IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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DAVID J. FOGELSON AND CORINNE FOGELSON, husband and wife,

Plaintiffs-Appellees/Cross-Appellants,

v.

Court of Appeals No. 35086
Thirteenth Judicial District Court
No. D-1329-CV-2010-02239

ERIC WALLACE, MARK BOZZONE, WALLEN DEVELOPMENT, INC., DEVELOPMENTS BY WALLEN, LLP,

Defendants-Appellants/Cross-Appellees,

PLAINTIFFS-APPELLEES DAVID J. FOGELSON AND CORINNE FOGELSON'S ANSWER BRIEF TO BOZZONE'S BRIEF-IN-CHIEF

Appeal from the Thirteenth Judicial District Court, County of Sandoval, The Honorable George P. Eichwald

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TABLE OF CONTENTS

I. **SUMMARY OF PROCEEDINGS**...1

A. Nature of the Case...1

1. The prior action...1

2. The instant case...2

II. **COURSE OF PROCEEDINGS AND DISPOSITION BELOW**.........3

A. The claims...3

B. Parties and their principals and owners...................................4

B. Pre-trial disposition of the claims 6

C. Summary of facts and substantial evidence support for Bozzone's Contested findings of facts and conclusions of law...................... ..7

III. **ARGUMENT** 14

A. Plaintiffs' prior suit against Wallen did not bar Plaintiffs' claims against Bozzone, individually, because Bozzone did not preserve any such claims and there was no arbitration clause compelling Bozzone to arbitrate...............................14

1. Bozzone did not preserve the arguments he now raises that the prior arbitration action against Wallen precludes this action against Bozzone...........................14

2. Plaintiffs' claim against Bozzone could not have been brought in the prior arbitration because Bozzone was not a party to the Agreement to arbitrate 16

B. The District Court did not erroneously disregard the law of agency..20

C. The District Court correctly found that Bozzone intentionally interfered with Fogelson's contractual relations 30

i

D. The District Court correctly found in favor of Fogelsons on this prima facia claim 36

E. The District Court correctly found a viable civil conspiracy claim 37

F. The evidence supports a finding of punitive damages 38

IV. CONCLUSION AND REQUEST FOR RELIEF...........................39

TABLE OF AUTHORITIES

NEW MEXICO CASES

Alexander vs. Carlton & Associates
2005-NMCA-034, 137 N.M. 293, 100 P.3d 509 17

Bogel v. Summit Investment Company, LLC,
205-NMCA-024.. 27, 31

Deflon v. Sawyers,
2006-NMSC-025, 137 P.3d 577 ....17, 18, 19

Diversey Corp. v. Chem-Source Corp.,
1998-NMCA-112, 125 N.M 748, 965 P.2d 332......................................27

Ettenson v. Burke,
2001-NMCA-003, 17 P.3d 440 37

Gracia v. Bittner,
1995-NMCA-064, 120 N.M. 191, 194, 900 P.2d 351,
354, NMRA 12-216(B)...16, 24, 25, 26,27

Heye v. American Golf Corp. Inc.,
2003-NMCA-138, 134 N.M. 558, 90 P.3d 495...17

Kaveny, et al., v. MDA Enterprises, et al.,
2005-NMCA-118, 138 N.M. 432, 120 P.3d 854 ....28, 30

Kelly v. St. vincent Hosp.,
1984-NMCA-130, 692 P.2d 1350...36

Kreischer v. Armijo,
1994-NMCA-118, 884 P.2d 827 ....28, 30

Mireles v. Broderick,
117 N.M. 445, 872 P.2d 863 25

Saiz v. Belen School District,
113 N.M. 387, 827 P.2d 102 25

Salazar v. Furr's,
629 P.Supp. 1403 (D.N.M. 1986) 18

Silva v. Town of Springer
1996-NMCA-022..37

Stinson v. Berry,
1997-NMCA-076, 123 N.M. 482, 943 P.2d 120....................................29, 30

CASES FROM OTHER JURISDICTIONS

Lobato v. Pay Less Drug Stores, Inc.,
261 F.2d 406, 408-409 (10th Cir. 1958) 29

Morgan v. City of Rawlins,
792 P.2d 975, 980 (10th Cir. 1986) 18

Smith v. Updegraff,
744 F.2d 1354 (8th Cir. 1984) 18

Wells v. Thomas,
569 F.Supp. 426, 434 (E.D.Pa. 1983)..18

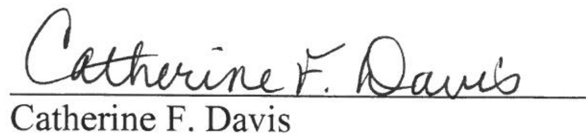
STATUTES AND RULES

1978 N.M.S.A. §44-7A-8(c)..17

NMRA 12-216..16, 25, 26

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A)(1)(F)(3), Plaintiffs-Appellees, David J. Fogelson and Corinne Fogelson, state that this Answer Brief complies with the length limitations of Rule 12-213(F) NMRA. The brief uses a proportionately spaced font, has a typeface of 14 points, and contains 9,469 words. The word count is obtained using Microsoft Word 2007.



Catherine F. Davis

STATEMENT OF ABREVIATIONS

Trial transcripts are identified as follows:

April 29, 2014: Tr.I
April 30, 2014: Tr.II
May 1, 2014: Tr.III

Plaintiffs exhibits are identified by Exhibit number.

Eric Wallace's exhibits are identified by name and letter, e.g. "Wallace Exhibit A".

Mark Bozzone's exhibits are also identified by name and letter, e.g. "Bozzone Exhibit A".

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

1. The prior action

Prior to filing this suit, Plaintiffs/Appellees/Cross-Appellants David J. Fogelson and Corinne Fogelson (hereinafter "Fogelson") filed a complaint in arbitration against Wallen Development, Inc. and Developments by Wallen, LLP (hereinafter sometimes jointly "Wallen") for breach of contract, fraud and unfair practices. [RP 3-4]. On May 25, 2008, Fogelsons, as Purchasers, and Wallen, as Seller, entered into a Purchase Agreement with Wallen for New Home Construction (hereinafter "Purchase Agreement"). [RP 11-34; Plaintiffs' Exhibit 24]. Wallen owned the lot, upon which a house was to be constructed for the Fogelsons (hereinafter "property"). [RP 3-4] Pursuant to the terms of the Purchase Agreement, Fogelsons agreed to pay Wallen $220,605.00 to purchase the property, which included the new home to be constructed thereon by Wallen. [RP 11-34; Plaintiffs' Exhibit 24] The Purchase Agreement contained a Cash Addendum, which set forth the payment schedule. [Plaintiffs' Exhibit 24, RP 27] Fogelsons paid $165,111.00 to Wallen in accordance with the requirements of the payment schedule on the Cash Addendum. [RP 3] Prior to completion of the construction of the home, Wallen abandoned the job and Claims of Lien were filed against the

Property in the amount of approximately $57,052.20 for labor and materials which were unpaid. [RP 3]

Paragraph 6 of the Purchase Agreement required Purchasers (Fogelsons) and Seller (Wallen) to resolve, through binding arbitration, any disputes arising between them relating to the construction or to the terms and provisions of the Purchase Agreement. [RP 13] Fogelsons filed a complaint in arbitration against Wallen. [RP 3] Larry Filener, as registered agent of Wallen, was served with the Complaint in Arbitration. [RP 36-37, 63, 219] Fogelsons obtained a default judgment in arbitration against Wallen for breach of contract, fraud and unfair trade practices. [RP 64-68] The default judgment against Wallen was for $165,111.00 in compensatory damages and $165,111.00 in punitive damages [RP 64, 67-68].

2. The instant case

Fogelsons filed an initial Complaint on September 16, 2010, against various Defendants, including Larry Filener, Eric Wallace, Jenice Montoya, Garry and Mary Wallen, and GM Westside Investments, LLC. [RP 1] Fogelsons filed their First Amended Complaint on March 26, 2012, and asserted tort claims against Defendants/Appellees Eric Wallace (hereinafter "Wallace") and Mark Bozzone (hereinafter "Bozzone), individually, and Wallen. [RP 162] On January 21, 2014, Fogelsons filed their Second Amended Complaint and asserted tort claims against

Wallace and Bozzone, individually, and asserted claims only for foreclosure against Wallen and other defendants. [RP 869].

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

A. The Claims

Fogelsons, in their First Amended Complaint and Second Amended Complaint, asserted that Bozzone was an investor in Wallen and was involved in the decision making processes of Wallen. [RP 163, 871] Fogelsons asserted tort claims against Bozzone for Conversion, Fraud, Unfair Trade Practices, Civil Conspiracy, Prima Facie Tort, and Intentional Interference with Contractual Relations [RP 166-171, 874-879] In Fogelson's First Amended Complaint and Second Amended Complaint, Fogelson asserted: 1) that Bozzone was involved in the decision-making processes of Wallen and had full authority to make decisions [RP 163. 871]; 2) Bozzone instructed the General Manager to close the Wallen down [RP 164, 871]; and 3) Bozzone instructed employees of Wallen which bills to pay or not pay [RP 165, 872]. Each of these allegations were denied by Bozzone in his Answer to the First Amended Complaint [RP 334] and his Answer to the Second Amended Complaint [RP 909]. Bozzone did not assert an affirmative defense that Bozzone was an agent of Wallen, that Bozzone was acting in his capacity as a manager of Holdings, or that Bozzone owed fiduciary duties to Wallen. [RP 335, 910-911]

Bozzone's counsel argued in her opening statement that the testimony would be clear that Mr. Bozzone was never an officer and solely put cash into the company through Mooresville. [Tr I: 16] At trial, Bozzone testified that he was not an officer at Wallen. [T II: 178] Bozzone asserted that he was an agent in Mooresville, which was an investor in Wallen. [Tr II: 178] Bozzone testified that Mooresville did not have any decision making authority in Wallen. [Tr III: 18]

B. Parties and their principals and owners

Bozzone cites Exhibit N and trial testimony located at Tr II:3 as preservation of his new arguments, presented for the first time on appeal, that Bozzone was a manager in Wall2Holdings ("Holdings") and Bozzone had the right to advise Wallen and to actively participate in management as a Holdings Manager. Although Exhibit N was admitted into evidence, there was no testimony about any provisions in Exhibit N allowing Bozzone to make management decisions. Tr. II:39, cited by Bozzone in his Brief in Chief on page 4, does not discuss the management role of any individual. Bozzone never testified that he owed fiduciary duties to Wallen. Bozzone never testified that he was an agent of Wallen. Bozzone never testified that he was privileged to take any actions as an agent or *de facto* director of Wallen. Bozzone never testified that he was a manager of Holdings and took actions in his role as manager of Holdings on behalf of Wallen. Instead, Bozzone testified that he was an agent in Mooresville, which was an

investor in Wallen and that Mooresville did not have any decision making authority in Wallen. [Tr II: 78; Tr III:18].

Bozzone asserts in his section entitled "B. Parties and their principals and owners", that Holdings' managers undertook additional efforts to get Wallen through its cash crunch and continue as a viable business and cites the trial transcript and Exhibits in support thereof. (p. 11 of Bozzone's Brief) Bozzone further argues that as a *de facto* director of Wallen, Bozzone owed fiduciary duties to Wallen. Bozzone's failure to preserve this argument is set forth below. The testimony and the exhibits cited do not contain any evidence or testimony that actions taken were taken by Bozzone as a manager of Holdings. The testimony and Exhibits cited concerned Bozzone's actions in purchasing unencumbered assets from Wallen, through other entities owned by him. Bozzone also cites Plaintiffs' Exhibit 72 and Bozzone Exhibits D and E as further evidence that he took actions as a manager of Holdings. Holdings is not mentioned anywhere in those Exhibits. Plaintiffs' Exhibit 72 consists of two emails between Jenice Montoya and Mark Bozzone about a draft 2009 Business Plan. Bozzone Exhibit D is an email to Wallace and Bozzone about cuts Larry Filener was implementing. Bozzone Exhibit E concerns guarantee fees.

C. Pre-trial and trial disposition of the claims

Prior to trial, the court granted Bozzone's motion to dismiss Fogelsons' Unfair Practices Act ("UPA") claims [RP 424-27, 861]. At trial and by Order dated May 21, 2014, the court granted Bozzone's Rule 1-041(b) motion as to the fraud and conversion claims, but denied the motion as to the claims of civil conspiracy, intentional interference with contractual relations and *prima facie* tort claims. [RP 1050]

A trial on the merits was held on April 29-30 and May 1, 2014. The parties filed proposed findings of facts and conclusions of law after the trial. [RP 1058-1111]

The trial court entered its findings of fact and conclusions of law and order of the court, wherein the court concluded that Bozzone actively participated in the commission of *prima facie* tort, intentional interference of contractual relations, and civil conspiracy against Fogelsons. The trial court found Bozzone individually liable for his own tortious acts, and found Bozzone and Defendant-Appellee Eric Wallace ("Wallace") jointly and severally liable for the damages of the Fogelsons. [RP 1150-1174]

Bozzone filed no post-trial motions, other than Bozzone's objections to the cost bill filed by the Fogelsons.

Bozzone argues that the court's findings and conclusions, set forth on pages 6-7 of Bozzone's brief, imposing liability on Bozzone are erroneous based upon disregard of the law of agency and resulting legally erroneous assumptions. Bozzone's failure to preserve his new defenses that Bozzone was an agent and the case law which supports that an agent can be held individually liable are addressed below in "III. Argument" of this answer brief.

D. Summary of facts and substantial evidence support for Bozzone's contested findings of facts and conclusions of law set forth in Bozzone's subsection E.

Fogelsons dispute several of the statements made in Bozzone's Summary of Facts. Some of the facts asserted by Bozzone in his Summary of Facts contradict the court's findings that have not been challenged or, if challenged, are supported by substantial evidence. Bozzone also challenges many of the trial court's findings and conclusions as erroneous as a matter of law because of the principals of agency. Fogelsons set forth below additional facts of the case and the evidence and court's findings in support of those facts.

On May 25, 2008, Fogelsons, as Purchasers, and Wallen, as Seller, entered into a Purchase Agreement with Wallen for New Home Construction (hereinafter "Purchase Agreement"). [RP 11-34; Plaintiffs' Exhibit 24]. Wallen owned the lot, upon which a house was to be constructed for the Fogelsons (hereinafter "property"). [RP 3-4] Pursuant to the terms of the Purchase Agreement, Fogelsons

agreed to pay Wallen $220,605.00 to purchase the property, which included the new home to be constructed thereon by Wallen. [RP 11-34; Plaintiffs' Exhibit 24] The Purchase Agreement contained a Cash Addendum, which set forth the payment schedule. [Plaintiffs' Exhibit 24, RP 27] Fogelsons paid $165,111.00 to Wallen in accordance with the requirements of the payment schedule on the Cash Addendum. [RP 3; Tr I:30] Prior to completion of the construction of the home, Wallen abandoned the job and Claims of Lien were filed against the Property in the amount of approximately $57,052.20 for labor and materials which were unpaid. [RP 3]

Bozzone was an agent in Mooresville, which was an investor in Wallen. [Tr II: 177-178] Bozzone denied in his Answers that he had any decision-making authority in Wallen. [RP 334, 909] Bozzone testified that Mooresville had no decision-making authority in Wallen. [Tr III: 18]

Bozzone knew that there was one general operating account into which all monies were put. [RP 1154, ¶30, Tr I:104] Although Bozzone argues on page 9 of Bozzone's Brief, that he was not aware that payments intended to be applied to a specific property were not segregated, the trial court found, based upon the testimony of Jenice Montoya ("Montoya") that Wallace, Bozzone and Filener were aware that there was just a general operating account into which all monies were put. [RP 1154, ¶30, Tr I: 104] Contrary to Bozzone's assertion in his Summary of

Facts, Montoya does not confirm in Tr I: 121 and 186-87 that Bozzone first learned that Wallen was not segregating funds in February of 2009. Rather, TR I: 121 contained Ms. Montoya's testimony about Bozzone's question on payables. In Tr I: 186-87, Montoya specifically states that Bozzone was questioning why funds paid to the construction on the model home were not paid to trades and not whether or not there was only one operating account.

As set forth above in section "A. The Claims", Fogelsons dispute that Holdings' managers and the equity investors took additional efforts to get Wallen through its cash crunch and continue as a viable business as claimed by Bozzone on page 11 of Bozzone's Brief.

Contrary to Bozzone's assertions in his Summary of Facts, Fogelsons did introduce evidence that Bozzone was aware of the Fogelsons' contract for a cash purchase. Bozzone challenges the court's Findings ¶40, 60. However, the evidence set forth below establishes that Bozzone knew Fogelsons were purchasing property for cash. Montoya, as General Manager, would provide a weekly update to Bozzone, Wallace, and Filener having to do with sales, cancellations and home starts. [RP 1151, ¶7 challenged by Bozzone as a matter of law; supported by Tr I: 80] Sales would be identified by communities and addresses. [RP 1151, ¶8 challenged by Bozzone as a matter of law, supported by Tr I:81] Montoya would tell Bozzone, Wallace and Filener about sales that

occurred as part of her weekly reporting requirements. [RP 1151 ¶9 challenged by Bozzone as a matter of law; supported by Tr I:82] Montoya would provide Bozzone with Production Summaries, which would state what sales had happened during the week, as well as what homes had started construction and gone vertical and what cancellations had occurred. [RP 1151-1152 ¶13, challenged by Bozzone as a matter of law; supported by Tr I: 84] Forecasts of closings were sent to Bozzone, which projected closings and when funds would be available. [RP 1152, ¶14 challenged by Bozzone as a matter of law; supported by Tr I: 84-85] Bozzone would receive start reports on a regular basis, which listed any home that had broken ground to vertical construction. [RP 1152, ¶15 challenged by Bozzone as a matter of law, supported by Tr I: 89] Cash flow by jobs reports would show cash flows coming in typically by address. [RP 1153, ¶20 challenged by Bozzone as a matter of law; supported by Tr I: 95] Bozzone received Exhibit 65, which stated that Fogelsons were a cash buyer. [Exhibit 65, RP 1155 ¶39, challenged by Bozzone as a matter of law; supported by Tr I: 84-85]

Plaintiffs' Exhibit 65 specifically lists under Projected Closings for February 2009 that Fogelsons were purchasing 1012 Cristanos for cash. The trial court, in its Finding ¶59 , cited Montoya's testimony that Exhibit 65 was part of the production summary regularly sent to Wallace, Bozzone and Filener. [RP 1157, challenged by Bozzone as a matter of law; supported by Tr I: 83, 84, 133, Tr II:

62] The trial court also cited in its Finding ¶59, the testimony of Wallace that he produced Exhibit 65, which shows a projected closing for February of 2009 for a cash sale of the Fogelsons. [Tr II: 62] The trial court found in its Finding ¶38 that once the Fogelson house began to go vertical, the Fogelson property would show up on production summaries and reports. [RP 1155 challenged by Bozzone as a matter of law; supported by Tr I: 106]

The evidence presented at trial supports the trial court's findings that Bozzone knew about the cash sale to Fogelsons and that Bozzone was aware, when he made the February 24, 2009 decision to close Wallen, that the Fogelson's house had not been completed. Bozzone received Exhibit 65, which showed a projected cash closing of the Fogelson house in February of 2009. [Tr I: 83, 84, 133, Tr II: 62] In February of 2009, Bozzone instructed Montoya that the company would close. [RP 1159 ¶78 challenged by Bozzone as a matter of law; supported by TR I: 154; TR III: 126; Plaintiffs' Exhibit 94 dated February 24, 2009] Bozzone told Montoya to not keep a skeleton crew to finish up the few homes that were within 30 days of completion, one of which was the Fogelsons' home. [RP 1160 ¶79 challenged by Bozzone as a matter of law; supported by Tr I: 154-155] Bozzone was only interested in information regarding the three homes for which he provided construction financing. [RP 1160 ¶81, challenged by Bozzone as a matter of law; supported by Tr I: 154-155; Plaintiffs' Exhibit 95]

Bozzone challenges the court's finding ¶54 that the decision to push payable and not pay vendors and the ratification thereof was reckless and done without regard to the rights of Fogelsons. This finding is supported by the evidence presented at trial as follows. By April of 2008, payments were being delayed to vendors, which was a collaborative idea with Wallace, Bozzone and Filener. [RP 1152, ¶18, challenged by Bozzone as a matter of law; supported by Tr I:93; Tr III: 119-120] Bozzone knew that payments to vendors were being delayed. [RP 1154, 1156 Findings ¶46, 51, 52, 53 challenged by Bozzone as a matter of law; supported by Tr I: 93; Tr III: 119-120; Tr I: 128-129, 132-133; Plaintiffs' Exhibit 46, 59, 64] Bozzone was receiving reports in January of 2009 which showed vendors and how late some of their payments were. [RP 1157 ¶57, challenged by Bozzone as a matter of law; supported by Plaintiffs' Exhibit 75; Tr I: 140-141] Bozzone knew in February of 2009 that contractors could lien after 30 days. [RP 1152 ¶19; challenged by Bozzone as a matter of law; supported by Tr I:94, 145; 1158 ¶67, challenged by Bozzone as a matter of law; supported by Plaintiffs' Exhibit 81and Tr I:94, 145] Bozzone became directly involved in the decisions about what liens to pay and that liens on closed homes should be paid first so that based on Bozzone's instructions other homes were being put ahead of the Fogelsons' home concerning liens. [RP 1158 ¶70 challenged by Bozzone as a matter of law; supported by Exhibits 84, 85; Tr I: 146-148] Bozzone fails to mention in his

Summary of Facts on pages 14-15, that it was Bozzone who instructed Montoya to address the liens on closed homes first. [Plaintiffs' Exhibits 83, 84, 85; Tr II: 164; Tr III: 13; RP 1158]

Bozzone challenges the court's Finding ¶75. This finding is supported by the court's Findings ¶73 and ¶74. Plaintiff's Exhibit 80 established that Wallace and Bozzone knew that approval of the construction loans was being held up for failure to fund an interest reserve. Bozzone instructed Montoya to tell homeowners and vendors that Wallen was in the middle of renewal with their banks to raise additional capital. [Plaintiffs' Exhibit 86; Tr I: 148-149]

Bozzone challenges Findings ¶80, 105, 107 and 108 as being conclusions of law. Those appear to be conclusions of law, which are supported by the evidence set forth above.

Contrary to Bozzone's Summary of Facts contained on page 16 of Bozzone's Brief, the trial court found, that the major reason Fogelsons did not receive any of the monies from the sale of the lots after Wallen was closed, was because Filener and Wallace undertook to return deposits to purchasers because they had been notified that the attorney general was investigating them. [RP 1163 ¶110, unchallenged by Bozzone ; supported by Tr III: 109] Filener and Wallace chose to return deposits rather than pay any monies to Fogelsons to hopefully prevent any further investigation by the attorney general's office. [Tr III: 132-133]

Fogelsons dispute that any evidence was presented by Bozzone at the trial in support of his new claim that Bozzone acted as manager for Holdings as claimed on page 17 of Bozzone's Brief. The trial court did not make any findings in support thereof.

Bozzone lists trial court's findings that are challenged based on what Bozzone claims is undisputed evidence (page 20-22 of Bozzone's Brief). The trial court's findings were supported by exhibits and testimony cited above that Bozzone knew that Wallen had only one Operating Account and Bozzone knew that Fogelsons were contract purchasers paying cash. No one, including Bozzone, testified that Bozzone was an agent for Holdings. To the contrary, Bozzone testified that he was an agent of Mooresville, an investor in Wallen. Bozzone knew that a closing was to occur in February of 2009, which was for a cash sale to Fogelsons.

III. ARGUMENT

A. Plaintiffs' prior suit against Wallen did not bar Plaintiffs' claims against Bozzone, individually, because Bozzone did not preserve any such claim and there was no arbitration clause compelling Bozzone to arbitrate.

1. Bozzone did not preserve the argument he now raises that the prior arbitration action against Wallen precludes this action against Bozzone.

Plaintiffs' suit against Bozzone is based on tortious acts committed by Bozzone in his individual capacity. In his Answers to the First Amended

Complaint and the Second Amended Complaint, Bozzone did not assert any affirmative defenses that the prior arbitration barred Plaintiffs' claims raised in this Case (e.g. res judicata or collateral estoppel). [RP 333, 908] At trial, Bozzone did not claim that the first suit barred claims against him on the basis that he was in privity with Wallen or on the basis that he was acting as an agent for Wallen. Nonetheless, Bozzone now argues this newly raised defense or claim was preserved by statements made in his counsel's Opening Statement at Tr. I: 16-17. (Ft. 7, page 22 of Bozzone's Brief) Bozzone's counsel, in her opening argument, stated only that an arbitration had been held solely against Wallen, that Fogelsons were seeking from Bozzone the damages that were awarded under that arbitration, and Fogelsons were seeking to hold Bozzone liable for debts of Wallen without a legal theory to do so. [Tr I: 17] Bozzone's counsel also argued that Bozzone was: 1) not a party to the contract; 2) was not an officer; and, 3) was only an investor. [TR. I 16]. At no time during her opening statement or at any other point during the proceedings did Bozzone's counsel argue that the prior arbitration barred Plaintiffs' claims against her client. Indeed, Bozzone's Record Proper citations to 51-55 and 199-207 in support of Bozzone's right to raise these claims on appeal are citations to motions filed by Wallace, not Bozzone. Although Bozzone presented Findings of Fact to the Court, claiming he was not a party to the arbitration and stating that an arbitration award had been entered, and setting out

the amount, Bozzone did not propose any Conclusions of Law to support the claim he now makes for the first time on appeal, specifically, that the preclusive effect of the first suit requires the reversal of the judgment for Plaintiffs on the basis that Bozzone was in privity with Wallen and was acting as an agent for Wallen. As this argument or defense was not preserved in the District Court, this Court cannot consider it for the first time on appeal. NMRA 12-216(A) generally requires error to be preserved below in order to be reviewed on appeal. *Gracia v. Bittner,* 1995-NMCA-064, 120 N.M. 191, 194, 900 P.2d 351, 354. NMRA 12-216(B) sets forth general exceptions to the preservation requirement, which allows an appellate court to consider jurisdictional questions or questions involving general public interest or fundamental error or fundamental rights of a party. *Id* at ¶12. None of those exceptions are applicable to the arguments now being raised by Defendant Bozzone.

2. Plaintiffs' claims against Bozzone could not have been brought in the prior arbitration because Bozzone was not a party to the Agreement to arbitrate.

The Purchase Agreement is between Wallen Development Inc. or Developments by Wallen LLP, as Seller, and Dave Fogelson and Corinne Fogelson, as Purchaser. (Exhibit 24) Paragraph 6 of the Purchase Agreement states that the Seller and the Purchasers agree to resolve exclusively through binding arbitration any dispute regarding the construction and the terms of the

Purchase Agreement. (Exhibit 24). While Bozzone seeks to deflect the Court's attention from the true issue by arguing that Fogelsons' claims in both suits are based on the same contract breach, requiring them to be brought in the same action, Bozzone ignores that he testified that he never signed any documents in the Fogelsons' transaction, let alone one which contained an arbitration clause. A legally enforceable contract to arbitrate is a prerequisite to arbitration. Parties will not be forced to arbitrate without such a contract. §44-7A-8(c) 1978 N.M.S.A. *Heye v. American Golf Corp., Inc.* 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495; *Carlton & Associates,* 2005-NMCA-034, 137 N.M. 293, 100 P.3d 509. In this case, there was no contract on which Fogelsons could rely to compel Bozzone to arbitrate. Therefore, the Fogelsons had no choice but to file this action to raise its individual tort claims against Bozzone and Wallace.

In further support of his argument, Bozzone cites *Deflon v. Sawyers,* 2006-NMSC-025, 137 P.3d 577 for the proposition that a prior suit against a principal, based upon corporate conduct, bars a new action against defendant officers or agents. However, *Deflon* did not involve an arbitration contract with only one party, as does the instant case. *Deflon* explored the res judicata and collateral estoppels effects of the dismissal of a federal lawsuit on subsequent state court proceedings. Id. at ¶1. In *Deflon*, the Plaintiff has previously sued her former employer, a corporation, in a federal court case for sex discrimination. In the

federal action, Plaintiff also brought state law claims for negligent retention and supervision and intentional infliction of emotional distress. The state court claims were based primarily on the actions of the corporate employees. *Id* at ¶1. Plaintiff subsequently filed another suit in state court against three employees of the corporation, individually, for intentional infliction of emotional distress, intentional interference with a contract, defamation, prima facie tort, and civil conspiracy. *Id* at ¶1. The *Deflon* court held that res judicata and collateral estoppels did not bar the state court claims.

The *Deflon* court cited *Morgan v. City of Rawlins,* 792 F.2d 975, 980 (10th Cir. 1986), wherein the Tenth Circuit indicated that privity does not exist where an initial lawsuit is brought against an employer and a second lawsuit is then brought against an employee acting in his or her individual capacity ("We fail to see how Mr. DeHerrera's employee/employer relationship bars his presence in this suit when he is named for actions for which he allegedly was personally responsible." (citing *Smith v. Updegraff,* 744 F.2d 1354 (8th Cir. 1984)).

The *Deflon* court noted that parties to a contract cannot bring an action for tortious interference with an existing contract against each other, citing *Salazar v. Furr's*, 629 F.Supp. 1403, (D.N.M. 1986) (citing *Wells v. Thomas,* 569 F.Supp. 426, 434 (E.D.Pa. 1983)). The *Deflon* court held that actions for intentional

interference with a contract claim against the Defendants in the state court action could only be brought against them in their individual capacities. *Id* at ¶7.

The *Deflon* court held that res judicata did not bar the Plaintiff's claims in the state court action, because privity does not exist where an initial lawsuit is brought against an employer and a second lawsuit is then brought against an employee acting in his or her individual capacity. *Id* at ¶12, 27. The *Deflon* court also held that collateral estoppel did not apply because the state court claims for intentional interference with a contract and civil conspiracy were not actually and necessarily decided in the federal court action. *Id* at ¶27.

Similarly, in the instant case, individual claims were brought against Bozzone for his individual actions, for which he is personally liable. As in *Deflon*, privity does not exist. In the prior arbitration action against Wallen, the complaint in arbitration did not assert claims and, no judgment had been entered, for intentional interference with a contractual relation, *prima facie* tort, conversion or civil conspiracy; therefore, those claims were not actually and necessarily decided in the arbitration action.

As Bozzone adopted the arguments regarding the preclusive effect of the prior suit set forth in Wallace's Brief-in-Chief to avoid duplication of argument, likewise this claim will be addressed further in the Answer Brief to Wallace's Brief-in-Chief and Fogelsons hereby adopt those arguments as if set forth herein.

Bozzone claims that he was in privity with Wallen and was acting as an agent for Wallen so that the prior suit bars this action. Fogelsons address that claim in Section B below and Fogelsons' arguments therein are incorporated in this Section regarding the arbitration claim.

B. The District Court did not erroneously disregard the law of agency.

In subsections C, D, E, F and G under Section III, Points and Authorities of Bozzone's Brief, Bozzone argues for the first time on Appeal that:

a) Bozzone, as an agent or an advisor to Wall2Builders, Holdings and Wallen, owed fiduciary duties to them and therefore could not owe any duties to Fogelsons because any such duty would irreconcilably conflict with Bozzone's fiduciary duties to Wallen (p. 26-28 of Bozzone Brief);

b) the District Court erred when it imposed a duty on Bozzone, as an agent of Wallen, to protect the interests of Fogelson, as a creditor of Wallen (p. 28-29 of Bozzone Brief);

c) the District Court erred because Bozzone had no duty to Fogelsons (p. 29-31 of Bozzone Brief); and,

d) Bozzone, as an agent of Wallen, when acting for his principal could not be held liable when Wallen breached its contract with Fogelsons (p. 31-32 of Bozzone Brief); and

e) Bozzone, as an agent of Wallen, is not liable for the intentional interference with the contract (p.32-35 of Bozzone's Brief)

All of the arguments are dependant on Bozzone's claim that he is an agent. Bozzone did not preserve any of these issues or arguments in his pleadings or in the trial court. To the contrary, from the time he first answered Plaintiffs' First Amended Complaint to the time he submitted his proposed Findings of Fact and Conclusions of Law, Bozzone vociferously denied that he was an agent, director or officer of Wallen. Fogelsons, in their First Amended Complaint and Second Amended Complaint, asserted that Bozzone was an investor in Wallen, that he was involved in the decision-making processes of Wallen, and that he had any authority to make decisions, including, but not limited to decisions regarding what bills to pay or not pay. [RP 163, 871] Each of these allegations made by Plaintiffs was denied by Bozzone in his Answer to the First Amended Complaint [RP 334] and in his Answer to the Second Amended Complaint [RP 909]. Bozzone never asserted affirmative defenses claiming that he was an agent of Wallen, that he owed fiduciary duties to Wallen or that Plaintiffs' claims were barred by the intra-corporate conspiracy immunity doctrine. [RP 335, 910-911] Moreover, in support of his Motion for Summary Judgment on Plaintiffs' Intentional Interference with Contractual Relations Claim, Bozzone actually cited to his deposition

testimony that he did not instruct the Wallen Entities to pay certain bills and not others. [RP 615]

At trial, Bozzone's counsel again argued that the testimony would be clear that Mr. Bozzone was never an officer of the company and his role was limited to putting cash into the company through Mooresville. [Tr I: 16] Bozzone again testified that he was not an officer at Wallen. [Tr II: 178] Instead, Bozzone asserted that he was an agent in Mooresville, which was an investor in Wallen. [Tr II: 178; Tr II: 18] Bozzone testified that Mooresville did not have any decision making authority in Wallen. [TR II: 18]. Bozzone constantly denied that, either individually or as an agent of Mooresville, he gave input on which vendors were to be paid. [Tr II: 182; Tr II: 19] Bozzone claimed that he was a Class B partner in Wall2 Builders, LP. [Bozzone's Exhibit B; Tr II:195; Wallace Exhibit Q; Tr II: 198] Although Wallace's Exhibit N (upon which Bozzone relies for the first time on appeal as establishing an agency), was admitted into evidence, there was no testimony by Bozzone or Wallace that any provisions in Wallace's Exhibit N allowed Bozzone to make management decisions. While Bozzone points the Court to Tr. II:39 in his Brief in Chief on page 4 in support of his newly raised agency claim, that testimony by Wallace does not discuss the management role of any individual, much less Bozzone.

At the close of trial, Bozzone submitted a finding of fact that, individually, he was not an investor, an officer or a director in Wallen. [Rp 1101] Bozzone did not offer any proposed Findings of Fact or Conclusions of Law that: 1) he was an agent acting on behalf of Wallen as the principal; 2) he was acting as a manager for Holdings; 3) he, as an agent of and advisor to Wall2Builders, Holdings and Wallen, owed fiduciary duties to them; 4) he had a fiduciary duty to exercise his business judgment in the best interest of Wallen; or 5) he was acting in the scope of his duties as an agent [RP 1101-1111] In closing argument, Bozzone's counsel continued to argue that Bozzone was not an investor, not an officer and not a director. [Tr III: 39, 47] The only mention of agency in the trial and pleadings below was that Bozzone was an agent of Mooresville, which was an investor in Wallen. [Tr III: 46] There was no motion at trial to amend Bozzone's Answer to conform to the evidence. There were no motions filed after the trial court's entry of its Findings and Conclusions of Law by Bozzone.

After repeatedly denying in his pleadings and at trial below that he was an agent, director or officer of Wallen, Bozzone now tries to argue, for the first time on appeal, that because the trial court found that he was acting as an agent, *de facto* officer, and/or director of Wallen, as a matter of law, he owed fiduciary duties to Wallen, which precluded him from owing any duty to Fogelsons (p. 4 of Bozzone's Brief-in-Chief). Bozzone argues for the first time on appeal, that the

trial court's findings are based upon disregard of the law of agency resulting in legally erroneous assumptions. (p. 6 of Bozzone's Brief-in-Chief) Bozzone also argues for the first time on appeal, that Bozzone's status as an agent for Holdings and Wallen meant his duty of loyalty precluded disclosures to outsiders, including creditors and potential creditors and his fiduciary duty of due care ran solely to the Wallen entities and their owners (p. 21 of Bozzone's Brief-in-Chief). Bozzone is correct that Fogelsons sought from the trial court findings that Bozzone was actively involved in the management and decision-making of Wallen. However, such findings do not permit Bozzone to ignore his own testimony and pleadings and\or completely change his theory of the case, because these theories and arguments were unpreserved in the trial court below.

As stated in *Gracia v. Bittner,* 1995-NMCA-064, 120 N.M. 191, 900 P.2d 351, "Every litigated case is tried at least three times: there is the trial the attorneys intended to conduct; there is the trial the attorneys actually conducted; and there is the trial that, after the verdict, the attorneys wished they conducted". *Id* at ¶1. On appeal, the Defendant in *Gracia* argued the trial court erred in: 1) failing to instruct the jury on the employee exception to the Owner-Resident Relations Act ("Act"); 2) failing to give Defendant's tendered instructions on Plaintiff's status as a trespasser; 3) instructing the jury that rental agreements under the Act could be

either written or oral; and, 4) admitting testimony of a local magistrate about application of the Act. *Id* at 3.

The Court in *Gracia* stated that NMRA 12-216(A) requires error to be preserved below before it will be reviewed on appeal. The Court further cited NMRA 12-216(B), which as a general exception to the preservation requirement, allows an appellate court to consider jurisdictional questions or questions involving general public interest or fundamental error or fundamental rights of a party, *Id.* at 12.

In *Gracia,* Defendant relied on the concept of fundamental error to attempt to rectify his failure to object or tender correct instructions on the Employee Exception under the Act. The Court examined issues more applicable to a case involving juries and jury instructions, but did state that the "fundamental law applicable to the facts in the case" has been interpreted to mean the theory of recovery, and not matters of defense or incidental matters. *Id* at 16.

Gracia cited two Supreme Court cases, *Saiz v. Belen School District*, 113 N.M. 387, 827 P.2d 102, and *Mireles v. Broderick,* 117 N.M. 445, 872 P.2d 863, which outlined the purposes of the preservation requirement: 1) that the trial court be alerted to the error so that it is given an opportunity to correct the mistake; and, 2) that the opposing party be given a fair opportunity to meet the objection. *Id* at 18. Bozzone did not alert the trial court to his new theories and defenses based on

agency so as to alert the trial court to the error and give it an opportunity to correct any such mistake. Fogelsons are prejudiced by the assertion of new theories and defenses by Bozzone based on agency because Fogelsons were not given a fair opportunity to address at trial the new arguments raised by Bozzone.

In the instant case, if this Court agrees that Bozzone did not preserve his arguments or theories as required by NMRA 12-216(A), Bozzone must rely on the exceptions of fundamental error or assert that it involves a general public interest. Like *Gracia*, this case does not involve matters of general public interest as an exception of the preservation requirement. This case, like the *Gracia* case, involves a private dispute between private parties. *Id* at 19.

The Court in *Gracia* discussed the general application of the law of fundamental error under the Act, since the Act did not apply to oral agreements, which neither party brought to the attention of the trial court. *Gracia* discussed how in the criminal context, fundamental error will only be involved when the question of guilt is so doubtful as to shock the conscience of the court or where the court considers it necessary to avoid a miscarriage of justice. *Id* at 24.

Gracia recognized that the common element in civil cases that have been reversed for unpreserved error has been the total absence of anything in the record of the case showing a right to relief in the person granted relief. *Id* at 25. The Court stated that "where there exists theories of recovery that are both within the

pleadings and within the evidence, the Court should not reverse on an issue raised for the first time on appeal after the opportunity has passed to timely correct any error presented by the issue. To hold otherwise would countenance sandbagging by trial attorneys." *Id* at 28. In *Diversey Corp. v. Chem-Source Corp.,* 1998-NMCA-112, ¶40, 125 N.M. 748, 965 P.2d 332, the court stated that the fundamental error doctrine generally does not apply in civil cases.

Here, Bozzone argues new theories that were not preserved at the trial level after the Court found that Bozzone: 1) acted individually; 2) was active at a high level of management in Wallen; 3) collaborated on the idea that payments be delayed to vendors even though Bozzone and Wallace knew subcontractors could lien properties; 4) ratified the idea of delaying payment to vendors; 5) dictated to the general manager, Jenice Montoya, what to do; 6) became directly involved in the decisions about which liens to pay; 7) paid the liens on closed homes first; 8) was directly responsible for the failure of Wallen to pay vendors on the Fogelsons' home; 9) instructed Jenice Montoya that the company would close; 10) instructed Jenice Montoya to not finish the few homes that were within 30 days of completion; 11) actively participated in the commission of the tortious acts against Fogelson; and 12) took an active role in the management and decision making as an individual. [RP 1152, 1153, 1156, 1158, 1159, 1160, 1162, 1163] The Court found that Bozzone acted in his individual capacity and did not make a specific

finding nor conclude as a matter of law that Bozzone acted as an agent of Wallen or a *de facto* director or officer. [RP 1164-1174]

Even if it could be correct to impute from the Court's Findings and Conclusions that it found Bozzone was an agent or *de facto* director or officer of Wallen, there exists theories of recovery that are both within Fogelson's pleadings and the evidence.

Officers or agents of corporations can be held liable if they engage in tortious conduct. *Kreischer v. Armijo*, 1994-NMCA-118, ¶5, 118 N.M. 671, 884 P.2d 827. *Kaveny, et al., v. MDA Enterprises, et al.,* 2005-NMCA- 118, ¶20-22, 138 N.M. 432, 120 P.3d 854. Both *Kreischer* and *Kaveny* involved tort claims against agents, officers and directors of corporation that had entered into contracts for construction of additions to homes. In *Kreischer,* the court upheld the trial court's denial of Plaintiff's claims of misrepresentation against the agent individually. *Kaveny* involved a construction contract for a detached cottage, which was to serve as Kaveny's new home. The Plaintiffs hired Defendant MDA Enterprises, Inc. d/b/a Arnett Home Remodelling ("MDA") to construct a detached cottage. Defendant Duebler, as a disclosed agent for MDA, made a contract with the Plaintiffs for the construction. *Id* at ¶2. Defendant Arnett argued that he acted at all times with corporate authority and did not have any individual liability. *Id* at

¶19. The trial court disagreed and found that Arnett's actions created individual liability. Id at ¶4.

The Court in *Stinson v. Berry*, 1997-NMCA-076, 123 N.M. 482, 943 P.2d 120 also found that officers or agents of corporations can be held individually liable if they engage in tortious conduct. The *Stinson* court held that if an officer or director directs or actively participates in the commission of the tortious act of the corporation, he will be liable, along with the corporation. *Id* at ¶17. If the officer or director directed, controlled, approved or ratified the activity that led to the injury, he or she can be held personally liable. *Id* at ¶17, citing *Lobato v. Pay Less Drug Stores, Inc.,* 261 F.2d 406, 408-409 (10th Cir. 1958). The *Stinson* court found that this rule has its roots in the law of agency as directors are the agents of their corporate principal, and the rule is that agents are liable for their own tortious acts, regardless of whether the principal is liable. *Id* at ¶18.

In this case, the trial court made factual findings that Bozzone : 1) acted individually; 2) was active at a high level of management in Wallen; 3) collaborated on the idea that payments be delayed to vendors even though Bozzone and Wallace knew subcontractors could lien properties; 4) ratified the idea of delaying payment to vendors; 5) dictated to the general manager, Jenice Montoya, what to do; 6) became directly involved in the decisions about which liens to pay; 7) paid the liens on closed homes first; 8) was directly responsible for the failure

of Wallen to pay vendors on the Fogelsons' home; 9) instructed Jenice Montoya that the company would close; 10) instructed Jenice Montoya to not finish the few homes that were within 30 days of completion; 11) actively participated in the commission of the tortious acts against Fogelson; and 12) took an active role in the management and decision making as an individual. [Rp 1152, 1153, 1156, 1158, 1159, 1160, 1162, 1163] Pursuant to the *Kreischer, Kaveny* and *Stinson* cases, the above findings establish a claim for individual liability against Bozzone, provided the elements of the torts pled are met, whether or not Bozzone acted in his capacity as an agent for Wallen.

C. The District Court correctly found that Bozzone Intentionally interfered with Fogelson's contractual relations

Fogelson addresses Bozzone's arguments in Section G, H and I herein.

Bozzone continues to assert in his arguments in G, H and I, his new theory of the case that, as an agent, he cannot be held to have intentionally interfered with contractual relations. Fogelsons incorporate their previous arguments that Bozzone failed to preserve this defense and that *Kaveny, Kreischer* and *Stinson* provide for agents and directors to principals to be held individually liable for their tortious actions.

The elements of a claim for intentional interference with contract are:

1) Defendant had knowledge of the contract;

2) performance of the contract was refused;

3) defendant played an active and substantial part in causing a plaintiff to lose the benefits of his contract;

4) damages flowed from the breach; and

5) defendant induced the breach without justification or privilege to do so.

Bogel v. Summit Investment Company, LLC, 205-NMCA-024, 137 N.M. 80, 107 P.3d 520.

Bozzone argues in Section H that there was no evidence that Bozzone knew of the Fogelsons' contract and Bozzone did not participate in post-closing decisions. The evidence of knowledge is:

Montoya, as General Manager, would provide a weekly update to Bozzone, Wallace, and Filener having to do with sales, cancellations and home starts. [RP 1151, ¶7 challenged by Bozzone as a matter of law; supported by Tr I: 80] Sales would be identified by communities and addresses. [RP 1151, ¶8 challenged by Bozzone as a matter of law, supported by Tr I:81] Montoya would tell Bozzone, Wallace and Filener about sales that occurred as part of her weekly reporting requirements. [RP 1151 ¶9 challenged by Bozzone as a matter of law; supported by Tr I:82] Montoya would provide Bozzone with Production Summaries, which would state what sales had happened during the week, as well as what homes had started construction and gone vertical and what cancellations had occurred. [RP

1151-1152 ¶13, challenged by Bozzone as a matter of law; supported by Tr I: 84] Forecasts of closings were sent to Bozzone, which projected closings and when funds would be available. [RP 1152, ¶14 challenged by Bozzone as a matter of law; supported by Tr I: 84-85] Bozzone would receive start reports on a regular basis, which listed any home that had broken ground to vertical construction. [RP 1152, ¶15 challenged by Bozzone as a matter of law, supported by Tr I: 89] Cash flow by jobs reports would show cash flows coming in typically by address. [RP 1153, ¶20 challenged by Bozzone as a matter of law; supported by Tr I: 95] Bozzone received Exhibit 65, which stated that Fogelsons were a cash buyer. [Exhibit 65, RP 1155 ¶39, challenged by Bozzone as a matter of law; supported by Tr I: 84-85]

Plaintiffs' Exhibit 65 specifically lists under Projected Closings for February 2009 that Fogelsons were purchasing 1012 Cristanos for cash. The trial court, in its Finding ¶59 , cited Montoya's testimony that Exhibit 65 was part of the production summary regularly sent to Wallace, Bozzone and Filener. [RP 1157, challenged by Bozzone as a matter of law; supported by Tr I: 83, 84, 133, Tr II: 62] The trial court also cited in its Finding ¶59, the testimony of Wallace that he produced Exhibit 65, which shows a projected closing for February of 2009 for a cash sale of the Fogelsons. [Tr II: 62] The trial court found in its Finding ¶38 that once the Fogelson house began to go vertical, the Fogelson property would show

up on production summaries and reports. [RP 1155 challenged by Bozzone as a matter of law; supported by Tr I: 106] The trial court found knowledge in its Findings listed above.

The second element that performance of the contract was refused is undisputed in that Fogelsons paid $165,111.00 of the contract price and did not receive the property. [RP 1162, ¶102] Performance of the contract was also refused by the filing of claims of lien against the property totaling approximately $60,000. [RP 1161, ¶95]

The third element was established that Bozzone played an active and substantial part in causing the Fogelsons to lose the benefits of their contract by the following evidence and contained in the court's findings set forth below:

By April of 2008, payments were being delayed to vendors, which was a collaborative idea with Wallace, Bozzone and Filener. [RP 1152, ¶18, challenged by Bozzone as a matter of law; supported by Tr I:93; Tr III: 119-120] Bozzone knew that payments to vendors were being delayed. [RP 1154, 1156 Findings ¶46, 51, 52, 53 challenged by Bozzone as a matter of law; supported by Tr I: 93; Tr III: 119-120; Tr I: 128-129, 132-133; Plaintiffs' Exhibit 46, 59, 64] Bozzone was receiving reports in January of 2009 which showed vendors and how late some of their payments were. [RP 1157 ¶57, challenged by Bozzone as a matter of law; supported by Plaintiffs' Exhibit 75; Tr I: 140-141] Bozzone knew in February of

2009 that contractors could lien after 30 days. [RP 1152 ¶19; challenged by Bozzone as a matter of law; supported by Tr I:94, 145; 1158 ¶67, challenged by Bozzone as a matter of law; supported by Plaintiffs' Exhibit 81and Tr I:94, 145] Bozzone became directly involved in the decisions about what liens to pay and that liens on closed homes should be paid first so that based on Bozzone's instructions other homes were being put ahead of the Fogelsons' home concerning liens. [RP 1158 ¶70 challenged by Bozzone as a matter of law; supported by Exhibits 84, 85; Tr I: 146-148] It was Bozzone who instructed Montoya to address the liens on closed homes first. [Plaintiffs' Exhibits 83, 84, 85; Tr II: 164; Tr III: 13; RP 1158]

Bozzone received Exhibit 65, which showed a projected cash closing of the Fogelson house in February of 2009. [Tr I: 83, 84, 133, Tr II: 62] In February of 2009, Bozzone instructed Montoya that the company would close. [RP 1159 ¶78 challenged by Bozzone as a matter of law; supported by TR I: 154; TR III: 126; Plaintiffs' Exhibit 94 dated February 24, 2009] Bozzone told Montoya to not keep a skeleton crew to finish up the few homes that were within 30 days of completion, one of which was the Fogelsons' home. [RP 1160 ¶79 challenged by Bozzone as a matter of law; supported by Tr I: 154-155] Bozzone was only interested in information regarding the three homes for which he provided construction financing. [RP 1160 ¶81, challenged by Bozzone as a matter of law; supported by Tr I: 154-155; Plaintiffs' Exhibit 95]

It is undisputed that damages flowed from the breach as the Fogelsons paid $165,111.00 and did not receive their monies back from Wallen and did not receive the property. [RP 1163, ¶102; RP 1161 ¶96]

The evidence that Bozzone induced the breach without justification or privilege to do so is the evidence that described above regarding the active and substantial part Bozzone played in causing the Fogelsons to lose the benefits of their contract. Bozzone denied in his Answers and in his testimony that he was actively involved in the decision-making of Wallen. Bozzone maintained throughout the trial that he was an agent of Mooresville, an investor in Wallen and that Mooresville had no decision-making role in Wallen. As such, Bozzone induced the breach without justification or privilege to do so as found by the trial court when it found that Bozzone committed his tortious acts in his individual capacity. [RP 1162, ¶105; RP 1156 ¶53; RP 1157 ¶54; RP 1158 ¶70; RP 1159 ¶72; RP 1160 ¶79-80; RP 1163 ¶107 and 108]

Now, for the first time on appeal, Bozzone argues that since Bozzone was acting as a *de facto* agent and director of Wallen, he was justified in his actions and privileged to do so. As set forth above, Bozzone did not preserve this argument in the trial court below. Furthermore, New Mexico case law cited above provides that an agent can be held liable for his individual actions if they were wrongful. A claim for intentional interference with a contract can be maintained if the agent

acted outside the scope of his duties, in bad faith and against the best interests of his principal. The trial court found that Bozzone took an active role in the management as an individual and not on behalf of Mooresville or any other entity. The trial court further found that Bozzone actively participated in the commission of tortious acts against Fogelsons. [RP 1163, ¶107, 108]

Improper means are innately wrongful or predatory. *Kelly v. St. Vincent Hosp.,* 1984-NMCA -130, ¶30, 692 P.2d 1350. Delaying payments to vendors and allowing liens to be filed against the property to be purchased by the Fogelsons is innately wrongful or predatory. [RP 1163, trial court's finding ¶107] Instructing Montoya to close down Wallen and not keep a skeleton crew to finish the homes within 30 days of completion is innately wrongful or predatory. [RP 1159, court's finding ¶78; RP 1160, court's findings ¶79-81]

The trial court properly found that Bozzone intentionally interfered with the contractual relationship between Wallen and Fogelsons.

D. The District Court correctly found in favor of Fogelsons on their prima facie claim

Bozzone argues that the prima facie tort claim should have been dismissed because the court found that Bozzone intentionally interfered with the contractual relationship between Wallen and Fogelsons. If this court rules that Bozzone committed the tort of intentional interference with a contractual relationship, then the prima facie tort claim against Bozzone should be dismissed. If this court rules

that Bozzone did not commit the tort of intentional interference with a contractual relationship, then, if the elements of prima facie tort are met, the claim would survive.

Fogelsons showed an intentional lawful act by Bozzone, an intent to injure Fogelsons by Bozzone, and insufficient justification by Bozzone. The elements of knowledge by Bozzone that were proven are set forth above in the summary of the case in the section on intentional interference with a contract. The actions by Bozzone in delaying payments to vendors, allowing the filing of liens against the property being paid for by Fogelson, ordering that Wallen be closed, and deciding not to finish the house were all intentional acts taken by Bozzone made with the intent to injure Fogelsons. Bozzone argues that his duty to Wallen justified his actions. This claim of duty to Wallen was not preserved in the pleadings or at trial.

E. The District Court correctly found a viable civil conspiracy claim

Bozzone correctly states the elements of a conspiracy claim as: 1) a conspiracy between two or more individuals; 2) specific wrongful acts carried out by Bozzone and Wallace pursuant to the conspiracy; and 3) damage to Fogelsons as a result of such acts. *Ettenson,* 2001-NMCA-003, ¶¶ 12, 14 (*quoting Silva v. Town of Springer,* 1996-NMCA-022, ¶25, 912 P.2d 304). As stated throughout this brief, both Wallace and Bozzone knowingly delayed payments to vendors , knowingly allowed liens to be filed against the property to be purchased by

Fogelsons, and did not finish the construction of the property even though Fogelsons had already paid $165,111.00. This court found that both Wallace and Bozzone committed a *prima facie* tort against Fogelsons. If that claim is allowed to stand against Bozzone, then the civil conspiracy claim stands. Fogelsons have also filed a cross-appeal against Bozzone and Wallace on the dismissal of the conversion claim and unfair practices act claim. If Fogelsons prevail on their cross-appeal, then there is an underlying claim which would support a civil conspiracy claim.

Bozzone argues that the intra-corporate immunity doctrine bars the claim of civil conspiracy as agents are legally incapable of a conspiracy. Bozzone failed to preserve the claim that he was an agent and therefore entitled to assert the intra-corporate immunity doctrine at trial.

F. The evidence supports a finding of punitive damages

Bozzone argues that there was no evidence that he acted with malice, utter indifference, or recklessly towards Plaintiff because it was undisputed that Bozzone was unacquainted with the Fogelsons and their circumstances. As cited in the evidence above, Bozzone received reports and production summaries that listed that Fogelson was a cash buyer, due to close in February of 2009. [Plaintiffs' Exhibit 65] Bozzone directed that Wallen be closed. Bozzone instructed Montoya to not finish the homes within thirty days of completion. Bozzone instructed

Montoya what vendors to pay or not pay. Bozzone knew that delay in paying vendors could lead to liens being filed against the properties. The trial court found that the decision to push payables and not pay vendors was reckless. [RP 1157, ¶54] The court found that even though Fogelsons had paid cash, other homes were being put ahead of the Fogelsons' home for payment of liens based on Bozzone's instructions to pay closed homes first. [RP 1159, ¶71] The court found that Bozzone actively participated in the commission of the tortious acts against Fogelsons by approving and ratifying the late payments to vendors, which led to the filing of mechanics liens against the Fogelsons' property. [RP 1163, ¶107] The court concluded that Bozzone's wrongful conduct was reckless. [RP 1165, ¶7] Therefore, the court's award of punitive damages was proper.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth herein the Judgment should be affirmed.

Respectfully submitted,

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