County. Plaintiff's complaint requested the dissolution of the Company pursuant to NMSA 1978, Section 53-16-16. Plaintiff also requested an accounting and damages based on the alleged misappropriation of corporate assets by Nicholas Villalobos. Plaintiff did not plead that the Buy-Sell Agreement of the parties was obtained through any fraud, duress, or mistake of material fact; the Complaint never addressed the Buy-Sell Agreement or its provisions. There was no evidence that Plaintiff ever complied with the requirements of the Buy-Sell Agreement in terms of offering his stock to the Company or to Nicholas Villalobos, requesting a meeting of the shareholders, request-

ing any information or documents, requesting a role in decision-making, or communicating with the Company or Nicholas Villalobos regarding his interest.

The Sandoval County District Court dismissed Plaintiff's original complaint for improper venue. Plaintiff then re-filed his complaint in Dona Ana County, asserting the same two-count Complaint for dissolution of the Company under NMSA 1978, Section 53-16-16 and for an accounting and damages for misappropriation of corporate assets by Nicholas Villalobos.

The District Court heard the testimony of the parties and witnesses, including extensive testimony from two certified public accountants qualified as experts in business accounting and valuation: Samuel Baca and Randy Travis. [Tr. Vol. III, pp. 190 – 233; 303 - 332] The Court's Rule 11-706 expert, Mr. Travis, testified that a growth rate of 4.2% was appropriate. [Tr. Vol. III, p. 214 - 216; Plaintiff's Ex. 44] Randy Travis and Samuel Baca both testified that the prime interest rate of 3.5% per annum between 2008 and 2012 was a commercially reasonable rate of interest. [Tr. Vol. IV, p. 71 - 72]

Disposition by the District Court:

The District Court heard the matter in bifurcated proceedings, the first of which concluded June 28, 2011 and resulted in the District Court's findings and conclusions dated November 21, 2011. [Tr. Vol. I; RP 474 – 479] The essence of the Court's findings and conclusions were that there was a shareholder relationship between Plaintiff and Nicholas Villalobos; Plaintiff was and remained a fifty per-

cent (50%) shareholder in the Company whose shares had to be valued and purchased by the Company or other shareholders. [RP 474 - 479]

The matter then proceeded to a determination of the value of Plaintiff's interest. [Tr. Vols. II – IV] Plaintiff voluntarily withdrew [Tr. Vol. III, p. 299-300], and the Court granted a directed verdict on Plaintiff's Count I for misappropriation and unlawful conversion of corporate assets, specifically noting that Plaintiff had produced no evidence of damages due to any misappropriation of corporate assets, financial improprieties, or mismanagement. [RP 684-686; Tr. Vol. III, p. 300 - 303] The matter proceeded to a trial on Count II: Plaintiff's petition for dissolution of the Company under NMSA 1978, Section 53-16-16. [RP 160-164]

Following the close of evidence, in response to Defendants' closing arguments in opposition to Plaintiff's petition for dissolution of the Company pursuant to Section 53-16-16, in which Defendants argued for enforcement of the Buy-Sell Agreement, Plaintiff's counsel invoked *McCauley v. Tom McCauley*, 104 N.M. 523, 724 P.2d 232 (Ct.App. 1986), and requested that the District Court allow Plaintiff to amend his Complaint to request that the District Court exercise its equity jurisdiction and order the purchase of Plaintiff's shares. [Tr. Vol. IV, pp. 216 - 217]

The District Court granted Plaintiff's amendment and – citing *McCauley* – established the District Court's own valuation [RP 751-755], rejecting the valuation formula set forth in the Buy-Sell Agreement, and the valuations calculated by

the two accounting experts based on the terms of the Buy-Sell Agreement and generally accepted accounting principles.

The District Court established the valuation of Plaintiff's stock as $599,082.50, based upon a valuation date of December 31, 2008. [RP 751-755] The District Court reasoned this date was close to the completion of the Mora Project and the first accounting period after Plaintiff was no longer "actively working" for the Company. [*Id.*]

In establishing its own valuation of Plaintiff's shares, the District Court concluded that, while the Buy-Sell Agreement was "applicable in general, it would be unconscionable for valuation of Plaintiff's stock." [*Id.*] The District Court found that "strict application" of the Buy-Sell Agreement "would result in a negative return to Lencho Villalobos." [*Id.*] The District Court found the Buy Sell Agreement unconscionable for valuation because "it would not repay Lencho Villalobos for the full value of the money he invested in Villalobos Construction Company only several months before. . . ." [*Id.*]

The District Court disregarded the contract rate of interest in the Buy-Sell Agreement, and established the rate of interest based on a prime rate. [*Id.*] Although the experts testified the commercially reasonable prime rate would have been 3.5% annually between 2008 and 2012, the District Court awarded prejudgment interest at the rate of 9.5 % computed on the entire valuation amount. [*Id.*] The Court also calculated that interest from February 2008, on the entire stock

value determined by the District Court as of December 31, 2008, rather than the investment of $252,632.22 made in February 2008. [*Id.*]

The District Court added prejudgment interest to the entire valuation of the stock beginning in February 2008, despite the fact that the stock valuation was calculated as of December 31, 2008. [*Id.*] The District Court made no findings that the Buy-Sell Agreement was unconscionable as to the specified contract rate of interest, and did not explain its failure to enforce the terms of the Buy-Sell Agreement as to the rate of interest contracted to by the parties. [*Id.*] The Court entered Judgment for $924,955.98 on behalf of Plaintiff and against Defendant Villalobos Construction Co, Inc. [RP 749 – 750; 774]

The District Court finally ruled that the entire valuation for the stock, plus the prejudgment interest calculated from February 2008, were immediately due and payable. The District Court made no finding that the Buy-Sell Agreement's provision for a five year payment period was unconscionable and did not explain its failure to enforce the terms of the Buy-Sell Agreement as to the rate of interest contracted for by the parties. [*Id.*] The District Court duplicated the recovery to Plaintiff by setting the valuation date of December 31, 2008, but calculating prejudgment interest beginning in February 2008.

The District Court entered its Findings of Fact and Conclusions of Law and Judgment on February 21, 2013. [RP 751] Defendants filed post trial motions for reconsideration on March 7, 2013 [RP 756] and for a New Trial and Disqualifica-

tion on March 8, 2013 [RP 775] Defendants' motions were denied on May 22, 2013. [RP 852, 855, 857] Defendants' Notice of Appeal was timely filed on June 5, 2013 [RP 860], and the matter assigned to the General Calendar. [Court file]

ARGUMENT AND AUTHORITY:

ISSUE 1: The Court erred in allowing this matter to proceed on a theory of dissolution under NMSA 1978, Section 53-16-16, finding there was no evidence of damage, but then awarding damages.

Standard of Review:

An appeal from the grant or denial of a motion for summary judgment presents a question of law; therefore, this Court reviews *de novo* the trial court's denial of summary judgment. *See Harrell v. Hayes*, 1998-NMCA-122, ¶ 11, 125 N.M. 814, 965 P.2d 933. Where a summary judgment motion presents solely an issue of law, the denial of the motion is not merged into a verdict, and the issue is reviewable on appeal from a final judgment. *Chaara v. Lander*, 2002–NMCA–053, ¶¶ 22–23, 132 N.M. 175, 45 P.3d 895. This Court in *Chaara* reviewed the denial of the summary judgment motion *de novo* and determined that the district court erred as a matter of law in failing to grant the movant summary judgment. *Id.* ¶¶ 10, 22–23.

This Court reviews the District Court's factual determinations for substantial evidence. *Garcia v. Garcia*, 2010–NMCA–014, ¶ 17, 147 N.M. 652, 227 P.3d 621. However, the Court reviews *de novo* the district court's application of the law to

the facts at hand in reaching its legal conclusions. *Ponder v. State Farm Mut. Auto. Ins.*, 2000–NMSC–033, ¶ 7, 129 N.M. 698, 12 P.3d 960.

Preservation:

Defendants raised, briefed, and preserved their arguments in Nicholas Villalobos's Amended Motion for Summary Judgment [RP 258], in objections on the record at proceedings in the bifurcated trial, part 2 [Tr. Vol. III, pp. 300 - 303], by Defendants' Motion for Entry of Findings of Fact and Conclusions of Law [RP 721], and by post-trial motions for reconsideration and a new trial [RP 763, 775, 826].

Argument and Authority:

A. The Court erred in denying Defendants' Amended Motion for Partial Summary Judgment as to Count II: Petition for dissolution under NMSA 1978, Section 53-16-16.

Plaintiff sought dissolution of the Company in Count II of his First Amended Complaint. Even where Plaintiff established in part one of the bifurcated proceedings that he was a shareholder in the Company, it was uncontroverted that Plaintiff signed the Buy-Sell Agreement. There was no evidence that the circumstances under which Plaintiff signed the Buy-Sell Agreement could properly lead to a supported finding that it was a contract of adhesion, nor that Plaintiff was in an "unequal bargaining position" when he signed. *Compare Guthmann v. La Vida Llena*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985) (holding adhesive contract inquiry asks: (1) whether it was prepared entirely by one party for the acceptance of the other;

(2) whether the party proffering the contract enjoyed superior bargaining power because the weaker party could not avoid doing business under the particular terms; and whether the contract was offered to the weaker party without an opportunity for bargaining on a take-it-or-leave-it basis), *disapproved on other grounds by Fiser v. Dell Computer*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215. The Buy-Sell Agreement precluded his right to compel dissolution of the Company.

Summary judgment is proper when the moving party is entitled to a judgment as a matter of law. Rule 1-056(C) NMRA; *Jelso v. World Balloon Corp.*, 1981-NMCA-138, 97 N.M. 164, 167, 637 P.2d 846, 849. The purpose of summary judgment is to eliminate a trial in cases where there is no genuine issue of fact, even though factual issues are raised in the formal pleadings. *Id.* Where the facts before the District Court are not in dispute but only the legal effect of the facts is presented for determination, summary judgment may be properly granted. Id.

Viewing all of the evidence in a light most favorable to Plaintiff, the trial court had before it the Buy-Sell Agreement, signed by Plaintiff with no allegation or proof of fraud, and with express provisions for calculation payment of a shareholder's value in the Company upon dissolution. The Court also had the undisputed evidence of the termination of the parties' working relationship in October 2008, and the fact that after 2008, Plaintiff had no involvement in the Company. The material facts before the District Court were not in dispute, only the determination of the legal conclusions to be drawn therefrom. Whether the Buy-Sell Agree-

ment controlled the parties' actions upon Plaintiff's termination of his relationship with the Company was a legal conclusion.

In signing the Buy-Sell Agreement, Plaintiff agreed that any involuntary dissolution of the Company was waived. Paragraph 7 of the Buy-Sell Agreement provided:

> Upon termination (for any reason other than his/her death or disability) of the Corporation's employment of a Shareholder, such former employee Shareholder shall be obligated to sell all his/her Stock.

[RP 275-4] Paragraph 7 of the Buy-Sell Agreement expressly provides that a shareholder employee, upon termination of the employment relationship, shall be obligated to sell his stock in the Company. Plaintiff established that he was a shareholder and admitted he was employed as a project manager/supervisor on the Mora Project for the Company. Plaintiff's sole remedy and recourse was that he was "obligated to sell" all his stock in the Company at a price and on terms specified by the Buy-Sell Agreement. 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.

Termination or dissolution of a company is a drastic remedy, to be used sparingly. *McCauley v. Tom McCauley & Son, Inc.*, 1986-NMCA-065, 104 N.M. 523, 527, 724 P.2d 232, 236. The Buy-Sell Agreement was indisputably prepared by the Company's attorney, Richard Gregory, with all other documents associated with

Plaintiff's acquisition of a Shareholder interest in the Company in February-March 2008. Section 1 of the Buy-Sell Agreement includes the following definitions:

> (c) Attempted Disposition. The term "Attempted Disposition" shall mean any act or occurrence which wold constitute a disposition hereunder but for the fact that such act or occurrence was in breach of, or not in accordance with the terms and provisions of the Agreement;
>
> (e) Disposition. The terms "disposition" shall mean any inter vivos sale, gift, transfer, pledge, mortgage or other encumbrance, or any disposition of Stock whatsoever, whether voluntary or involuntary.

Plaintiff's lawsuit and request to dispose of his Stock through involuntary corporate dissolution represents an "Attempted Disposition" as defined under the Buy-Sell Agreement. Plaintiff sought to avoid all of the requirements within the Buy-Sell Agreement, and avoid the corresponding valuation of his Stock according to the Buy-Sell Agreement, by disregarding the required offer to either the Company or to Nicholas Villalobos.

Under New Mexico law, the general rules of contract interpretation include recognition that:

> The mere fact that the parties are in disagreement on construction to be given to the contract does not necessarily establish an ambiguity. . . . [W]here the terms of an agreement are plainly stated, the intention of the parties must be ascertained from the language used. Absent a finding of ambiguity, provisions of a contract need only be applied, rather than construed or interpreted.

Levenson v. Mobley, 106 N.M. 399, 401-02, 744 P.2d 174, 176-77 (1987) (internal citations omitted). When a contract or agreement is not ambiguous, courts interpret the meaning of the document and the intent of the parties according to the clear language of the document, and enforce the contract or agreement as written.

Espinosa v. United of Omaha Life Ins., 2006-NMCA-075, ¶ 26, 139 N.M. 691, 137 P.3d 631. The interpretation and application of the Buy-Sell Agreement's contractual provisions governing "Attempted Disposition" and "Disposition" of stock was a matter of law. There was no genuine issue of material fact precluding enforcement of the Buy-Sell Agreement's terms and conditions governing disposition of stock in the event that a shareholder ceased to be employed by the Company.

The District Court's failure to enforce the terms of the Buy-Sell Agreement effectively rendered the Buy-Sell Agreement meaningless. New Mexico law has firmly established that it is not within the province of the courts to write a new contract for the parties; the court's duty is confined to interpreting the contract which the parties made for themselves. *Western Bank v. Matherly*, 106 N.M. 31, 33, 738 P.2d 903, 906 (1987). The Court cannot do for the party what they failed to do for themselves. *Id.* Courts must allow people to make and live by their own contracts, absent fraud, duress or coercion. The wisdom or desirability of the provisions they agree upon are not proper considerations upon which the District Court can exercise its equitable discretion and rescue a party from the effects of his or her bargain.

The District Court improperly nullified the parties' unambiguous agreement and subverted the parties' manifest intent to preserve the Company in the event of a dissolution. *See Watson Truck & Supply v. Males*, 111 N.M. 57, 60, 801 P.2d 639, 642 (1990) (holding New Mexico Courts will not rewrite a contract to create an

agreement for the benefit of one of the parties that, in hindsight, would have been wiser). The District Court's decision should be reversed.

ISSUE 2: The District Court erred in allowing Plaintiff to avoid the parties' contractually agreed upon method for the disposition of stock in the Company.

Standard of Review:

This Court reviews whether a contract is unconscionable as a matter of law. *Cordova v. World Fin. Corp.*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 260, 208 P.3d 901, 905; *Fiser v. Dell Computer Corp.*, 2008–NMSC–046, ¶ 19, 144 N.M. 464, 188 P.3d 1215 (providing the issue of the unconscionability of a contract "is a matter of law and is reviewed *de novo*").

The interpretation of language in an unambiguous contract is also an issue of law that is reviewed *de novo. Krieger v. Wilson Corp.*, 2006-NMCA-034, ¶ 12, 139 N.M. 274, 279, 131 P.3d 661, 666. "A contract must be construed as a harmonious whole, and every word or phrase must be given meaning and significance according to its importance in the context of the whole contract." *Aspen Landscaping v. Longford Homes of N.M.*, 2004–NMCA–063, ¶ 14, 135 N.M. 607, 92 P.3d 53.

This Court reviews the district court's factual determinations for substantial evidence. *Garcia v. Garcia*, 2010–NMCA–014, ¶ 17, 147 N.M. 652, 227 P.3d 621. However, the Court reviews *de novo* the district court's application of the law to the facts at hand in reaching its legal conclusions. *Ponder*, 2000–NMSC–033, ¶ 7, 129 N.M. 698, 12 P.3d 960.

Preservation:

Defendants raised, briefed, and preserved their arguments in Nicholas Villalobos's Amended Motion for Summary Judgment [RP 258; 418]; in Defendants' Motion for reconsideration of Partial Summary Judgment and Enforceability of Parties Buy-Sell Agreement as a Matter of Law [RP 641]; in objections on the record at proceedings in the bifurcated trial, part 2 [Tr. Vol. III, pp. 300 - 303], by Defendants' Motion for Entry of Findings of Fact and Conclusions of Law [RP 721], and by post-trial motions for reconsideration and a new trial [RP 763, 775, 826].

Argument and Authority:

A. The District Court erred in failing to enforce the Buy-Sell Agreement in the absence of sufficient evidence of unconscionability in the valuation provisions of the Buy-Sell Agreement.

"Unconscionability" is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party. *Rivera v. Am. Gen. Fin. Servs.*, 2011-NMSC-033, ¶ 43, 150 N.M. 398, 259 P.3d 803, 816. The doctrine of contractual unconscionability can be analyzed from both procedural and substantive perspectives. *Id.*

Procedural unconscionability examines the particular factual circumstances surrounding the formation of the contract, including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free

to accept or decline terms demanded by the other. *Id.* ¶ 44. Substantive unconscionability concerns the legality and fairness of the contract terms themselves, and the analysis focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns. *Id.* ¶ 45. A contract provision is substantively unconscionable if it is grossly unreasonable and against our public policy under the circumstances. *Id.* ¶ 47.

Under New Mexico principles of contract law, a finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both. *Id.* ¶ 47. While it is more likely a contract will be invalidated for unconscionability if there is a combination of both procedural and substantive unconscionability, there is no absolute requirement that both must be present to the same degree or that both be present at all. *Id.* ¶ 47.

To analyze whether a contract is substantively unconscionable, the court looks to the terms of the contract itself and considers whether the terms of the agreement are commercially reasonable, fair, and consistent with public policy. *See Rivera*, 2011–NMSC–033, ¶ 45, 150 N.M. 398, 259 P.3d 803. For example, "[c]ontract provisions that unreasonably benefit one party over another are substantively unconscionable." *Cordova*, 2009–NMSC–021, ¶ 25, 146 N.M. 256, 208 P.3d 901. In *Cordova*, the Supreme Court clarified that New Mexico contract law defines a

substantively unconscionable contract provision as one that "is grossly unreasonable and against our public policy under the circumstances." *Id.* ¶ 31.

The threshold for unconscionability in New Mexico is high, and unconscionability traditionally relates to contracts that violate broad public policy across numerous contracts. *See, e.g., State ex rel. King v. B & B Inv. Group*, 2014-NMSC-024, 329 P.3d 658 (installment loans bearing interest rate of 1,147.14% to 1,500.00% contravene public policy and are substantively unconscionable); *Cordova*, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901 (form arbitration provision accompanying loan agreements was so unfairly and unreasonably one-sided that it was substantively unconscionable); *Ruppelt v. Laurel Healthcare Providers,* 2013-NMCA-014, 293 P.3d 902 (arbitration agreement was substantively unconscionable); *Figueroa v. THI/Casa Arena Blanca*, 2013-NMCA-077, 306 P.3d 480, 483 (same); *Rivera*, 2011-NMSC-033 (same); *Flemma v. Halliburton Energy Servs.*, 2013-NMSC-022, 303 P.3d 814 (same); *Bargman v. Skilled Healthcare Group*, 2013–NMCA–006, 292 P.3d 1 (same); *Padilla v. State Farm Mut. Auto. Ins.*, 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901; *Monette v. Tinsley*, 1999-NMCA-040, 126 N.M. 748, 975 P.2d 361; *Fiser,* 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215 (consumer class action lawsuit ban); *Felts v. CLK Mgmt.*, 2011-NMCA-062, 149 N.M. 681, 254 P.3d 124 (same); *Clay v. New Mexico Title Loans*, 2012-NMCA-102, 288 P.3d 888 (appeal limitation); *but see Rivera v. Rivera*, 2010-NMCA-106, 149 N.M. 66, 73, 243 P.3d 1148, 1155 (prenuptial agreement in violation of NMSA

1978, Section 40–3A–4(B); *Drink v. Martinez*, 89 N.M. 662, 665, 556 P.2d 348, 351 (1976) (option to purchase held unconscionable as to property not subject to original lease).

The holding of *State ex rel. Highway & Transp. Dep't v. Garley*, 1991-NMSC-008, 111 N.M. 383, 389, 806 P.2d 32, 38 is instructive. In *Garley,* the highway department brought an action to condemn leased property, naming only the lessor as defendant. The lessee intervened and asserted an interest in the tract by virtue of his lease. The trial court issued summary judgment for the lessor, and the lessee appealed. The Supreme Court held the lessee was not entitled to avoid effect of condemnation clause of lease on grounds of mutual mistake, misrepresentation or unconscionability.

Garley noted that "[t]he doctrine of unconscionability was intended to prevent oppression and unfair surprise, not to relieve a party of a bad bargain." *Id., citing Drink*, 89 N.M. at 665, 556 P.2d at 351. Finding that there was ample authority upholding the validity of clauses of this type, the Supreme Court held that, although the lessee presented evidence in his that the effect of the clause was to force him out of business and impose a "substantial loss" upon him, he made no showing that this was the purpose of the clause. *Garley*, 111 N.M. at 390, 806 P.2d at 39.

Similarly, in the instant case, there is no basis for a determination that the terms or circumstances of the Buy-Sell Agreement were unconscionable when the

parties entered into it, nor when Plaintiff left the employ of the Company to strike out on his own. Absent an affirmative showing of mistake, fraud or illegality, the fact that some terms of an agreement resulted in a hard bargain does not render a contract unconscionable. *Smith v. Price's Creameries*, 98 N.M. 541, 545, 650 P.2d 825, 829 (1982); *see also Builders Contract Interiors v. Hi-Lo Indus.*, 2006-NMCA-053, ¶ 11, 139 N.M. 508, 512, 134 P.3d 795, 799 (holding district court erred as a matter of law in characterizing negligence as mistake giving rise to unconscionability in contract).

Plaintiff's Complaint did not refer to the Buy-Sell Agreement nor plead any grounds for equitable relief from it. *E.g.* Rule 1-009 NMRA (fraud must be pleaded with particularity and proven by clear and convincing evidence). There was no evidence of mistake of fact or law, nor evidence that the Buy-Sell Agreement was the product of any fraud or illegality. The Buy-Sell Agreement, with the other shareholder documents, was prepared by attorney Rich Gregory, working equally for both Villalobos brothers and the Company.

Plaintiff's request for a court-ordered dissolution under NMSA 1978, Sec. 53-16-16 was merely Plaintiff's effort to avoid the Buy-Sell Agreement, which he signed with Defendant Nicholas Villalobos on March 18, 2008. As set forth above, the Buy-Sell Agreement expressly restricted any "disposition" of stock in the Company, and also expressly restricted any "attempted disposition" of stock outside the Buy-Sell Agreement. The Buy-Sell Agreement established the parties' agreed

method for valuation of the stock and should have been enforced by the District Court.

B. The District Court erred by failing to enforce the parties' contractual rate of interest, set forth in the Buy-Sell Agreement, in the absence of sufficient substantial evidence or a legal conclusion that the interest rate in the Buy-Sell Agreement was unconscionable or otherwise unenforceable.

Parties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits. When a contract was freely entered into by parties negotiating at arm's length, the duty of the courts is ordinarily to enforce the terms of the contract which the parties made for themselves. *Nearburg v. Yates Petroleum*, 1997-NMCA-069, ¶ 31, 123 N.M. 526, 943 P.2d 560. New Mexico . . . has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals. "Great damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relationship voluntarily assumed by the parties." *United Wholesale Liquor v. Brown-Forman Distillers*, 108 N.M. 467, 471, 775 P.2d 233, 237.

> Although the power of the courts to invalidate the agreements of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of a transaction should be convincingly established in order to justify the exercise of the power. This is so because public policy also requires that parties of full age and competent understanding must have the greatest freedom of contracting, and contracts, when entered into freely and voluntarily, must be upheld and enforced by the courts.

5 *Williston on Contracts* § 12:3 (4th ed.).

New Mexico recognizes the importance of parties being able to enter into binding contracts and agreements that will govern their behavior, and the importance of being able to rely upon the efficacy and enforceability of such agreements in ordering their affairs. In the absence of grossly inequitable conduct, New Mexico courts do not have discretion to interfere with contractual rights and remedies which go to the heart of the bargain. *Winrock Inn Co. v. Prudential Ins. Co.*, 1996-NMCA-113, ¶ 36, 122 N.M. 562, 928 P.2d 947. Courts will allow equity to interfere only when well-defined equitable exceptions justify deviation from the parties' contract. *Nearburg,* 1997-NMCA-069, ¶ 31. New Mexico courts have consistently enforced clear contractual obligations. *United Properties v. Walgreen Properties*, 2003-NMCA-140, ¶ 7.

The purpose of prejudgment interest is to "compensate a plaintiff for the lost opportunity to use the money owed between the time the plaintiff's claim accrued and the time of judgment". *Pub. Serv. Co. v. Diamond D Constr.*, 2001–NMCA–082, ¶ 52, 131 N.M. 100, 33 P.3d 651. The Buy-Sell Agreement established an interest rate to accrue on the unpaid purchase price, which shall be based on the lowest prime rate charged by any bank in Las Cruces, and pursuant to Section 2(f) of the Buy-Sell Agreement. [Def's Exh. A-6] The undisputed evidence from the Court's Rule 11-706 expert Randy Travis and CPA Sam Baca was that the lowest prime rate of interest charged by banks in Las Cruces, New Mexico in 2008 - 2012 was 3.5 % per annum, and that this was a commercially reasonable rate of interest.

[Tr. Vol. IV, p. 71 - 72] There was no evidence to support the District Court's imposition of a 9.375% pre-judgment interest rate, in light of the contractual provision – which the Court did not find to be unconscionable – and the undisputed testimony.

The evidence in the instant case established that the parties freely and willingly entered into a valid Buy-Sell Agreement that they intended to guide their affairs and settle their rights in the event of a termination of the shareholder agreement between them. The recognition and affirmation of contracts as necessary to the function of an ordered society stem from the desire to allow individuals to engage in business ventures that appeal to them, without the unnecessary interference of courts and government.

The District Court's recitation of its grounds for its decision evinces the Court's conviction that Plaintiff made a bad life choice by entering into the business with his brother, and then failing to obtain a return of his capital and interest at the time he left the business. The District Court erred in disregarding the law and facts which reflected Plaintiff's choices, in the absence of any evidence that the Buy-Sell Agreement was unfair or unconscionable.

By relieving Plaintiff of the consequences of the Buy-Sell Agreement, allowing him to sue for involuntary dissolution, but then turning the matter into a damages trial based on an eleventh hour amendment, the District Court cast doubt on parties' ability to order their world and relationship contractually. The failure of

courts to recognize and enforce contracts creates a situation in which agreements between parties are rendered useless: agreements cannot be relied upon because they are subject to the vicissitudes of the courts and government. This outcome is highly undesirable as a policy matter and should be rejected.

There may be cases in which Buy-Sell Agreements should be set aside due to unforeseen eventualities and circumstances, or to prevent a party from benefiting from wrongdoing. The record in this case is devoid of either contingency. The decision of the District Court, if allowed to stand, renders the enforcement of written agreements unpredictable, and thus makes individuals and entities less likely to attempt to order their relationships contractually. No interest of the government or society can be served by such an outcome. The District Court's decision should be reversed.

C. The District Court erred in failing to enforce the contractual payment term of five (5) years, set forth in the Buy-Sell Agreement, for payment of the stock purchase price by the Company, in the absence of sufficient substantial evidence or a legal conclusion that the contractual term was unconscionable or otherwise unenforceable.

As set forth *supra*:

> [I]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding, shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice. Therefore, you have this paramount public policy to consider-that you are not lightly to interfere with this freedom of contract.

Cash v. Street & Trail, Inc., 221 S.E.2d 640, 642 (Ga. App. 1975) (citation omitted). The recognition and affirmation of contracts as necessary to the function of an ordered society stem from the desire to allow individuals to engage in business and personal relationships that appeal to them, without the unnecessary interference of courts and government.

The Buy-Sell Agreement contained a clear provision allowing the existing shareholder to receive payment for the value of his interest as follows:

> At least twenty-five percent (25%) of the purchase price determined pursuant to Paragraph 2(e) of the Stock being acquired by each purchaser shall be paid by certified or cashier's check upon the closing, and any balance shall be evidenced at such time by each purchaser's several negotiable promissory note(s), each note secured by the stock purchased by the obligor under such note, payable in five (5) equal annual installments. . . .

As with the interest rate provision, there was no finding of fact from the District Court that the payment terms were unconscionable, and review establishes that they are not. Notwithstanding this clear provision in the parties' Buy-Sell Agreement, and despite the fact that there was no evidence to support a finding of unconscionability of this provision, the District Court ordered the entire amount it calculated was owed to Plaintiff, including all amounts of prejudgment interest in an amount more than double that deemed commercially reasonable, were ordered paid immediately. Again, the District Court's disregard for the terms of the Buy-Sell

Agreement is unsupported by the evidence and constitutes an impermissible judicial intrusion on the parties' contractual agreement and expectations.

ISSUE 3: The District Court erred in its exercise of its equitable powers.

Standard of Review:

The question of whether, on a particular set of facts, the district court is permitted to exercise its equitable powers is a question of law, while the issue of how the district court uses its equitable powers to provide an appropriate remedy is reviewed for abuse of discretion. *United Properties v. Walgreens Properties*, 2003–NMCA–140, ¶ 7, 134 N.M. 725, 82 P.3d 535. Under the abuse of discretion standard, a lower court's ruling will be overturned if it is unreasonable. *Edens v. Edens*, 2005–NMCA–033, ¶ 13, 137 N.M. 207, 109 P.3d 295.

Preservation:

Defendants raised, briefed, and preserved their arguments in Nicholas Villalobos's Amended Motion for Summary Judgment [RP 258], in objections on the record at proceedings in the bifurcated trial, part 2 [Tr. Vol. III, pp. 300 - 303], by Defendants' Motion for Entry of Findings of Fact and Conclusions of Law [RP 721], and by post-trial motions for reconsideration and a new trial [RP 756, 763, 775, 826].

Argument and Authority:

A. The District Court erred in exercising equitable discretion under Section 53-16-16 in the absence of sufficient substantial evidence of any oppressive conduct by a majority sharehold as to a minority shareholder and in the absence of sufficient substantial evidence that Plaintiff made any effort to have a role in the Company prior to seeking its dissolution.

As set forth above, Courts must tread carefully when deciding to venture into the realm of equitable relief in the world of contracts and business dealings. This Court acknowledged in *United Properties* a "broad public interest in protecting the right of private parties to be secure in the knowledge that their contracts will be enforced." 2003-NMCA-140, ¶ 10.

Contractual discretion granted to a court is not an invitation to exercise primary and independent discretion, but only to exercise discretion following determination of facts that support the exercise of discretion. *See Chavez v. Chavez*, 39 N.M. 480, 50 P.2d 264, 272 (1935) (holding the discretion of the trial court in applying the maxims of equity to the facts of a particular case is not a loose and unfettered discretion, but is subject to review for abuse), *overruled on other grounds by Pavletich v. Pavletich*, 50 N.M. 224, 174 P.2d 826 (1946). *Chavez* differentiated primary independent discretion and factually dictated discretion. 39 N.M. 480, 50 P.2d at 272.

New Mexico decisions have long relied on the proposition that courts may not rewrite obligations that parties have freely bargained for themselves in the absence of grossly inequitable conduct. *Winrock Inn v. Prudential Ins.*, 1996–

NMCA–113, ¶ 36, 122 N.M. 562, 928 P.2d 947. "Equity jurisdiction has never given the judiciary a roving commission' to do whatever it wishes in the name of fairness or public welfare." *United Properties,* 2003-NMCA-140, ¶ 19. A court should not interfere with the bargain reached by the parties unless the court concludes based on sufficient substantial evidence that the policies favoring freedom of contract ought to give way to one of the well-defined equitable exceptions. *Nearburg*, 1997–NMCA–069, ¶ 31.

The *de novo* analysis of the application of equity in this case must be made against the "long-standing backdrop of New Mexico law enforcing contractual obligations as they are written." *United Properties*, 2003–NMCA–140, ¶ 12. In *United Properties*, this Court dealt with a lease agreement that was "clear as can be" and lacking in any ambiguity. *Id.* The tenant at a shopping center absentmindedly forgot to meet the deadline to renew the lease at least 90 days before its expiration as required by the contract. *Id.* ¶ 4. When the tenant tried to renew the lease 40 days past the deadline, the landlord rejected the offer and refused to renew. *Id.* The tenant made an innocent mistake and had put nearly $2 million into the property, and the courts were asked to offer the tenant equitable relief and forgive the technical oversight of a missed deadline. *Id.* ¶¶ 3, 26.

This Court rejected the appeal to equity. *Id.* ¶ 26. Instead, the Court sought to preserve "the sanctity and predictability of the written word," stating: "We will not use equitable principles to save a party from the circumstances it created." *Id.* ¶

31. Only when finding – based on sufficient substantial evidence – "fraud, real hardship, oppression, mistake, [or] unconscionable results" in a contractual transaction should a court exercise its equitable powers." *Id.* (citation omitted). This Court concluded – contrary to the finding of the district court – that the tenant should have been held to the written terms of the contract. 2003–NMCA–140, ¶ 31.

In the instant case, the District Court decided that equitable relief was available to relieve Plaintiff of his contractual agreement. As in *United Properties*, the contractual Buy-Sell Agreement was clear on its face, and the district court's interference upset the bargaining nature inherent to business dealings. A review of the evidence consistent with the applicable *de novo* standard of review shows the following:

Plaintiff had access to an attorney, but testified he chose not to avail himself of opportunities to question the attorney regarding the documents he was signing in February 2008. [Tr. Vol. III, pp. 12 – 22] Plaintiff signed the Buy-Sell Agreement willingly and with no evidence of duress or coercion. [*Id.*] He worked as a project manager and supervisor on the Mora Project, but left that position to pursue other opportunities, including his own successful business enterprise. The terms of the Buy-Sell Agreement Plaintiff signed were straightforward and within the bounds of New Mexico law.

"[C]onduct that does not produce an injury, even though objectionable to the protestants, does not call for judicial interference." *Dilaconi v. New Cal Corp.*, 97 N.M. 782, 788, 643 P.2d 1234, 1240 (Ct.App.1982). Here, Plaintiff was entitled to get out of the Company what he put in—payment for the value of his labor as the project manager and supervisor on the Mora Project and the return of his capital investment of a little more than $250,000.00. The contract is clear, and the actions of Nicholas Villalobos do not rise to the level of requiring a court to step in and provide equitable relief beyond standard legal remedies. The district court erred in applying an equitable remedy in this case and must be reversed.

B. The District Court' Reliance on *McCauley v. Tom McCauley & Son* was erroneous.

Following the trial, the District Court rejected Plaintiff's prayer for dissolution and instead fashioned alternate remedies by invoking its equitable jurisdiction, citing *McCauley v. Tom McCauley & Son*, 104 N.M. 523, 724 P.2d 232 (Ct.App. 1986). Despite noting that Plaintiff had produced no evidence to support an award of damages [RP 684 - 685], the District Court allowed Plaintiff to amend his Count II – for dissolution pursuant to NMSA 1978, Section 53-16-16 – to request equitable relief according to *McCauley*.

As a preliminary matter, and as argued fully *supra*, *McCauley* is inapplicable where there exists a written Buy-Sell Agreement signed by the parties, which governs in the event of a dissolution or attempted dissolution. There was no evidence of minority shareholder oppression resulting in damages, and no evidence of un-

conscionability. Prior to closing argument on December 17, 2012, Plaintiff made no effort to amend his Complaint or to assert a claim other than for statutory dissolution. [Tr. Vol. IV, pp. 217 – 218] There was no assent to the Court's eleventh hour amendment, and Defendants consistently argued that the Buy-Sell Agreement and the other contractual documents controlled.

The District Court adopted *McCauley* as grounds to allow it to fashion an equitable remedy, in contravention of the Buy-Sell Agreement. *McCauley* involved an oppressed minority shareholder in a close corporation. In *McCauley* there was no written or signed agreement for the disposition of stock upon termination of a shareholder.

Plaintiff was not a minority shareholder. As a 50% shareholder in the Company, Plaintiff had the same right and opportunity to notice corporate meetings, maintain and access corporate records, and participate equally in the management, obligations and risks of the business. Plaintiff voluntarily resigned himself from any such roles. He never requested a corporate meeting. He never requested to see or copy corporate records or books. Plaintiff left the Company in October or November 2008, and within six months had commenced a civil proceeding for the dissolution of the Company and for damages based on alleged misconduct that Plaintiff later volunatarily abandoned and that both Plaintiff and the District Court noted were without evidence.

In contrast to the situation obtaining in *McCauley*, the Buy-Sell Agreement expressly set forth the method for the disposition of Plaintiff's stock and for payment to be receive by the Plaintiff for stock sold to the Company or to another shareholder. *McCauley* simply does not stand for the proposition that a court can disregard the agreements and contracts of parties and fashion a remedy that the court believes appropriate.

McCauley related to oppression of a minority shareholder and recognition of the harsh and drastic remedy of involuntary dissolution. The District Court's remedy, in contravention of the Buy-Sell Agreement, effectively committed all working capital of the Company toward satisfaction of the Judgment. Without working capital, the Company would be unable to obtain bonding, and without bonding, the Company would be unable to bid for work or to complete work performed. The prejudice to the Company by the amendment was extreme. [RP 757, 830]

The District Court's disregard of the parties' agreement and imposition of its unwarranted equitable jurisdiction went far beyond the authority granted in *McCauley*. Nothing in *McCauley* suggests that it permits a shareholder to simply ignore the agreements and contractual arrangements between shareholders and to allow the courts to fashion other remedies. Even assuming that the amounts due to Plaintiff under the Buy-Sell Agreement were lower than anticipated by Plaintiff at the time he entered into them, there is no evidence of unconscionability to support the District Court's actions in this case. The District Court erred as a matter of law

in invoking its equitable jurisdiction under *McCauley* on the fact of the instant case, and should be reversed.

ISSUE 4: The District Court's valuation coupled with an award of prejudgment interest impermissibly duplicated the compensation award to Plaintiff.

Standard of Review:

An award of damages in a bench trial must be supported by substantial evidence. *Yates Petroleum v. Kennedy,* 108 N.M. 564, 565, 775 P.2d 1281, 1282 (1989). Generally, damages must be proven with reasonable certainty, and surmise, conjecture, or speculation will not support an award. *Smith & Marrs v. Osborn*, 2008-NMCA-043, ¶ 23, 143 N.M. 684, 690, 180 P.3d 1183, 1189.

Preservation:

Defendants raised, briefed, and preserved their arguments in Nicholas Villalobos's Amended Motion for Summary Judgment [RP 258], in objections on the record at proceedings in the bifurcated trial, part 2 [Tr. Vol. III, pp. 300 - 303], by Defendants' Motion for Entry of Findings of Fact and Conclusions of Law [RP 721], and by post-trial motions for reconsideration and a new trial [RP 763, 775, 826].

Argument and Authority:

The District Court erred in applying an interest rate as of February 2008, when the valuation date was established as December 31, 2008.

A determination by this Court upholding the prejudgment interest rate would not end the problems with the District Court's award. *See Pub. Serv. Co.*, 2001–NMCA–082, ¶ 52 (explaining that prejudgment interest compensates a plaintiff for the lost opportunity to use the money owed between the time the plaintiff's claim accrued and the time of judgment); *see also Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 55, 127 N.M. 47, 59, 976 P.2d 999, 1011 (prejudgment interest serves two purposes, promoting early settlements and compensating persons; however, it was never intended to encompass an award of punitives). New Mexico follows a policy against awarding a claimant compensation that exceeds his losses - the policy against duplicate recovery. *See, e.g., Hale v. Basin Motor Co.*, 110 N.M. 314, 795 P.2d 1006 (1990) (*citing Hood v. Fulkerson*, 102 N.M. 677, 680, 699 P.2d 608, 611 (1985)); W. Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 48, 330 (5th ed.1984). The policy was denied effect in this case.

The District Court's judgment included prejudgment interest beginning February 2008 for the entire amount of the Judgment. The calculation fails to distinguish between the different components of the judgment, which originate on different dates. The Judgment includes, in part, valuation of Plaintiff's stock interest in

the Company as of December 31, 2008. This is the date the District Court determined to value the Company. Yet the Judgment computes and includes pre-judgment interest on this valuation not from December 31, 2008, but from February 2008, a date the Court rejected for purposes of valuation. Because of this error, the Judgment incorrectly includes interest for ten (10) months on the Stock valuation that was effective December 31, 2008.

The District Court's calculation in this matter duplicates the recovery to Plaintiff. The valuation established by the Court for December 31, 2008 already incorporates Plaintiff's return on his stock interest through December 31, 2008. There is no basis for awarding pre-judgment interest pre-dating the valuation date. The rate of return, the expectation of financial gain, and the appreciation of Plaintiff's financial interest in the Company are already established by the valuation as of December 31, 2008. Calculating and awarding pre-judgment interest between February and December 31, 2008 duplicates the amount Plaintiff could reasonably have expected to earn based on his investment in the Company in February 2008.

In February 2008, it is undisputed that Plaintiff made a $252,000 capital investment in the Company. To the extent pre-judgment interest is recoverable, only the $252,000 capital contribution made in February 2008 should bear interest from this date. Instead, the District Court calculated prejudgment interest on the entire award, consisting of Plaintiff's original capital contribution of $252,000 and the

stock valuation of Plaintiff's shareholder interest, an amount only realized after ten months and the completion of several projects. In other words, the valuation amount contained within it the increase in value from February through December 2008. There was no evidence to support the District Court's implicit conclusion that Plaintiff's capital investment immediately increased the stock value of the Company to the amount determined due and owing to Plaintiff after ten months. The District Court's award results in an impermissible duplication of damages based on Plaintiff's initial investment, and must be reversed.

If the District Court is going to award pre-judgment interest on an award, the time of the valuation for purposes of the judgment must be equivalent. If the date of valuation of the Company is February 2008, then the undisputed evidence is that, as of February 2008, Plaintiff had invested only $250,000 in the Company, and the prejudgment interest award must be calculated based on that figure.

If the District Court's determination of December 31, 2008 as the proper date of valuation is to be upheld, then pre-judgment interest can only be calculated from the date of the valuation. To do otherwise will duplicate the recovery by allowing Plaintiff the benefit of both ten months of investment return (reflected by the valuation amount as of December 31, 2008) and ten months of pre-judgment interest compensating Plaintiff for the lost opportunity during that period. *See Security Pacific v. Signfilled Corp.*, 1998-NMCA-046, 125 N.M. 38, 45, 956 P.2d 837, 844

(granting interest as well as awarding the return of mobile home and diminution in value would result in duplicate recovery).

ORAL ARGUMENT IS REQUESTED.

The issues presented in this matter, which involved two separate trials, are complex. The Court of Appeals will benefit in its decision from hearing the argument of counsel, with the concomitant ability to pose questions to counsel regarding the case.

CONCLUSION:

For the foregoing reasons, the decision of the District Court must be overturned and the judgment in favor of Plaintiff set aside. The case should be remanded to the District Court with instructions to implement the remedies and calculations of interest set forth in the Buy-Sell Agreement and in accordance with New Mexico law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September 2014, a true and correct copy of the foregoing was sent via U.S. Mail, postage prepaid, to:

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