IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ROBERT CIOLLI and MARY LOU CIOLLI,

Plaintiffs-Appellees,

vs.

MCFARLAND LAND & CATTLE COMPANY,

Defendant-Appellant.

No. 32,241

APPELLEES' ANSWER BRIEF

Appeal taken from County of Quay, Tenth Judicial District Court, Honorable Albert J. Mitchell, Jr.

Oral Argument is requested pursuant to Rule 12-214(B) NMRA.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE

This brief was prepared using a proportionally-spaced type style, Times New Roman, and the body of the brief contains 8,269 words. Microsoft Word, version 2003.

I. SUMMARY OF PROCEEDINGS

Appellant has failed to present an objective and complete summary of the trial court's proceedings, as required by Rule 12-213 NMRA; thus, Appellees submit the following additional summary of facts evidenced by the trial transcript and exhibits for the Court's consideration:

A. Evidence regarding Prescriptive Easement

The Appellees Robert Ciolli and Mary Lou Ciolli purchased the Ciolli Ranch under a real estate contract in 1997 and began using the road at issue after their purchase. **[Tr. 10:18:10-10:18:30]** Appellee Mary Lou Ciolli never obtained permission from Appellant to use the access road that crossed the Appellant's property ("disputed road") because the Ciollis didn't believe permission was necessary. **[Tr. 10:19:01, 10:19:08]**. Mrs. Ciolli believed the disputed road was a private road that she had a right to use. ***Id.*** Mrs. Ciolli has never met with any of the McFarlands. **[Tr. 10:38:33-10:38:38 and Tr. 11:01:00-11:01:15]**.

Similarly, Appellee Robert Ciolli never spoke with the McFarlands about permission to use the disputed road. **[Tr. 11:06:20-11:06:32, 11:14:06-11:14:45, and 11:16:27-11:16:51]**. Mr. Ciolli did not believe he needed permission from the McFarlands to use the disputed road. **[Tr. 11:24:00-11:24:06].** Mr. Ciolli further believed the road belonged to the Ciollis. **[Tr. 11:08:10-11:08:46]**.

In 2003 or 2004, the Appellees were approached by real estate broker, Richard Randalls, who said he had a buyer if they were interested in selling. **[Tr. 10:38:45-10:39:00]**. At some point after that, Mrs. Ciolli heard that a bank told Mr. Randalls that the Ciolli Ranch was "landlocked." **[Tr. 10:40:08-10:40:15]**. Mrs. Ciolli did not believe the rumors that the Ciolli Ranch was "landlocked" because she did not think that it was even possible. **[Tr. 10:43:52-10:44:08]**. Mrs. Ciolli did some internet research regarding whether a property could become landlocked, and discussed the issue with her husband, but took no further action because she did not believe it was a real issue. **[Tr. 10:44:08-10:44:27]**.

Regardless, real estate broker Richard Randalls discussed a potential easement with Shine McFarland. He could not remember when it occurred or if the Ciollis were with him during the discussion. **[Tr. 1:35-1:43]**. Shine McFarland refused to recognize an easement. *Id.* Richard Randalls testified that he told the Ciollis that the easement had been denied. *Id.* Richard Randalls did not mention to the Ciollis whether they had permission to use the disputed road. *Id.*

When Mr. Ciolli heard the rumors that his property was landlocked, he asked Shine McFarland for an easement, and Shine McFarland denied the easement; however, Shine McFarland said nothing about whether the Ciollis could or couldn't use the road. **[Tr. 11:06:20-11:06:32, 11:14:06-11:14:45, and 11:16:27-11:16:51]**. At some point after Mr. Ciolli spoke with Shine McFarland, Kelly

McFarland told him "we use your property, you use our property," and everyone works together; however, Mr. Ciolli believed this statement was made in the context that Appellant was concerned that the Ciollis were going to exclude Appellant from using the Ciolli Ranch. **[Tr. 11:20:00-11:21:55]**. The disputed road was not specifically discussed. *Id.*

Appellee Ciollis both testified that they have used only the disputed road for access since they purchased the Ciolli Ranch in 1997. **[Tr. 10:18:10-10:18:30, 10:19:10-10:19:22, and 11:05:48-11:06:05]**. The Appellees visited the Ciolli Ranch frequently in the first year or two that they purchased the property, visiting the property two or three times per month, or once a month in the winter. **[Tr. 10:19:34-10:19:46]**. The Ciolli Ranch has always been used for ranching and leased for grazing. **[Tr. 10:20:04-10:20:23]**. The Ciollis have leased out the Ciolli Ranch for grazing since 2002, and after its purchase in 1997, they immediately continued the grazing lease that was previously held between Junior Cosner and the prior owner of the Ciolli Ranch. **[Tr. 10:47:20-10:47:55 and 11:18:00 -11:18:11**. Mr. Ciolli personally uses the Ciolli Ranch for hunting, recreation, and general enjoyment. **[Tr. 11:11:22-11:11:52 and 11:13:38-11:14:03]**. Mr. Ciolli also testified that Kelly McFarland and Appellant's workers have seen him driving on the McFarland access, and have never tried to stop him. **[Tr. 11:06:06-11:06:30]**.

Judge Mitchell found, on the record, that no permission was given to the Ciollis by Appellant during the 10 year prescriptive period. **[Tr. 2:48:49-2:49:50]**. Further, Judge Mitchell found on the record that no set course or instructions, indicating permission to use a specific road, was ever given to the Ciollis by Appellant. **[Tr. 2:55:00-2:55:29]**. Additionally, Judge Mitchell found that the Ciolli Ranch had been leased and utilized continuously since 1997, and the 10 year prescriptive period was in place. *Id.*

B. Evidence regarding Easement by Necessity

A common grantor, Benton "Doc" Hodges, deeded the land owned by Appellant to it but reserved 400 acres now comprising the Ciolli Ranch. **[Tr. 11:03:08-11:03:52]; RP 00a5.** In order to use the Latham route, Appellees would have to go through other property owned by the Hodges and other property owned by the Becks; however, the Appellees were denied permission by the Becks, and the Hodges have their property posted and wired shut. **[Tr. 11:03:08-11:03:52]**. Furthermore, the Appellees have only known one entry to their property: the disputed road. **[Tr. 11:03:53-11:04:16]**. Mrs. Ciolli learned of the Latham route one month prior to trial. **[Tr. 10:44:40-10:45:12 and 11:02:00-11:02:22]**.

Mr. Ciolli testified that the northeast and southwest portions of his property are separated by a creek; thus, if Appellees were to try and use the Latham route, it would not be easy to pass the creek to get to the southwest portion of their property.

[Tr. 11:11:54-11:12:33]. Mr. Ciolli was never told about the Latham route. **[Tr. 11:12:35-11:13:15]**. Mr. Ciolli tried once to use the Latham route prior to trial, but couldn't make it to his property due to gates. *Id.* Significantly, Kelly McFarland acknowledged that the only other routes he knows of are the Latham route, a route that is impassible, and another route through Dale Hodge's property. **[Tr. 1:56:07-1:57:12]**.

During the summer of 2011, Appellees wished to sell their property; however, a recorded easement is a condition of sale for their current buyers. **[DS at unpaginated 5; Tr. 11:10:02-11:10:30]**. Appellees again proposed a written easement; however, Kelly McFarland denied the easement and, at that time, provided oral permission for use of the disputed road. **[DS at unpaginated 5].** Appellant has offered to buy the property for $30,000.00 less than the current interested buyers; however, Appellant refuses to provide the legal easement necessary for the Appellees to sell their land to anyone else. **[Tr. 9:36:20-9:36:47]**.

C. Evidence misstated by Appellant

Appellant argues that the "historical route" used to access the Ciolli Ranch was the Latham route, and in its brief, p. 2, states that "Hodges accessed the property designated as Ciolli Ranch from the North and East from NM State Highway 284 (Latham Route) and not across the property conveyed to McFarland". Kelly McFarland did testify that his father, Shine McFarland, and Doc Hodges used

the "historic route" in the 1960's. **[Tr. 1:44:-27, 1:51:20]**. Significantly, there was no testimonial or other evidence from which it could be inferred that there was unity of title among the properties crossed by the Latham Route and the Ciolli Ranch property. Regardless, testimony concerning how the property may have been physically accessed in the 1960's, by Shine McFarland who was not in privity of title with the Ciollis nor their agent, is completely irrelevant to the issues before this Court. Specifically, as outlined above, the Latham Route is impassible today. **[Tr. 11:12:35-11:13:15 and 11:03:08-11:03:52]**.

Appellant also argues that permission was given to the Ciollis to use the disputed road; however, the testimony cited does not stand for that proposition. First, Appellant states that "Appellees, as well as their real estate broker, visited the Appellant to request a written easement across McFarland Ranch." [Tr. 11:01:10]. However, this citation actually refers to testimony by Mrs. Ciolli that she has never run into any of the McFarlands.

Second, Appellant stated that it "declined to give a written easement but gave Appellees permissive use of the feed road to access the Ciolli Ranch. (Tr. 11:21:01-23:06, 1:35:18, 1:55:34, Tr. 2:13:10)." The first transcript reference refers to testimony by Mr. Ciolli that Kelly McFarland told him "we use your property, you use our property," and everyone kind of works together. **[Tr. 11:21:01-23:06]**. The citation also references testimony by Mr. Ciolli that, at that point, he got the

impression McFarland was concerned that the Ciollis would exclude McFarland from the Ciolli Ranch, but the road was not specifically discussed. *Id.* Thus, this testimony actually does not prove permissive use of the disputed road was granted, especially given that Mr. Ciolli believed he already had a right to use the road. **[Tr. 11:09:52, 11:24:07-13, 11:24:07-13]**.

The second citation of Appellant regarding permissive use refers to testimony by Richard Randalls that he requested an easement from Shine McFarland on behalf of the Ciollis, that Shine McFarland declined an easement, and that Randalls told the Ciollis that the easement was denied. **[Tr. 1:35:18]**. This does not prove that permissive use was granted to the Ciollis in 2003 or 2004, especially in light of the fact that Mr. Ciolli testified that at that time, Shine McFarland did not tell him whether or not he could use the disputed road. **[Tr. 11:06:20-11:06:32, 11:14:06-11:14:45, and 11:16:27-11:16:51]**. The third citation to supposed permissive use is testimony by Kelly McFarland that he has never withdrawn permission for the Ciollis to use the disputed road; however, this ignores the testimony that permission was never actually sought or given to the Ciollis. **[Tr. 10:19:01-10:19:08, 10:38:33-10:38:38, 11:06:20-11:06:32, 11:14:06-11:14:45, 11:16:27-11:16:51, and 11:24:00-11:24-06]**. Thus, this citation also fails to establish permission was given to the Ciollis at the inception of their use.

The fourth citation regarding permissive use refers to trial testimony by Kelly McFarland that he would give written permission, the same as his oral permission, for the Ciollis to use the disputed road; however, he would not give a legal easement. **[Tr. 2:13:10]**. This proposed written permission was not tendered until the date of the trial, January 30, 2012. Accordingly, this testimony does not prove that the Ciollis had been using the disputed road with permission since they purchased the Ciolli Ranch. Thus, none of the citations provided by Appellant prove permissive use prior to the trial date.

Appellant also argues that there are "alternative routes of access from public roadways to Ciolli Ranch (10:57:10) including the Latham route, which was the shortest and most direct although none of these access routes were recorded (Tr. 1:56:13 p.m.)." The first citation refers to testimony by Mrs. Ciolli that no one has ever objected to her using the disputed road; thus, this citation does not prove that there are alternative routes as Appellant suggests. **[Tr. 10:57:10]**. The second citation refers to testimony by Kelly McFarland that the only alternative routes he is aware of is the Latham route and a potential route through the Hodge property. **[Tr. 1:56:07-1:56:13]**. Kelly McFarland could list no other alternative routes. *Id.* The Latham route is impassible, and the potential route across Hodge property would require permission and an easement. **[Tr. 11:03:08-11:03:52 and 11:12:35-**

11:13:15]. Thus, the testimony cited by Plaintiff does not prove there are any viable alternative routes.

II. ARGUMENT

A. ISSUE 1: The Trial Court's conclusion that the Appellees were holders of an easement is supported by substantial evidence; and the elements of a prescriptive easement are supported by clear and convincing evidence.

1. Standard of Review.

The standard of review is not *de novo*, as Appellant suggests. **[Brief-in-Chief, at p. 7** (citing *State v. Granillo-Macias*, 2008-NMCA-021, ¶7, 143 N.M. 455, 176 p.3d 1187) (holding *de novo* standard of review applied in a DWI case where the issue was whether probable cause existed, which is an issue of mixed law and fact)]. This case does not involve an issue regarding probable cause, or mixed law and fact issue; thus, the standard of review is not *de novo*.

In this case, the issue is whether an easement by prescription was established by the facts after an evidentiary trial on the merits. Accordingly, this Court must decide whether substantial evidence supported the district court's findings, and whether these findings support the conclusions that the elements required to establish an easement by prescription were proved by clear and convincing evidence. *Algermissen v. Sutin*, 2003-NMSC-001, ¶9, 133 N.M. 50, 54, 61 P.3d 176, 180, (citing *Village of Capitan v. Kaywood,* 96 N.M. 524, 524, 632 P.2d 1162, 1162 (1981); *Scholes v. Post Office Canyon Ranch, Inc.,* 115 N.M. 410, 411, 852

P.2d 683, 684 (Ct.App.1992). "Even in a case involving issues that must be established by clear and convincing evidence, it is for the finder of fact, and not for reviewing courts, to weigh conflicting evidence and decide where the truth lies." *State ex rel. Dep't of Human Servs. v. Williams*, 108 N.M. 332, 335, 772 P.2d 366, 369 (Ct.App.1989). The Appellate Court gives weight to the evidentiary finding of those who were able to judge credibility even when the standard of proof is clear and convincing. *In re Castellano*, 119 NM 140, 149, 889 P.2d 175, 184 (1995).

2. Appellant failed to present an objective and complete summary of the trial court's proceedings, as required by Rule 12-213 NMRA, and such failure is fatal to its challenge to the evidence upon which the trial court relied in reaching its Judgment.

Appellant failed to comply with Rule 12-213 NMRA by presenting to this Court an incomplete, argumentative interpretation of the actual evidence relied upon by the trial court, and this failure is fatal to the first issue raised on appeal.

A contention by the appellant that a judgment or finding of fact "is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing on the proposition." Rule 12-213(A)(3) NMRA. The appellate courts interpret Rule 12-213 NMRA as imposing a duty upon an appellant "to marshal all of the evidence in support of the findings and then demonstrate that, even if the evidence is viewed in a light most favorable to the decision reached below, together with all reasonable inferences

attendant thereto, the evidence is insufficient to support the findings." *Maloof v. San Juan County Valuation Bd.*, 114 N.M. 755, 759-60, 845 P.2d 849, 853-54 (Ct. App. 1992) (holding that Appellant's failure to properly set forth the substance of testimony and evidence which supported the findings was fatal to Appellant's challenge to the sufficiency of the evidence); *see also*, *Aspen Landscaping, Inc. v. Longford Homes of New Mexico, Inc.*, 2004 NMCA 63, ¶ 28, 135 N.M. 607, 92 P.3d 53, 60 (holding that appellant "must provide this Court with a summary of *all* the evidence bearing on the finding, including the evidence that supports the trial court's determination, regardless of interpretation.") (*Emphasis added*).

Compliance with Rule 12-213 occurs when "neither the appellee nor the reviewing court [has] to supplement the appellant's presentation of the evidence." *Martinez v. Southwest Landfills, Inc.*, 115 N.M. 181, 184-85, 848 P.2d 1108, 1111, 1112 (Ct. App. 1993). Here, Appellant made material omissions and misrepresentations of evidence, and the failure of Appellant to properly set forth the substance of the evidence is fatal to Appellant's first issue on appeal, precluding this Court's review.

Appellant failed to provide the Court with material evidence regarding Appellees' testimony that they never sought permission to use the road, because they thought the road was their own. **[Tr. 10:19:01-10:19:08, 10:38:33-10:38:38, 11:06:20-11:06:32, 11:14:06-11:14:45, 11:16:27-11:16:51, and 11:24:00-**

11:24:06]. Appellant also failed to provide the Court with material evidence regarding the Appellees' testimony that Appellant never provided them with permission to use the road. *Id.* Appellant failed to provide the Court with testimony that Kelley McFarland only spoke with Mr. Ciolli one time, and at that time he discussed the "Rule of the Range" and did not specifically discuss the disputed road. **[Tr. 1:53:23 – 1:54:12]**. Similarly, Appellant has failed to cite to the Court any authority for the proposition that the "Rule of the Range" is an exception to establishment of an easement by prescription.[1]

Additionally, Appellant failed to provide the Court with material evidence regarding the Appellees' use of the disputed road, including the frequency of use of the disputed road, and the duration of use of the disputed road. **[Tr. 10:18:10-10:18:30, 10:19:10-10:19:22, 10:19:34-10:19:46, 10:20:04-10:20:23, 10:47:20-10:47:55, 11:05:48-11:06:05, 11:11:22-11:11:52, and 11:13:38-11:14:03]**. Similarly, Appellant failed to provide the Court with material evidence regarding the fact that Appellant knew Appellees used the disputed road, but did nothing to try to stop them. **[Tr. 11:06:06-11:06:30]**. Finally, Appellant failed to provide this Court with the trial court's oral findings and conclusions regarding the prescriptive easement. **[Tr. 2:48:49, 2:54:47, and 2:55:06]**.

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[1] Appellees note that a Google.com search of the term "Rule of the Range" produces references to customs and practices at shooting ranges.

In sum, Appellant failed to make a proper challenge to the evidence. Appellant completely omitted all of the evidence that supported the trial court's determination that a prescriptive easement had been established. Accordingly, pursuant to *Maloof v. San Juan County Valuation Bd.*, 114 N.M. 755, 759-60, 845 P.2d 849, 853-54 (Ct. App. 1992), this Court should summarily affirm the trial court's findings of fact and conclusions of law, and the trial court's Judgment.

3. Alternatively, Appellant's first issue on appeal fails on the merits because sufficient evidence supports the trial court's decision that Appellees established a prescriptive easement.

Even if this Court finds that Plaintiff made a proper record of the evidence, there is clear and convincing evidence to support the trial court's findings. The Transcript reflects that the trial court's Judgment was based on oral findings that a prescriptive easement was established by clear and convincing evidence. **[Tr. 2:48:49, 2:54:47, and 2:55:06]**. "Oral comments of a trial court may be used to explain the trial court's theory, although they may not be used to overturn a finding made by that court." *Blea v. Sandoval*, 107 N.M. 554, 560, 761 P.2d 432, 438 (Ct. App. 1988).

As outlined by this Court in its Notice of Proposed Summary Disposition, and the Court in *Algermissen v. Sutin*, 2003-NMCA-001, ¶ 10, 133 N.M. 50, 61 P.3d 176, "an easement by prescription is created by an adverse use of land, that is open

or notorious, and continued without effective interruption for the prescriptive period (of ten years)."

a. **Adverse use of the disputed road existed.**

"Adversity. . . means a person hold an interest 'opposed or contrary to that of someone else.'" *Id.* at ¶ 11. Use may be presumed to be adverse "if all the other elements of a prescriptive easement claim are satisfied." *Id.* However, "[i]f the presumption is rebutted by evidence of express or implied permission, plaintiffs must still persuade the trial court that their use was adverse." *Id.* at ¶ 13.

In this case, the Appellant misrepresented to this Court that there was evidence sufficient to rebut the presumption of adversity. Appellant does not cite to any evidence that it "repeatedly or continuously" told the Ciollis that they had permission to use the disputed road. To the contrary, the Ciollis believed that the road belonged to them, and also believed that they did not need permission from anyone to use it. **[Tr. 10:19:01-10:19:08, 10:38:33-10:38:38, 11:06:20-11:06:32, 11:14:06-11:14:45, 11:16:27-11:16:51, and 11:24:00-11:24:06]**. Thus, the Ciollis' use was clearly adverse to Appellant, because the Ciollis were using the disputed road as if they owned it, contrary to Appellant's ownership rights.

The only evidence that permission was ever given to the Ciollis came from Kelly McFarland, and he testified that he had one conversation with Mr. Ciolli in 2003 or 2004, approximately seven years after the Ciolli's purchase and inception of

their use, in which he told Mr. Ciolli that he didn't mind him "using the property," and that the "Rule of the Range" was that people who needed access to each others' ranches could have it. **[Tr. 1:53:23 – 1:54:05]**. This testimony is inadequate to rebut the Ciolli's evidence of adverse use because any claimed permission was granted only after the Ciollis initial use of the road. *Compare*, *Hester v. Sawyer*, 41 NM 497, 505, 71 P.2d 646, 651, (1937). ("If use has its inception in permission . . . it is stamped with such permissive character and will continue as such until a distinct and positive assertion of a right hostile to the owner is brought home to him by words or acts.") However, Mr. Ciolli thought Kelly McFarland was discussing the property in general, and not the disputed road in particular, because he interpreted McFarland's statement as an indication McFarland was concerned that McFarland Ranch personnel would be excluded from the Ciolli Ranch. **[Tr. 11:20:00-11:21:55]**. Neither of the Ciollis believed they needed permission to use the road because they thought it was their road. **[Tr. 10:19:01-10:19:08, 10:38:33-10:38:38, 11:06:20-11:06:32, 11:14:06-11:14:45, 11:16:27-11:16:51, and 11:24:00-11:24:06]**. The trial court weighed this evidence and clearly found that no express or implied permission was given to prevent commencement of the prescriptive period. **[Tr. 2:48:49, and 2:54:17]**. Thus, Appellees met their burden of proof at trial, and despite Appellant's claim that permissive use existed,

Appellees persuaded the trial court that their use was adverse to Appellant. *See Algermissen v. Sutin*, at ¶ 13.

Appellant seems to argue that because the trial court found a "right" to use the disputed road has always existed, that it follows that a finding of permissive use was made, thereby extinguishing any claim of prescriptive easement. **[Brief-in-Chief, at p. 9; RP 101, at second ¶ 1]**. However, the trial court actually found that no permissive use existed; thus, there is a distinction between the trial court's use of the word "right" and "permissive use." **[Tr. 2:48:49, and 2:54:17]**. *See Hester, supra*, 41 N.M. at 506, ("A use acquired merely by consent, permission or indulgence of the owner of the servient estate can never ripen into a prescriptive right.") (*Citations omitted.*) Similarly, this Court noted that the trial court stated in its findings that "the corporation has stated for many years that they would never stop [Appellees] from crossing to reasonably use [Appellees'] land." **[RP 102]**. The trial court's finding was consistent with a finding of acquiescence on the part of the Appellant rather than permission. *See, Brown & Brown of MT. Inc. v. Raty*, 369 Mont. 67, 72, 289 P.2d 156, 162 (Mont. 2012):

> . . . "acquiescence" and "permission" as used in this connection ["adverse" requirement] are not synonymous. "Acquiescence" regardless of what it might mean otherwise, means when used in this connection, passive conduct on the part of the owner of this servient estate consisting of a failure on his part to assert his paramount rights against the invasion thereof by the adverse user. "Permission" means more than the mere acquiescence. It

> denotes the grant of a permission or license. (*Internal citations omitted.*)

The trial court did not find that Appellant stated *to the Appellees* for many years that Appellees had permission to use the property. **[RP 102].** Rather, the trial court found no permissive use, and its written finding seems to refer to the Appellant's general position at trial that the "Rule of the Range" was that anyone had the right to use anyone else's property. **[Tr. 2:48:49, 2:54:17, 1:53:23-1:54:05]**.

Thus, the fact finder in this case weighed the evidence and found no permissive use. As previously discussed, "[e]ven in a case involving issues that must be established by clear and convincing evidence, it is for the finder of fact, and not for reviewing courts, to weigh conflicting evidence and decide where the truth lies." *State ex rel. Dep't of Human Servs. v. Williams*, 108 N.M. 332, 335, 772 P.2d 366, 369 (Ct.App.1989). Accordingly, Appellees respectfully request that this Court uphold the trial court's determination that adverse use existed from inception, and a prescriptive easement was established.

b. Open or notorious use of the disputed road existed.

Open or notorious use is "the only way that knowledge can be imputed to the landowner." *Algermissen v. Sutin*, at ¶ 18. To be open, "the use must be visible or apparent." *Id.* at ¶ 19. Frequent use of a road was found to be "so plainly apparent that the requirement of open and notorious use" is satisfied. *Silverstein v. Byers*, 114 N.M. 745, 748, 845 P.2d 839, 842 (Ct. App. 1992).

This case is analogous to *Silverstein*, because the use of the road by the Ciollis was so plainly apparent the requirements of open and notorious use have been satisfied. Specifically, Appellees both testified that they have always only used the disputed road since they purchased the Ciolli Ranch in 1997. **[Tr. 10:18:10-10:18:30, 10:19:10-10:19:22, and 11:05:48-11:06:05]**. Also, Mrs. Ciolli testified that Appellees visited the Ciolli Ranch frequently in the first year or two that they purchased the property, visiting the property two or three times per month, or once a month in the winter. **[Tr. 10:19:34-10:19:46]**. Additionally, the Ciolli Ranch has always been used for ranching and leased for grazing. **[Tr. 10:20:04, 10:20:23, 10:47:20, 10:47:55, and 11:18:00-11:18:11]**. Mrs. Ciolli testified that the Ciolli Ranch has been leased for grazing since 2002, and Mr. Ciolli testified that in 1997, they immediately continued the grazing lease that was previously held between Junior Cosner and the prior owner of the Ciolli Ranch. *Id.* These lessees have also used the disputed road. **[Tr. 2:55:08-2:55-28]**. Mr. Ciolli testified that he uses the disputed road to access the Ciolli Ranch for hunting, recreation, and general enjoyment. **[Tr. 11:11:22-11:11:52 and 11:13:38-11:14:03]**. Thus, there is clear and convincing evidence that the road was frequently used for the appropriate seasonal uses of the Ciolli Ranch and its ranching activities. This meets the openness requirement.

To be notorious, "the claimant's use of the property must be either actually known to the owner or widely known in the neighborhood." *Sutin* at ¶19. In *Cunningham v. Otero County elec. Coop., Inc.*, 114 N.M. 739, 742-743, 845 P.2d 833, 836-37 (Ct.App 1992), the Court held that "when landowner actually saw a power line, the open and notorious requirement was satisfied."

In this case, Mr. Ciolli testified that Kelly McFarland and Appellant's workers have seen him driving on the McFarland Ranch road, and never tried to stop him. **[Tr. 11:06:06-11:06:30]**. Additionally, Kelly McFarland admitted that he knew the disputed road was the only way the Ciollis have accessed their property since they purchased it. **[Tr. 2:00:00-2:00:27]**. Thus, there is substantial evidence that Appellant knew of the Ciollis' use of the disputed road as the only access, and the notoriousness requirement has been met. Finally, there was no evidence to support a finding that the road was used by the general public or multiple neighboring owners. Consequently, neither McFarland nor the Appellant's employees could have been confused as to who was using the road to the Ciolli Ranch.

c. Continuous and uninterrupted use of the disputed road existed.

For the use to be continuous, "it must take place with the same consistency that a normal owner of the claimed servitude would make, so long as it is reasonably frequent." *Sutin*, at ¶23. "Continuity is to be determined in relation to

the right claimed, and is sufficient if the property is used whenever needed, if it is reasonably frequent." *Id.* (citing *Restatement Third of Property: Servitudes* (2000), § 2.17 cmt. i*). Also see, Brown, supra*, 289 P.3d at 164. ("[C]ontinuous use does not mean constant use; rather, if the claimant used the property in dispute whenever he desired, without interference by the owner of the servient estate, the use was continuous and uninterrupted." (*Citations omitted.*)

In this case, there is uncontested evidence that the disputed road was used reasonably frequently, and with the same consistency that a normal owner of ranch land would use for access for grazing and recreation. As discussed above, Appellees visited the Ciolli Ranch frequently in the first year or two that they purchased the property, visiting the property two or three times per month, or once a month in the winter, leased it for grazing, and used it for hunting and recreation. **[Tr. 10:19:34-10:19:46, Tr. 10:47:20-10:47:55, and 11:18:00-11:18:11]**. The Ciolli's lessees have also used the disputed road. **[Tr. 2:55:08-2:55-28]**. Judge Mitchell found that the Ciolli Ranch was utilized continuously by the Ciollis and their lessees since 1997. **[Tr. 2:55:00-2:55:29].** Thus clear and convincing evidence supports that the disputed road was used reasonably frequently, and the continuity requirement has been met.

The requirement that the use be uninterrupted "refers to the actions of the prospective servient owner." *Sutin*, at ¶ 23. Thus, "if the owner takes any action

that stops the claimants' use of the property, this will defeat the claim." *Id.* In this case, there was no evidence that the Appellant ever tried to stop the Appellees from using the disputed road. **[Tr. 11:06:14]**. Therefore, there is clear and convincing evidence that Appellees use of the disputed road was continuous and uninterrupted.

d. Prescriptive period for use of disputed road has been met.

The prescriptive period for an easement by prescription is 10 years. *Sutin*, at ¶ 10. There is clear and convincing evidence that the Appellees have used the disputed road for over fifteen years. **[Tr. 10:18:10-10:18:30, 10:19:10-10:19:22, and 11:05:48-11:06:05]**. Judge Mitchell found that the 10 year prescriptive period had been met. **[Tr. 2:55:08-2:55:28]**.

e. All of the elements for a prescriptive easement have been met.

Clear and convincing evidence supports the trial court's findings on the record that Appellees used the disputed road adversely to the Appellant, openly and notoriously, continuously and uninterrupted, for the prescriptive period. Thus, Appellees respectfully request that this Court affirm the trial court's findings and Judgment.

4. Appellant's first issue fails on the merits because sufficient evidence supports the Judgment based on an easement by necessity, pursuant to the "right for any reason analysis."

As discussed above, the Transcript reflects that the trial court's Judgment was based on oral findings that a prescriptive easement was established by clear and convincing evidence. **[Tr. 2:48:49, 2:54:47, and 2:55:06]**. However, if this Court disagrees, and does not affirm the Judgment based on the substantial evidence outlined in support of a prescriptive easement, Appellees agree with this Court's analysis in the Notice of Proposed Summary Disposition that the evidence was also sufficient to establish an easement by necessity, pursuant to a "right for any reason" analysis. [**Notice of Proposed Summary Disposition, p. 6 – 9**].

As noted in the Notice of Proposed Summary Disposition, this Court "may affirm a district court's ruling on a ground that was not relied on below if reliance on the new ground would not be unfair to the appellant." [***Id.*, at p. 6,** (*citing Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154)]. While the Court may affirm a trial court ruling that is right for the wrong reasons, it may not do so unless there is substantial evidence supporting the right reason. *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (citing *Allsup's Convenience Stores, Inc. v North River Ins. Co.*, 1999-NMSC-006, ¶ 20, 127, N.M.1, 976 P.2d 1). Thus, "even if the district court offered erroneous rationale for its decision, it will be affirmed if *right for any reason*." *Id.* (*Emphasis added*). *Meiboom* held that while the lower court's decision was based on its

misapprehension of case law, there was sufficient evidence in the record to support the decision on other grounds. *Id.*

The application of this doctrine would not be unfair to Appellant because there is substantial evidence that an easement by necessity was established. Appellant argues that application of the "right for any reason" analysis would be unfair because the Court would have to "delve into. . . fact-dependent inquiries." **[Brief-in-Chief, at p. 11]**. Appellant misinterprets the scope of appellate review discussed in *Meiboom*, 128 N.M. at 541. Appellate Courts do not engage in "fact finding." *See*, *Pinnell v. Board of County Commissioners* 1999-NMCA-074 {14}, 127 N.M. 452, 456, 92 P.2d 503, 507. However, the appellate court is not precluded from determining whether substantial evidence in the trial record supports affirmation of the trial court's ruling for the "right reason." *Allsup's Convenience Stores, Inc., v. North River Ins., Co.*, 1999-NMSC-006 {20}, 127 N.M. 1, 10, 976 P.2d 1, 10. ("While we could affirm a trial ruling which is right for the wrong reason . . .we may not do so in the absence of any substantial evidence supporting what would be the right reason." (*Citation omitted.*) In addition, the Appellant's *Requested Findings of Fact and Conclusions of Law* admitted that the McFarland Ranch and Ciolli Ranch had been under common ownership and that on severance of the McFarland Ranch, no express easement had been reserved by the common grantor. R.P. 95, ¶¶ 3-4.

As demonstrated below, there are no fact-dependent inquiries to be made by the Court, because substantial evidence already establishes the existence of an easement by necessity. In addition, application of the "right for any reason" doctrine would not be unfair in this case, because the Ciollis alternatively pled an easement by necessity in their original Complaint. **[RP 0003, at ¶ 15]**. The "unfairness" question arises only where an issue was not explicitly raised below. *Pinnell, supra,* 1999 NMCA-074, {14}. Thus, Appellant has been on notice that this was a possible ground for granting the easement since the inception of the litigation.

An easement by necessity arises "from an implied grant or reservation of right of ingress or egress to a landlocked parcel." *Hurlocker v. Medina*, 118 N.M. 30, 31, 878 P.2d 348, 349 (Ct. App. 1994). "Necessity for such easement arises out from the presumption that, when a grantor conveys property, absent a clear indication to the contrary, the grantor is presumed to have intended to have reserved unto himself, or to have conveyed to his grantees, a means of access to the property in question, so that the land may be beneficially utilized." *Herrera v. Roman Catholic Church*, 112 N.M. 717, 720, 819 P.2d 264, 267 (Ct. App. 1991). To establish an easement by necessity, the following elements must be proven:

> (1) unity of title, indicating that the dominant and servient estates were owned as a single unit prior to the separation of such tracts; (2) that the dominant estate has been severed from the servient tract thereby curtailing

> access of the owner of the dominant estate to and from a public roadway; and, (3) that a reasonable necessity existed for such a right of way at the time the dominant parcel was severed from the servient tract.

Id. (*Citations omitted*).

With regard to the first element, both Appellant's property and Appellees' property were originally owned by the same person: Benton Hodges. **[RP 0003, at ¶ 9;RP 0027, at ¶ 9** (Appellees pled unity of title in their Complaint, and Appellant did not deny this allegation); **Tr. 9:28:46 – 9:29:51** (Appellant's counsel informs Judge Mitchell on the record that Benton Hodges' heirs owned the Ciolli Ranch in 1980 when the quiet title action was filed); **Tr. 1:42:37 – 1:43:47** (Appellant's president Kelly McFarland testifies that his parents purchased the McFarland Ranch in the 1960s from Benton "Doc" Hodges, and Doc Hodges retained the 400 acre Ciolli Ranch"). The record contains substantial evidence that unity of title exists and the dominant and servient estates were owned as a single unit prior to the separation of such tracts.

With regard to the second element, Hodges severed the dominant estate from the servient estate, when he deeded the servient estate to the McFarlands and retained the dominant estate, thus curtailing his access to and from a public roadway, because he either had to cross McFarland's land to the South, or to use the Latham route, he had to cross property owned by Beck and Latham. **[Tr. 11:03:08 – 11:03:52]** and **RP 0095, at ¶5** ("Hodges accessed the property designated as the

Ciolli Ranch from the North and East from NM State Highway 284 [Latham Route] and not across the property conveyed to McFarland.")]. However, the record contains no evidence that Hodges or the Ciollis ever had a grant of easement through the Beck or Latham property. Nor did the Appellant offer any evidence to contradict the Ciollis testimony that they were denied access by Beck and the route was also barred by gates that were wired shut. **[Tr. 11:03:08]**. The Latham property was also barred by gates. **[Tr. 11:12:52]**.

With regard to the third element, there was reasonable necessity for a right of way at the time the dominant parcel was severed from the servient tract. [***Id.*; *and see*, RP 0096, at ¶ 16** ("Plaintiff desired to sell the Ciolli Ranch and learned that they did not have a recorded easement to gain access to their property across any of the adjoining ranches, including the McFarland Ranch."); **Tr. 11:11:59** (Mr. Ciolli testified that only way to get to Ciolli Ranch is across McFarland Ranch)].

Additionally, even if this Court finds that permission was given for the Ciollis to use the disputed road, which the Ciollis deny, "[i]t is no barrier to the finding of an easement by necessity that the benefited [sic] parcel is accessible under [revocable] permission to cross other land . . ." *Herrera*, at 112 N.M. at 721 819 P.2d at 268 (stating that "[t]he fact that defendants had an alternative permissive route was irrelevant") (internal quotations and citations omitted).

"Revocable permission to use another's property does not negate an easement by necessity." *Id.*

Findings of fact may be given a liberal interpretation if the interpretation is supported by the evidence. "if from facts found, the other necessary facts may be reasonably inferred, the judgment will not be disturbed. *Id.* In sum, an easement by necessity was established by substantial evidence. There is no need for the Court to conduct any fact-dependent inquiries. Both the pleadings and the evidence gave notice that the Plaintiffs claimed an easement by necessity as an alternate theory. Thus, the Ciollis respectfully request that this Court affirm the trial court's Judgment pursuant to a "right for any reason" and easement by necessity analysis.

B. ISSUE 2: The 1980 Quiet Title Judgment did not extinguish an easement by prescription or necessity because the Appellees are not barred by the doctrines of *res judicata* or collateral estoppel under the uncontested facts.

1. Standard of Review

Appellant has argued that the final decree in its 1980 Quiet Title action extinguished any easements by implication or prescription. **[RP 0027]**. Appellant asserts that this is a question of statutory interpretation; however, the "Quieting Title" Act, §§ 42-6-1 through 42-6-17 NMSA, does not establish the preclusive effect of a quiet title judgment or final decree. Rather, the question of whether the 1980 Quiet Title action "extinguished" any easements by prescription or necessity is actually a question of whether sufficient evidence was introduced to meet all of the

elements of collateral estoppel. *See Blea v. Sandoval*, 107 N.M. 554, 559, 761 P.2d 432, 437 (Ct. App. 1988) (holding that collateral estoppel is the correct theory to apply "where there is an allegation that plaintiffs are attempting to litigate an issue already decided in an earlier different cause of action."). This issue is within the competence of the trial court, and this Court reviews the trial court's determination for an abuse of discretion. *Shovelin v. Cent. New Mexico Elec. Co-op., Inc.*, 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993).

2. Appellant's second issue fails on the merits because a quiet title final decree cannot extinguish an easement by prescription or necessity established after the entry of the final decree.

In *Trigg v. Allemand*, 95 N.M. 128, 130 619 P.2d 573, 575 (Ct. App. 1980), the Triggs appealed a trial court order determining that Allemand and other property owners had a right of ingress and egress over the Triggs' property. The trial court rejected the Triggs' claim that Allemand was barred use of the road by a prior quiet title action:

> Any rights of access which may have been extinguished by . . . a Final Decree [that] was entered in 1954 ***is not enforceable in this proceeding in that use of the road has existed for a period in excess of ten years since and after entry of said Final Decree in 1954***, and Trigg and his predecessors in interest ***failed to assert said Final Decree during any time prior to the filing of this lawsuit*** and Allemand has held prescriptive use of said road has existed for a period long in excess of ten years next preceding the filing of this lawsuit.

Id. at 131 – 132 (*emphasis added*).

The Court of Appeals agreed with this finding of fact, and held that any rights of access that might have been extinguished by the final decree were not enforceable because the use of the road existed for a period in excess of ten years after the Judgment's date in 1954. *Id.* at 135. The Court of Appeals also reasoned that the 1954 final decree was irrelevant because the final decree did not specifically extinguish easements. *Id.*

The holding in *Trigg* is dispositive of the Appellant's claim. In this case, the *Final Decree* was entered in 1980. [**Exhibit 1-30-12 B, at p. 2**]. There is no evidence in the transcript that Appellant asserted the 1980 *Final Decree* to try and prevent the Ciollis from using the disputed road prior to initiation of this action. In fact, there is substantial evidence that the Ciollis never sought or received permission to use the road. **[Tr. 10:19:01-10:19:08, 10:38:33-10:38:38, 11:06:20-11:06:32, 11:14:06-11:14:45, 11:16:27-11:16:51, and 11:24:00-11:24:06]**. Additionally, there is clear and convincing evidence that the Ciollis have openly, notoriously, and continuously used the disputed road since 1997. **[Tr. 10:18:10-10:18:30, 10:19:10-10:19:22, 10:19:34-10:19:46, 10:20:04-10:20:23, 10:47:20-10:47:55, 11:05:48-11:06:05, 11:11:22-11:11:52, 11:13:38-11:14:03]**. Thus, like in *Trigg*, use of the disputed road existed for a period in excess of ten years *after* the 1980 *Final Decree*. Also, as in *Trigg*, the 1980 *Final Decree* is irrelevant, because it did not extinguish any easements; rather, it only quieted title to Appellant's fee

interest in the land. [**Exhibit 1-30-12 B, at p. 2**]. Thus, Appellant's claim that the 1980 Quiet Title action extinguished the Ciolli's right to assert an easement by prescription or necessity is without merit.

3. Alternatively, a default quiet title final decree has no collateral estoppel effect.

As discussed above, collateral estoppel is the correct theory to apply "where there is an allegation that plaintiffs are attempting to litigate an issue already decided in an earlier different cause of action." *Blea v. Sandoval*, 107 N.M. 554, 559, 761 P.2d 432, 437 (Ct. App. 1988). In *Blea*, the plaintiffs claimed that a default judgment entered against defendant in a prior quiet title action had collateral estoppel ramifications for the defendant in plaintiffs' subsequent ejectment action. *Id.* at 558. *Blea* ruled that a default judgment has no collateral estoppel effect. *Id.* (citing Restatement (Second) of Judgments § 27e, at 257 (1982); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958, 103 S.Ct. 2430, 77 L.Ed.2d 1317 (1983); *In re McMillan*, 579 F.2d 289 (3d Cir. 1978); *Lynch v. Lynch*, 250 Iowa 407, 94 N.W.2d 105 (1959)). Because the plaintiffs' quiet title judgment was entered by default, *Blea* held that the defendant was not collaterally estopped from claiming equivalent or superior title to the plaintiffs as a defense to their ejection action.

This case is analogous to *Blea*. Appellants are attempting to use a Final Decree entered by default to collaterally estop the Ciollis from claiming an

easement by prescription or necessity. The 1980 *Final Decree* specifically states that Defendants did not appear and were in default. **[Exhibit 1-30-12 B, at p. 2]**. Thus, the 1980 *Final Decree* has no collateral estoppel effect and Plaintiff's second issue on appeal must fail on the merits. *Blea* at 558.

4. Alternatively, the quiet title decree cannot extinguish an easement by prescription or necessity because it failed to prove each of the elements of collateral estoppel.

Before a quiet title final decree or judgment may be given collateral estoppel effect, four conditions must be met. *Blea v. Sandoval*, 107 N.M. 554, 761 P.2d 432, 437 (Ct. App. 1988) *cert. denied* (107 N.M. 413, 759 P.2d 200 (1988). "First, the parties in the second suit must be the same or in privity with the parties in the first suit; second, the causes of action must be different; third, the issue or fact must have been actually litigated in the first case; and, fourth, the issue must have been necessarily determined in that case. *Id.* (citing *International Paper Co. v. Farrar*, 102 N.M. 739, 700 P.2d 642 (1985).

In this case, only the first element of collateral estoppel is partially established. First, Appellant in this action is in privity with the Plaintiffs in the 1980 Quiet Title action, but the Plaintiffs in this action are not in privity with the Hodges Defendants in the 1980 Quiet Title action. **[RP 0003, at ¶ 9; RP 0027, at ¶ 9 Tr. 9:28:46 – 9:29:51; Tr. 1:42:37 – 1:43:47]**. Benton Hodges, the common grantor, is not a named defendant in the 1980 Quiet Title Action, nor is he identified

as a deceased party whose unknown heirs were sought to be bound. Jim D. Akers, the Ciollis' grantor is, likewise, not a named party in the 1980 Quiet Title Suit. Defendant's Exhibit B; Plaintiffs' Exhibit 5.

Second, the causes of action are different. The 1980 Quiet Title action was an action to quiet R.W. McFarland and Elsie Slough McFarland's fee interest in the McFarland Ranch. [**Exhibit 1-30-12 B, at p. 2**].

With regard to the third element, the issue or fact must have been actually litigated in the first suit. In this case, the issues as to whether easements by prescription or necessity were created were not litigated in the first suit. *Id.* In fact, no issues were litigated in the first suit, as the quiet title judgment was entered by default. *Id.*

With regard to the fourth element, the issues must have been necessarily determined in the first suit. However, in this case, the issues regarding whether an easement by prescription or necessity were created were not determined in the first suit. *Id.* The only determination made in the first suit was the determination that the McFarlands owned the McFarland Ranch in fee, without any liens. *Id.* Thus, Appellant failed to establish substantial evidence to support its theory that the 1980 Quiet Title action worked to "extinguish" or collaterally estop the Ciollis from claiming an easement by prescription or necessity.

5. *Res Judicata* does not bar the Ciollis' claims for an easement by prescription or by necessity.

"*Res Judicata* bars re-litigation of the same claims between the same parties or their privies when the first litigation resulted in a final judgment on the merits." *Deflon v. Sawyers*, 2006-NMSC-25; 139 N.M. 637, 173 P.3d 577 (2006). It was not disputed that the Ciollis are successors in interest to Benton Hodges and the Appellant is likewise a successor to the same grantor. **[RP 0003, RP 0009; and, Tr. 1:42:37-1:43:47]**. As previously discussed, neither Benton Hodges no Jim D. Akers were named a party in any capacity to the 1980 Quiet Title Suit. Consequently, the "same party" test fails. In addition, the 1980 Quiet Title Suit quieted title only to the fee interest and any claims of lien attaching to the fee. *Defendant's Exhibit B*. The Quiet Title Decree does not cut off adverse use claims which are commenced and ripen after the date of the decree. *See Trigg*, *supra,* at 95 N.M. at 135, (". . . any rights of access that might have been extinguished by that case is not enforceable in that the use of the road has existed for a period in excess of ten years after 1954").

III. CONCLUSION.

Appellees have established that Appellant failed to present an objective and complete summary of the trial court's proceedings, as required by Rule 12-213 NMRA, and that such a failure is fatal to its challenge to the evidence upon which the trial court relied in reaching its Judgment. Additionally, Appellant's first issue on appeal must fail on the merits because sufficient evidence supports the trial

court's decision that Appellees established a prescriptive easement by clear and convincing evidence. Alternatively, Appellant's first issue on appeal also must fail on the merits because sufficient evidence supports the Judgment based on an easement by necessity, pursuant to the "right for any reasons analysis."

Further, Appellant's second issue on appeal fails on the merits because a quiet title final decree cannot extinguish an easement by prescription or necessity created after the entry of the Final Decree, because a default quiet title Final Decree has no collateral estoppel effect, and because Appellant failed to establish all of the elements required to prove that the Final Decree had *res judicata* effect.

Accordingly, Appellees respectfully request that this Court affirm the trial court's Judgment, which establishes a permanent easement for ingress and egress in favor of Appellees. **[RP 0114]**.

IV. REQUEST FOR ORAL ARGUMENT.

Pursuant to Rule 12-214(B)(1) NMRA, Appellees request oral argument. Appellees believe that oral argument may help to resolve the issues in this case due to Appellant's failure to provide an objective and complete summary of the trial court's proceedings, as required by Rule 12-213 NMRA.

Respectfully Submitted,

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