IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DAVID J. FOGELSON and CORINNE FOGELSON, husband and wife,

Plaintiffs-Appellees,

vs.

35086

Ct. App. No. ~~34,493~~
Thirteenth Judicial District Court
No. D-1329-CV-2010-02239

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

Defendants-Appellants.

DEFENDANT-APPELLANT MARK BOZZONE'S BRIEF-IN-CHIEF

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

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A)(1)(c), Defendant-Appellant, Mark Bozzone, states that this Brief in Chief 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 10,664 words. The word count is obtained using Microsoft Word 2010.

Alice T. Lorenz

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

In June 2009, prior to filing this suit, Plaintiffs Donald and Corinne Fogelson obtained a default judgment against Wallen Development, Inc. and Developments by Wallen, LLP (hereinafter sometimes jointly "Wallen") for breach of contract, fraud, and unfair trade practices [RP 3-4]. Their claims were based on the breach of a 2008 contract under which Wallen was to build Plaintiffs a house. Through a Cash Addendum, Plaintiffs agreed to pay cash in installments as the house was completed [RP 152; Exhibit 24]. Wallen went out of business without finishing the house.

The default judgment against Wallen was for $165,111.00 in compensatory damages and $165,111.00 in punitive damages [RP 64, 67-68]. Larry Filener, who was secretary, treasurer and CFO of Wallen Development Inc. and Wallen's registered agent, was served in that action, but not made a Defendant. Appellant Mark Bozzone ("Mark") was neither named as a party, nor notified of that suit [RP 3, 63, 219, 225; Exhibit 140].

2. The instant case

Plaintiffs filed their Complaint on September 16, 2010, against Garry Wallen, Mary Wallen (former Wallen owners), Larry Filener, Eric Wallace, Jenice

Montoya (former General Manager of Wallen Development, Inc.), and GM Westside Investments, LLC [RP 1]. As in their first suit, the various counts of this complaint—conversion, fraud, unfair trade practice, civil conspiracy and prima facie tort—were based upon the breach of Plaintiffs' 2008 Purchase Agreement [RP 2-3]. The relief requested was the same $165,111.00 in compensatory damages and $165,111.00 in punitive damages, plus the pre and post judgment interest and attorney fees that had already been awarded against Wallen in Plaintiffs' first suit [RP 1-10; *see also* 5/24/12 Tr.: 22-24].

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

A. The claims

In the First Amended Complaint, filed March 26, 2012, Plaintiffs again named Wallace as a Defendant, added as Defendants Mark Bozone (sic), Wallen Development, Inc. and Developments by Wallen, LLP, and removed as Defendants GM Westside Investments LLC, Larry Filener, Jenice Montoya, Garry and Mary Wallen [RP 94].

As against Mark, Plaintiffs claimed conversion, fraud, unfair trade practices, civil conspiracy, intentional interference with contractual relations and *prima facie* tort [RP 162-174]. Plaintiffs sought to hold Mark and Wallace jointly liable with each other, and with Wallen, for the compensatory and punitive damages

previously awarded for Wallen's breach of contract [Id.].[1] Mark was not served until the Fall of 2012 [RP 318, 332].

B. Parties and their principals and owners

In Spring 2007 Garry Wallen retired and the Wallen family limited partnership sold Wallen to Wall2Builders LP and Wall2 Development, Inc. (hereinafter sometimes referred to jointly as Wall2Builders) [RP 585; Tr.III:3, 25]. Wall2Holdings, LLC ("Holdings") was the general partner, while 8Fish, LP and Mooresville, L.L.C., were Wall2Builders LP's limited partners [Bozzone Exhibit B, pp.3, 43; Wallace Exhibits M, N, P, Q]. Defendant-Appellant Eric P. Wallace is the President of 8Fish [Exhibit Q; Tr.III:23]. Mark is Mooresville's manager [Bozzone Exhibit C, p. 6]. Mooresville was not a party to this action. Mooresville, as an equity investor, initially contributed $2.5M to the purchase of Wallen [Tr.II:178-179].

Holdings' Operating Agreement identifies three individuals as its managers: Larry Filener, who also became Secretary, Treasurer and CFO of Wallen Development Inc.,[2] Eric Wallace, a CPA who also became President of Wallen

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[1] By a Second Amended Complaint filed January 21, 2014, Plaintiffs added as Defendants subcontractors that, in 2009, had asserted liens against the almost-completed house [RP 869-889].The liens expired in 2012 and Plaintiffs' claims against those subcontractors are not a part of this appeal.

[2] Larry Filener received a discharge in bankruptcy prior to Plaintiffs' filing of this suit.

Development Inc., and Mark [Exhibit N, pp.3, 15-16; Tr.II:39]. Mark was not formally made an officer or director of Wallen but had the right to advise Wallen and to actively participate in management as a Holdings manager [Wallace Exhibit N, pp. 15-16]. As Holdings managers these three individuals were agents of, and owed fiduciary duties to both Holdings and to Wall2Builders. As officers and directors of Wallen Development Inc., Filener and Wallace owed fiduciary duties to Wallen Development Inc.

In Plaintiffs' pleadings, briefing, opening statement, throughout trial, and in their proposed findings and conclusions, Plaintiffs maintained that their claims against Mark rested on the premise that he acted as an agent, *de facto* officer and/or director of Wallen Development Inc. [*see e.g.* Tr. I:11-13, 37-38, 43, 53-54, 76, 78-83, 91-92, 96-100, 104-08, 124-25, 131, 139-42, 144-48, 151;Tr.II:45-47, 56; RP 654, 657 (¶ 25), 661-62, 718, 968 (¶ F(1)), 1058-62, 1064-65, 1067-71 (proposed findings 3-5, 8, 12, 14, 16-17, 20, 34, 48-52, 56-57, 59, 69, 75, 81, 85, 102, 107), 1084 (conclusion 29)]. Most of Plaintiffs' exhibits were tendered to show, *inter alia*, Mark's active involvement as a Wallen manager [*see e.g.* Exhibits 1-23, 27-48, 50-52, 54-60, 62-78, 80-103, 108-09]. As a *de facto* director or officer, Mark owed fiduciary duties to Wallen Development Inc.[3]

[3] Garry and Mary Wallen were made Class E partners of Wall2Builders in December 2007, apparently to secure their position as creditors, resulting from the terms of Wall2Builders' purchase of Wallen [Bozzone Exhibit C, p.3].Thus,

Plaintiffs also explained in their opening statement, and confirmed through their questioning of witnesses and proposed findings and conclusions, that their claims were based on Mark's:

(1) failure to advise them of Wallen's financial troubles,

(2) failure to advise them that their payments were not segregated and used to pay only vendors on their house, and

(3) participation in management decisions that led to the house not being completed or Plaintiffs' funds returned [*see e.g.* Tr.I:11-13, 30, 33-36, 43, 50, 52-54, 78-94, 100, 104-06, 111, 121, 124, 128-29, 140, 143-48, 150; Tr.II:45-47, 54-55,; RP 1058-1088].

C. Pre-trial and trial disposition of the claims

Prior to trial, the court granted Mark's motion to dismiss the UPA claim [RP 424-27, 861]. As against Mark, the case proceeded to trial on the claims of intentional interference with contractual relations, conspiracy, fraud, conversion and *prima facie* tort. At trial and by Order dated May 21, 2014, the court granted Mark's Rule 1-041(b) motion with respect to the fraud and conversion claims [RP 1050]. It denied the motion with respect to civil conspiracy, intentional interference with contract and *prima facie* tort claims [Id.].

Holdings, as Wall2 Builders' general partner, and its individual managers, Filener, Wallace and Mark, owed fiduciary duties to Garry and Mary Wallen.

The court's findings indicate that it imposed liability on Mark based on:

(1) Mark's not having advised Plaintiffs of Wallen's financial protocols and problems [RP 1151-57, (Findings 11-17, 20, 29-30, 41-44, 50-57, 61-62)];

(2) Mark's decisions addressing those problems [RP 1151-52, 1154, 1156-60, 1162-63, (Findings 6-9, 11-15, 18-19, 35-36, 46-47, 49-57, 61-62, 65-76, 78-82, 103-08)];

(3) negligence in failing to change Wallen's banking practices so as to segregate funds paid by cash buyers [RP 1153-54, (Findings 27, 28)]; and

(4) negligence in failing to realize that Plaintiffs should have been included in the list of customers whose payments were to be returned [RP 1151, 1153, 1155, 1157, 1160 (Findings 8, 26, 38-40, 59-62, 80)].

All of these findings are based upon disregard of the law of agency and the resulting legally erroneous assumptions: that Mark owed a duty to Plaintiffs to inform them of Wallen's financial status, that his obligation to Wallen to act with due care also ran to Plaintiffs, and that he had a duty to manage Wallen so as to protect the interest of its creditors, when he was instead obligated to act with the sole purpose of advancing Wallen's interests and was precluded from disclosing Wallen's confidential or private information [*see* RP 1164-69, 1172, 1174, Conclusions 2, 4, 5, 7, 9, 13, 14, 16-19, 21, 25, 44, 46]. They are also based upon a

disproved assumption that, after Wallen closed, Mark had a role in the decisions that affected Plaintiffs [*see* Tr.II:85-86, 99, 101-02, 104-05].

The court's Findings of Fact and Conclusions of Law do not contain actual *factual* findings on the required elements of intentional interference with contract, rely on the same factual claims for the *prima facie* tort claim as for the intentional interference with contract claim, fail to address the requirements that alleged coconspirators be "legally capable" of conspiring, and that injury to Plaintiffs must be the object of the conspiracy, and base their conclusions on actions Defendants were privileged to take. Thus, they fail to support the judgment [*see* RP 1150-74].

Oddly, the Plaintiffs proposed and the court adopted conclusions that Mark created an "unreasonable risk of harm" to Plaintiffs [RP1169-70, 1174. Conclusions 16, 46]. No such claim was pleaded or could have been established as this language pertains to tortious conduct that creates risk of physical injury—not to breach of contract claims.

D. Summary of Facts

1. Plaintiffs' purchase from the Wallens

In May 2008 Plaintiffs purchased a lot and house-to-be-built from Wallen. They signed a standardized form of contract that, in a Cash Addendum (the fifth of eight addenda), was modified to provide for a cash purchase [RP 152; Exhibit 24]. The Cash Addendum provided that Plaintiffs were to pay $1,000.00 as a non-

refundable deposit, $50,625.00 upon contract sign-off, $55,000.00 upon completion of the slab and $55,000.00 upon completion of the cabinets [Id.]. The balance of the $226,005.00 purchase price was to be paid at closing [Id.]. Jenice Montoya, Wallen's general manager, signed the contract, including the Cash Addendum, for Wallen [Id.; RP 587; Tr.I:27].

Plaintiffs' payments did not go directly to the subcontractors who were building the house. Instead Wallen deposited those funds in Wallen's Operating Account and used them, along with other customers' payments, to pay Wallen's creditors [Tr.I:104, 130, 184-85]. When Wallen determined that it had no option but to close its doors, the house still needed electrical and plumbing fixtures, carpeting, landscaping and stucco finishing.

2. Wallen's business activities and ultimate failure

Jenice Montoya, testifying for Plaintiffs, said that she understood that Filener, Wallace and Mark were working "through other entities" when purchasing Wallen in April 2007, and that she was told that "Mark was more of an investor within the company at that original time" [Tr.I:76-77]. Montoya said that when Garry Wallen was running the company it had only one Operating Account, which was standard practice in the industry, and that she had never been told to change that or to keep separate accounts for cash buyers [Tr.I:184-85].

Mark testified that it was February 2009 when he learned that funds that DJA Fifth Street (DJA) had loaned for construction of houses had not been segregated, but had instead been placed in Wallen's Operating Account. Before that he had been unaware that payments intended to be applied to a specific property were not segregated [Tr.II:176-177,188; *and see* Bozzone Exhibit G]. While Plaintiffs initial questioning of Montoya was designed to show that Mark could have learned earlier that Wallen was not segregating funds, on cross-exam Montoya confirmed that Mark first asked about the practice in February 2009, after he had learned that DJA's construction loan funds had not been used on the homes Mark believed were being built with those funds [Tr.I:104, 121, 186-87].

Montoya described regular meetings, email communication, and telephone conferences with Wallace, Filener and Mark [Tr.I:78, 79-82, 84, 90]. Filener set the agenda for telephone conferences [Tr.I:87, 163]. Montoya reported to all three [Tr.I:78-79, 166, 170]. Each had their own area of expertise: Larry's was finance, Eric's was operations and Mark's was marketing, sales and development [Tr.I:78-79]. Montoya testified that each one could give her instructions on matters within his area of expertise [Id].

In 2008 the economic downturn began eroding New Mexico's construction industry [Tr.II:97-98; Tr.III:77-78]. Wallen had a large inventory of undeveloped land, most of which was encumbered [Tr. I:167; Tr.II:79, 91-94]. As a result

Wallen had large carrying costs [Id.; Tr.II:92]. Wallen's land had been purchased for $3.8M, but the recession drastically reduced its value—a problem because land was its largest asset [Tr.III:93]. Even though Wallen had substantially reduced the debt load on its land, Filener testified that land value "plummeted" to the point that it ultimately went "underneath" the debt [Tr.III:93]. Wallen, like others in the industry, did not know how long the downturn would last or when land might regain its value [Tr.I:165; Tr.II:202]. The recession turned out to be more long lasting than they could have imagined [Tr.II:98,202; Tr.III:102].

As of April 2008 Wallen needed 8 to 10 closings per month to break even [Tr.I:164]. Plaintiffs signed their contract in May 2008 [Exhibit 24]. By August 2008 Wallen was no longer achieving their goal [Tr. Tr.I:164; Tr.II:22]. Wallen responded by reducing its workforce, reducing excess lot inventory, cutting expenses to match production levels and modifying the agreement for payment of the outstanding debt to Garry Wallen [Tr.I:83, 116, 136-37, 140;Tr.III:101; Bozzone Exhibit E]. Wallen also worked on a new business plan to present to its banks in order to obtain lines of credit or renewals of lines of credit [Tr.I:105, 137-39; Tr.II:96; Exhibits 63, 69, 72]. The employees who remained after layoffs agreed to reductions in pay [Tr.I:83, 161]. Wallen's owners chose to forgo payments due them. They received no payments after February 2008 [Tr. I:194-195; Tr.II:199-200; Bozzone Exhibits D, E].

In April 2007 Wallen's total debt was $23M [Tr.II:22-23]. By 2008 that debt had been reduced to $15.1M [Tr.II:23]. Wallen had 43 spec home sites in 2007 [Id.]. They were reduced to 7 in 2008 [Id.]. Wallen reduced its inventory of vacant lots from 416 in 2007 to 176 in 2008 [Id.].

Holdings' managers and the equity investors undertook additional efforts to get Wallen through its cash crunch and continue as a viable business [Tr.I:91-93, 97-98, 111, 141; Tr.II:24-25, 79, 91-94, 101; Exhibit 72, Bozzone Exhibits D, E]. Wallace testified that they asked entities owned or managed by Mark to contribute more money to Wallen [Tr.II:47, 106-07].[4] In April 2008, Mooresville purchased vacant land for $1.3M [Exhibit 18; Tr.I:166-67; Tr. II:54-55]. In the summer of 2008 Mooresville again assisted with Wallen's excessive inventory of undeveloped land and cash crunch by purchasing four unencumbered lots [Tr.I:109-12; Tr.II:91-94]. Land purchases were intended to infuse cash into Wallen [Tr. I:173; Tr.II:91-94]. Increasing cash, while reducing inventory of undeveloped land, helped the company's position with lenders [Id.]. The lots Mooresville purchased lost value as the recession dragged on and by the time of trial were worth only a fraction of what Mooresville had paid [Tr.II:117-18, 120-27, 129; Bozzone Exhibits M, N, O, P, Q].

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[4] The Wall2Builders LP Partnership Agreement provides in Section 3.4 that no additional capital contributions were required. Thus, additional contributions were entirely voluntary [Bozzone Exhibit B].

In August 2008 Bank of America foreclosed on several Wallen lots [Tr.II:35, 95-96, 151]. It did so after Wallen requested that it reduce the limits of Wallen's line of credit and provide a two or three year loan, instead of one that incurred renewal fees every six months [Tr.II:95-96; Exhibit 74]. The Bank did not have liens on some of the lots listed in its foreclosure action [Tr.II:60; Exhibit 55]. In September 2008, while negotiating with the Bank, Wallen's counsel represented that the Bank's misconduct had the potential to do serious damage to Wallen [Tr.II:35-37, 59-60; Exhibit 43]. In fact, two other Wallen banks, Wachovia and Century Bank, had put additional lending on hold until the Bank of America problem was resolved [Id.; Tr.II:64, 100-01; Exhibits 45, 90]. As a result, DJA, an entity formed by Mark, opted to provide Wallen with a construction loan [Tr.I:134, 176-77, 179-80; Tr.II:101].

DJA's construction loans were intended to permit Wallen to complete construction of two houses in its Cabezon development, one of which was under contract. Mooresville also provided funding for a model home in Cabezon to generate sales [Tr.I:134, 176-77]. As noted, Wallen treated Mooresville's and DJA's funds the same way as funds from other sources—they went into the single Operating Account and then used to pay Wallen's ongoing expenses [Tr.I:187-88]. As a result, when Wallen closed, only a small portion of Mooresville's or DJA's funds had been used on the houses they were intended to fund, and they had

substantial liens against them [Tr.I:188-89; Tr.II:103, 106-07; Exhibit 97]. Mooresville and DJA had to pay off those liens and then pay for the homes to be completed in order to recoup, in part, funds provided to Wallen [Tr.II:191-195; Tr.III:70-74, 76-77; Exhibit 102, Bozzone Exhibit J].

Wallen's practice was to pay bills twice a month, on the 10th and 25th [Tr.I:96-97]. In April of 2008 reduced cash flow caused Wallen to be unable to timely pay some vendors [Tr.I:158-59]. Montoya was instructed to pay the oldest outstanding invoices first and push some amounts owed to the next payment cycle or until funds became available [Tr.I:93, 119-21, 128-29, 170]. Eventually some payments were pushed out to 60 or 90 days [Tr.I:128; Tr.II:28]. Montoya continued to pay Wallen's bills from April 2008 through February 2009, albeit with delays of up to 90 days [Tr.II:28].

Filener testified that it was not illegal, or even uncommon in 2008, to delay or "push" payables [Tr.III:97-98]. Mark testified that they had had no choice but to push payables when there was no money to pay timely [Tr.II:137-38].

The first time that Wallen found itself closing on homes where the vendors had not been paid in full was November 2008 [Tr.I:143; Tr.III:18]. Montoya expected to receive funds in December 2008 to cover those invoices, but found that the bookkeeper had overestimated by approximately $100,000 what Wallen would be receiving [Tr.I:135-36; TrII:20-21; Exhibit 68]. About three weeks after

Montoya communicated this information to Wallace, Mooresville addressed the matter by contributing $105,000 to Wallen [Tr.I:145; Tr.II:34-35; Tr.II:19-21, 33-34].

Negotiating loans and loan renewals was part of normal business practices for a land development business [Tr.I:203; Tr.III:142]. Wallen did business with five different banks [Tr.II:9-10, 26]. While loan renewals from some of their lenders would have allowed Wallen to come current with vendors, Wallen ultimately became unable to meet the new demands being imposed [Tr.II:63-65, 88; Exhibits 59, 93].

Charter Bank's loan expired in December 2008, as did Compass Bank's loan [Tr.I:135; Tr.II:37]. Charter indicated it would renew only if it got the remainder of a required interest reserve. While Wallen had deposited the first half of the reserve, it needed to raise the second half to meet that requirement. It only concluded that it would be unable to do that in February 2009 [Tr.I:144; Exhibits 59, 80, 93].

Ultimately Compass Bank did renew and Filener and Wallace continued actively looking for new investors and replacement banks [Tr.III:13, 15; Exhibit 93]. But in February 2009 some of the vendors whose invoices had been outstanding for 60-90 days began filing liens [Exhibits 119-125]. When there was not enough cash to pay all vendors, Wallen paid vendors on closed homes, largely

because those would have been the oldest payables [Tr.II:163-164; Tr.III:13-14; Exhibits 81-83, 88].

Mooresville had chosen to infuse the additional $105,000 into Wallen in February 2009 because Mark believed Wallen would be able to get through the crisis and stay in business [Tr.III:16-17]. Wallen expected to be able to obtain the necessary loans and/or investment funds to pay its vendors and its intent was to pay the remaining vendors as it became able to do so [Tr.III:17-18]. But on February 18, 2009, Wallen learned that Century Bank was withdrawing its offer to provide construction loans. Mark then concluded that the company would not survive without major land sales in the short term, or significant capital investment [Tr. Tr.II:64-65, 162-163].

On February 23, 2009, Filener reported issues with Charter Mortgage, while also reporting his belief that Charter would work with Wallen if Wallen had a viable business plan and met some stringent conditions [Exhibit 93]. Filener proposed asking Garry Wallen to contribute $350,000 and asking Mark and Wallace to contribute additional capital [Id.]. Filener testified that on February 23, 2009, he was still working to keep the company open [Tr.III:100-01].

The situation changed drastically on February 24, 2009, when Charter Bank appropriated the funds in Wallen's Operating Account [Tr.III:103-104]. Thereafter Wallace, Filener and Mark concluded that Wallen had no choice but to close

within the week [Tr.I:154; Tr.III:125-26]. Without funds, Wallen could not complete construction on partially built homes.

Although Filener and Wallace undertook to return deposits to purchasers, for reasons that are not entirely clear, Plaintiffs were not included on the list of depositors [[Tr.I:156; Exhibit 96].[5]

On February 26, 2009, Plaintiffs emailed Filener and Wallace, advising that they had paid a substantial amount on their house, that it was unfinished and asking how Wallen was going to proceed [Exhibit 98]. Plaintiffs believed they sent this email to Mark, but had sent it to mbozzone@wallenbuilders.com, an incorrect address [Exhibit 98; Tr.I:59-60].[6] Mr. Fogelson acknowledged that he first heard Mark's name after Wallen closed, and had never met nor spoken with Mark [Tr.I:56-59, 63-64].

Plaintiffs did reach Filener [Tr.I:42; Exhibits 99, 100]. Filener was aware of their claim as of March 5, 2009 [Exhibits 99, 100]. There was no evidence that Filener informed Mark of Plaintiffs' situation.

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[5] Plaintiffs' Exhibit 96 indicates that it was former Defendant Montoya who compiled the list of customers who were due refunds. Montoya included only persons whose homes were not yet under construction [Tr.I:156; Exhibit 96]. Neither Filener nor Wallace explained their failure to add Plaintiffs to the list once they became aware of Plaintiffs' situation

[6] Mark's email address was, at all times, mark@bayco.net [Tr.II:87].

Filener told Plaintiffs he was working on a plan [Tr.I:42]. When Filener did not thereafter provide a plan, Plaintiffs retained attorney Catherine Davis. She wrote to "Wallen Development, Inc." on March 18, 2009 [Exhibit 105]. The letter demanded the return of Plaintiffs' payments or completion of the house and a closing [Id.]. The e-copy of the letter intended for Mark was directed to mbazzone@wallenbuilders.com, yet another incorrect address [Id.]. Mark testified that he never received any communication from Plaintiffs or their lawyer and was unaware of their situation [Tr.II:194].

Attorney Thomas Gulley was retained by Wallace and Filener to respond to Plaintiffs' claim [Tr. I:43-44:Tr.II:86, 104-05]. Gulley wrote to Davis on April 6, 2009, copying Filener and Wallace—but not Mark [Exhibit 110]. Gulley stated that Wallen was working toward a solution [Exhibit 110]. Unsatisfied, Davis wrote to Gulley on April 13, 2009, advising that Plaintiffs would initiate their contract's arbitration process if they did not hear from Gulley by April 20, 2009 [Exhibit 115]. Mark was not copied on this correspondence.

3. Mark Bozzone's role with Wallen, Mooresville, Holdings and Wall2Builders

Mark acted as manager for Holdings, advised Wallen, and was manager for Mooresville, one of Wallen's owners through Holdings and Wall2Builders. Mark, along with Wallace and Filener, received weekly updates that included information on projected closings and availability of funds [Tr.I:78, 80, 82]. They were also

provided information on sales, cancellations and home starts [Tr.I:79-80, 84]. Sales were primarily identified by communities and addresses [Tr.I:81; *see* Exhibit 65]. Mark and Wallace did not receive copies of individual Purchase Agreements, nor did they handle or process payments [Tr.I:183,191; Tr.II:81]. A cash forecast they received in November, Exhibit 65, identified properties under construction by address and purchaser's names but did not show if or when purchasers had made payments, or which vendors had been paid. It indicated a projected closing for Plaintiffs' house of "February 2009" [Tr.I:85; Tr.II:82-83, 85; Exhibit 65].

Plaintiffs introduced no evidence that Mark had familiarized himself with the details of Wallen's contracts or their many addenda, or that Mark had ever seen their contract. Filener, who was the only Holdings manager physically located in New Mexico, was unaware that cash buyers paid in installments, and so could not have advised Mark of that fact [Tr.III:124-24]. There was no evidence that any decision Mark made was made with the specific intent of interfering with Plaintiffs' contract or that he was aware, when participating in the February 24th decision to close Wallen, that Plaintiffs' house had not been completed.

4. After Wallen closed

Mark was not kept informed about or involved in post-closing decisions or actions involving Plaintiffs. Instead, those decisions were made by Filener, Wallace, Garry Wallen, and their attorney [Tr.II:67-68, 85-86, 99, 101-05].

Filener testified that he created a trust for lots that were not encumbered, so that he, as trustee, could sell them and use the proceeds to pay Wallen's debts. Mark played no part in that trust [Id.; Tr.II:85-86, 102; Wallace Exhibit T]. Filener testified that he did not become aware of Plaintiffs' contract until after Wallen's closure, never reviewed its Cash Addendum and that he did not repay Plaintiffs because he was following his lawyer's advice to pay "deposits" [Tr.III:106, 109, 111, 132-33, 141]. He did not explain why he didn't consider Plaintiffs' payments to be "deposits." Filener said that he wanted to but could not propose a solution to Plaintiffs' situation because he needed Garry Wallen's agreement [Tr.III:137]. He apparently didn't get that agreement [Id]. Filener never spoke to Mark about Plaintiffs' house [Tr.III:111].

Wallace became aware of Plaintiffs' claim in March 2009. He or Filener hired counsel to respond. Neither Mark nor Mooresville were represented by the attorney Wallace/Filener hired [Tr.II:85-86]. Wallace confirmed that Mark was not involved with Wallen in March 2009 [Tr.II:99].

The trust sold unencumbered lots in May 2009 [Tr.II:67-68, 70]. Wallace believed that funds received from the sale of unencumbered lots were not paid to Plaintiffs because "[t]hey were paid to people who had priority over the Fogelsons" [Tr.II:74] Wallace did not explain why Plaintiffs' payments were not considered "deposits." Wallace also said that the Trust made interest payments to

Charter to keep Charter from foreclosing on land they hoped to be able to sell for as much as $1M [Tr.II:74-75; 103-04]. Payments were made based upon the advice of counsel [Tr.II:103].

Wallace testified that neither Mark nor any of Mark's entities were repaid for funds contributed to Wallen, either as equity or as loans [Tr.II:103,107]. There was no evidence that, prior to Plaintiffs' first suit, Mark had been made aware of Plaintiffs' situation.

E. Challenged findings and conclusions

Among the court's findings, in direct contradiction to undisputed evidence, are the challenged findings that:

(1) Mssrs. Filener, Wallace and Bozzone (rather than the entities for which each acted as agents and managers) bought the Wallen companies [Finding 1],

(2) Mark knew that Wallen had only one Operating Account (when the evidence was that Mark discovered that funds were not segregated only upon inquiry made in February 2009) [Finding 30],

(3) Mark knew that Plaintiffs were contract purchasers paying cash (when the only evidence was that he could have learned that had he pursued an inquiry that he did not pursue) [Finding 40, in part], and

(4) Mark was made aware of Plaintiffs' attorney's demands through Mr. Fogelson's email (when it was undisputed that, because Fogelson and his attorney

misspelled Mark's name and sent their emails to the wrong addresses they never reached Mark) [Findings 85-87, 89, 112, 115].

The district court also entered findings that imposed liability on Mark based upon his not having made disclosures to Plaintiffs, when his status as an agent for Holdings and Wallen meant that his duty of loyalty precluded disclosure to outsiders, including creditors and potential creditors [RP 1151-57, Findings 11-17, 20, 29-30, 41-44, 50-57, 61-62]. It imposed liability for decisions Mark made for Wallen in contravention of basic agency principles, when his fiduciary duty of due care ran solely to the Wallen entities and their owners [RP 1151-52, 1154, 1156-60, 1162-63 (Findings 6-9, 11-15, 18-19, 35-36, 46-47, 49-57, 61-62, 65-76, 78-82, 103-08)]. Mark hereby challenges all of these findings.

The district court erroneously found that Mark had been negligent by not changing Wallen's banking practices so as to segregate funds paid by cash buyers, and in failing to include Plaintiffs in the list of customers whose payments were to be returned. In so doing it failed to recognize that "negligence" was not a basis for Plaintiffs' claims and that basing liability on "negligence" required a duty running *to Plaintiffs* that did not exist [RP 1151, 1153-55, 1157, 1160 (Findings 8, 26-28, 38-40, 54, 59-62, 80)]. Mark hereby challenges all of these findings.

The findings necessary to support a claim of intentional interference with contract, conspiracy, and *prima facie* tort either were not made, were made in the

absence of evidentiary support or were conclusions, not findings [*See* RP 1155, 1157, 1159-64 (Findings 40 54, 60, 75, Finding 80 (which is actually a conclusion of law), 85, 89); RP 1162-63 and 105, 107, 108 (which are actually conclusions of law), and 115)].

Also legally erroneous and irrelevant to any of Plaintiffs' claims are Conclusions 16 and 46, which state that Mark breached a duty by creating an "unreasonable risk of harm" [RP 1169-70, 1174]. This language pertains to negligence, landowner or product liability claims where defendant is alleged to have created a risk of physical injury. There were no such claims here.

III. POINTS AND AUTHORITIES

A. Summary of argument

The court erred by permitting Plaintiffs to bring a second suit naming Mark as a defendant when they failed to name him in their first suit. As an agent for Wallen he is in privity with Wallen. He was named here as a defendant entirely based upon advice given and actions taken in his capacity as an agent for Wallen. Thus, the claims against him are precluded.[7]

The court erred in basing liability upon findings of negligence. Only intentional torts were alleged and Mark's fiduciary duties, as manager of Holdings

[7] Wallace raised the preclusive effect of the first suit by pretrial motions. Mark raised it in his Opening Statement [RP 51-55, 199-207; Tr.I:16-17]

and as an advisor or (albeit informally), a director or officer of Wallen Development, precluded his being held to have any duty to Plaintiffs.

The negligence findings demonstrate that the court failed to appreciate that, under the circumstances presented, where the defendants were agents, subject to fiduciary duties to Wallen and its owners, Plaintiffs' claims could not lie. They, along with the inapposite "unreasonable risk of harm" finding, also demonstrate that the court was unclear about the nature of plaintiffs' claims and their required elements.

The findings required to support a conclusion of intentional interference with contract were not made and could not have been made given the evidence presented. The fiduciary duties that precluded Mark from having irreconcilably conflicting duties to Plaintiffs also precluded him from being liable for an intentional interference claim. As Wallen's agent, he had a right and privilege to interfere to protect the interests of his principal. And intentional interference also requires, *inter alia*, that Mark have had actual knowledge of the specific contract allegedly interfered with, a required element that Plaintiffs did not prove.

The court was obligated to dismiss the *prima facie* tort claim that was based on the same factual allegations as the intentional interference claim. Even if the court were not precluded from permitting Plaintiffs to use *prima facie* tort to evade the requirements of another tort, the claim would have had to be dismissed because

its requisite elements could not be established. There was no evidence of conduct targeting Plaintiffs or malicious intent to injure, and could not have been given that Mark and Plaintiffs were wholly unknown to each other.

The intra-corporate conspiracy immunity doctrine prohibits claims of conspiracy against agents of the same principal or based upon agents allegedly conspiring with their own principals. And conspiracy itself is not actionable. It is only the intentional tortious act, committed by an individual who is legally capable of conspiring, in furtherance of an alleged conspiracy, and designed to injure plaintiffs, that can give rise to liability. As an agent Mark was legally incapable of conspiring with Wallen's other agents, Wallen, or its owners. And proof failed on the underlying tort claim. Therefore, entry of judgment for Mark on the conspiracy claim was required.

The conclusion of breach of a duty not to create an "unreasonable risk of harm" is untethered to any cause of action actually pleaded and wholly inapplicable. Finally, there was no basis for assessing punitive damages because Mark had no duty to Plaintiffs, committed no tort, and there was no evidence of any culpable state of mind.

B. Plaintiffs' prior suit against Wallen barred their claims

In order to avoid duplication of argument, Mark hereby adopts the arguments regarding the preclusive effect of the prior suit set forth in Wallace's

Brief-in-Chief as if set forth herein. This issue presents a question of law. *Turner v. First New Mexico Bank*, 2015-NMCA-068, ¶¶ 5, 6, 352 P.3d 661 (when the facts are not in dispute, the preclusive effect of a prior judgment is a question of law, reviewed de novo). Here it was undisputed that Plaintiffs based both suits on the same contract breach and sought exactly the same damages against Mark as had been awarded in the default judgment entered against Wallen.

Where corporate officers or agents are alleged to have acted in their official capacities and within the course and within the scope of their duties, a prior suit against their principal based upon corporate conduct, allegedly caused by the defendant officers or agents, bars the action. *Deflon v. Sawyers*, 2006-NMSC-025, ¶¶ 4-5, 7, 137 P.3d 577 (*citing Lowell Staats Mining Co. v. Philadelphia Electric Co.*, 878 F.2d 1271 (10th Cir. 1989)). It is only where the agent acts beyond his authority, and not as an agent of the corporation, that he may be held liable for interfering with a corporate contract. *Id.*

Plaintiffs' position, on which they prevailed, was that Mark and Wallace acted as Wallen's agents. That should have resulted in dismissal of the lawsuit. Thus, the preclusive effect of the first suit requires the reversal of the judgment for Plaintiffs and entry of judgment for Mark and Wallace.

C. Mark, as an agent of and advisor to Wall2Builders, Holdings and Wallen, had fiduciary duties to them.

Duty is a question of law to be determined by the court. *Calkins v. Cox Estates*, 1990-NMSC-044, ¶ 8, 792 P.2d 36. A "plaintiff must show that defendant's actions constituted *a wrong against him*, not merely that defendant acted beneath a required standard of care...." *Id.* ¶ 7 (emphasis added). Here, because Mark was sued for actions taken as an agent of Wallen, the legal questions are whether, in that capacity, and in the face of the duties owed to Wallen, he had any duty to Plaintiffs, and whether his actions as an agent, taken on behalf of his principals, could subject him to liability for intentional interference with contract. The answer to both questions is "No."

"An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation." *Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶ 18, 92 P.3d 653. Agents, including those acting as officers, directors and advisors for organizational entities owe fiduciary duties to those entities. *Restatement (Third) Agency*, § 8.01 (2006, database updated Mar. 2016). "The common law emphasizes the fiduciary nature of the agency relationship..." *Maes v. Audubon Indemnity Ins. Group*, 2007-NMSC-046, ¶ 17, 164 P.3d 934, citing *Restatement (Third) of Agency* § 1.01 (2006).

The fiduciary duties Mark owed to Wallen and its owners were due care, loyalty and good faith. *Walta v. Gallegos Law Firm, P.C.*, 2002-NMCA-015, ¶ 41, 40 P.3d 449; *Las Luminarias of the New Mexico Council of the Blind v. Isengard*, 1978-NMCA-117, ¶ 8, 587 P.2d 444 (corporate officer owes duty of "undivided and unselfish loyalty"). The district court disregarded the law of agency and so failed to recognize the existence of these fiduciary duties. That error caused the court to treat, as if it were wrongful conduct, actions that were appropriate given Mark's fiduciary duties.

It also caused the court to assume Mark had duties to Plaintiffs, when any such duties would have been in irreconcilable conflict with his fiduciary duties to Wallen. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (agent breaches duty of loyalty unless he acts with the sole purpose of advancing the best interests of the entity); *Troy Corp.v. Schoon*, 959 A.2d 1130, 1137-38 (Del. Ch. 2008) (recognizing that director's sharing of confidential corporate information with creditor could be tortious); *Torch Liquidating Trust v. Stockstill*, 561 F.3d 377, 382-85 (5th Cir. 2009) (creditors' claims against directors for provision of misinformation and non-disclosure were impermissible); *Joseph P. Caulfield & Associates, Inc. v. Litho Productions, Inc.*, 155 F.3d 883, 890-91 (7th Cir. 1998) (applying *Restatement (Second) of Torts* § 772 (1979) in concluding that

one does not tortuously interfere by giving "honest advice" within the scope of a request for advice). Thus, the judgment is based on legal errors.

D. An agent's fiduciary duties to his principal preclude duties to his principal's creditors because any duty to creditors would be in irreconcilable conflict with his fiduciary duties.

A number of cases, including most notably, *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92, 100-102 (Del. 2007) ("Gheewalla"), recognize that imposing a duty on corporate agents to protect the interests of an entity's creditors—persons with whom it has contracted—would create a conflict between their fiduciary duty to exercise their business judgment in the best interest of the entity, and their own interests in avoiding potential personal liability. *See In re Rehabilitation of Centaur Ins. Co.*, 632 N.E.2d 1015, 1018 (Ill. 1994) (corporate officers owe no fiduciary duties to corporate creditors); *Torch Liquidating Trust*, 561 F.3d at 389 (corporate fiduciary never owes duties to corporate creditor; sharing of confidential corporate information is breach of duty); *accord Azar v. Prudential Ins. Co. of America*, 2003-NMCA-062, ¶¶ 43, 68 P.3d 909 (buyer-seller relationship is not fiduciary; without fiduciary relationship there is no duty to disclose) *and Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-014, ¶ 14, 750 P.2d 118 (rejecting imposition of duty that would interfere with existing fiduciary duty).

"Business judgment" decisions include those made in an effort to maintain or prolong an entity's viability. *In re Midway Games, Inc.*, 428 B.R. 303, 315 (Bkrcty. D. Del. 2010). As explained in *Midway*, the law is settled that directors do not have a duty to creditors to abandon the effort to rehabilitate the corporation in favor of the creditor's interests; they have no duty to protect creditors at the expense of the entity and its shareholders. *Id.*

In *Gheewalla*, 930 A.2d at 101, the court held that, even when a corporation is experiencing financial difficulties or is "navigating in the zone of insolvency, the focus for…directors does not change;" and agents must continue to exercise their business judgment in the best interests of the entity and its owners. That business judgment includes a duty to maximize the value of the corporate entity for the benefit of those having an interest in it. It does not include a duty to corporate creditors. *Id.*

E. The court erred in entering judgment against Mark when he had no duty to Plaintiffs.

An agent's fiduciary duties to his principal limit the circumstances under which he can be sued to situations where he has a separate duty to the Plaintiff. *Stinson v. Berry*, 1997-NMCA-076, ¶¶ 20-22, 943 P.2d 129 (corporate agent may be personally liable for a tort injuring a third party, even when acting within the scope of his duties, if he "has a duty to that third party"). An agent's duty to his own principal cannot support a third party claim. *Id.*, 1997-NMCA-076, ¶ 21

("[g]enerally, an officer will not be held liable to a third person for negligence amounting to a breach of duty the officer owes to the corporation").

A finding of negligence is dependent upon the existence of a duty on the part of the defendant. *Schear v. Board of County Comm'rs of County of Bernalillo*, 1984-NMSC-079, ¶ 4, 687 P.2d 728. Here, Mark had no separate duty to Plaintiffs. As explained in *Gheewalla*, 930 A.2d at 102, recognizing a direct duty to creditors "would create uncertainty for directors who have a fiduciary duty to exercise their business judgment in the best interest of the insolvent corporation" and would conflict with those directors' duties to "maximize the value of the insolvent corporation for the benefit of all having an interest in it."

Not only was there no duty as a matter of law, Plaintiffs never pleaded any negligence claims against Mark. Thus, the district court's negligence findings and its "unreasonable risk of harm" conclusions, demonstrate that it failed to apply the law of agency, did not understand the nature of the claims actually before it and failed to undertake the legal analysis required of it.

Because Mark had no duty running to Plaintiffs, all findings and conclusions dependent upon an assumption that a duty was owed are erroneous as a matter of law. That includes all findings or conclusions based on claims of non-disclosure and breach of a duty not to create unreasonable risks of harm. The latter is not even a claim that could have been advanced, given that it applies to risks of

physical harm, usually arising from defective products or dangerous premises, not to contract breaches. *See Proctor v. Waxler*, 1971-NMCA-106, ¶¶ 15-22, 488 P.2d 108, (discussing application of the *Restatement (Second) Torts*, § 343 (1965) to landowners where a condition on their property creates risks of *physical* injury); *Stinson*, 1997-NMCA-076, ¶¶ 2-6.

F. The court erred in holding Mark responsible for Wallen's contract breach

Agents, when acting within the scope of their duties, are acting for their principal, and cannot ordinarily be held liable when their principal breaches a contract with a third party. *Gallegos v. Citizens Insurance Agency*, 1989-NMSC-055, ¶ 22, 779 P.2d 99 ("agent is not liable for the disclosed principal's breach of contract unless he expressly was made a party to the contract or unless his conduct indicated an intent to be bound"); *Kreischer v. Armijo*, 1994-NMCA-118, ¶¶ 5-6, 11, 14-15, 884 P.2d 827 (agents of an entity are not individually liable for the entity's breach of contract).

Persons whose contracts with an entity have gone unfulfilled are corporate creditors. It is settled that shareholders, directors, officers, limited partners and other agents have no duty to corporate creditors. NMSA 1978 § 53-11-25 (shareholders owe no duty to corporate creditors); *Gheewalla*, 930 A.2d at 100-102 ("[i]t is well established that directors owe their fiduciary obligations to the corporation and its shareholders," while creditors are afforded protection through

contractual agreements); *In re Rehabilitation of Centaur Ins. Co.*, 632 N.E.2d at 1018 (it is well established that corporate officers do not owe fiduciary duties to creditors).

All of Plaintiffs' claims were based on their position that Mark was acting as an agent for Wallen. In that capacity, and as an advisor to Wallen and a Holdings manager, he was required to act solely in the interest of his principals and their owners. *Fletcher, Cyc. Corp.* § 1158.10 (Current through 2015 Update) (the privilege to influence the actions of a corporation by inducing it to breach its contracts "extends to non-employees who serve as business advisors and agents.").

As the court explained in *In re Hearthside Baking Co., Inc.*, 402 B.R. 233, 247, 249 (Bkrtcy. N.D. Ill. 2009) an insider who assumes the role of corporate fiduciary by making decisions that corporate fiduciary ordinarily makes, and exercising operating control, owes fiduciary duties to that entity and its shareholders. One of those duties is undivided loyalty; a duty that precludes an agent from disclosing private or confidential information of his principal or putting creditors' interests ahead of those of his principal. *Id.*

G. Agents are not liable for intentional interference with contract except where the agent has caused the breach through his own breach of his duties to his principal.

An agent's fiduciary duties to his principal ordinarily preclude that agent from being sued for intentional interference with contract. *Mintz v. Blue Cross of*

California, 172 Cal.App.4th 1594, 1602, 92 Cal.Rptr.3d 422, 429 (2009); *Fletcher*, *supra*. As the court explained in *Mintz*, the duty not to interfere ordinarily falls only on strangers to the contract, "interlopers who have no legitimate interest in the scope or course of the contract's performance." Corporate agents not only have a privilege to interfere with a contract, but the duty to do so, when it is in the best interest of their principal. 92 Cal.Rptr.3d at 429; *In re Hearthside Baking Co.,Inc.*, 402 B.R. at 247.

While there is an exception to non-liability, it is a narrow one. As against an agent of the contracting party, a claim for intentional interference with contract can be maintained only if the agent acted outside the scope of his duties, in bad faith, and against the best interests of his principal *Ettenson v. Burke*, 2001-NMCA-003, ¶¶ 16-18, 17 P.3d 440; *Deflon v. Sawyers*, 2006-NMSC-025, ¶¶ 7-10.

To prevail on a claim for intentional interference with contract Plaintiff must establish all elements of the claim. *Deflon*, 2006-NMSC-025, ¶ 16; *Mintz*, 92 Cal.Rptr.3d at 429. In *Bogle v. Summit Investment Company, LLC*, 2005-NMCA-024, ¶¶ 18, 20, 107 P.3d 520, the Court set forth the elements as:

(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. It is the fifth element that ordinarily precludes claims against corporate agents.

In *Deflon,* 2006-NMSC-025, ¶ 26, the court said that the inquiry should be to determine the Defendant's primary motive for interference. If the motive was primarily proper, there would be no liability. *Id.*

It is settled that a motive to protect one's own interest is not wrongful. In fact, one definition of "privilege" is "a good faith assertion…to protect a legally-protected interest of one's own…." *Fikes v Furst*, 2003-NMSC-033, ¶ 23, 81 P.3d 545 (citing *Speer v. Cimosz*, 1982-NMCA-029, ¶ 15, 642 P.2d 205). In *Ettenson*, 2001-NMCA-003, ¶¶ 14-18, the court explained that "a court cannot say as a matter of law that an agent is not acting in the best interest of the entity simply because the agent may have stood to profit along with the entity."

The logic behind this statement is simple: because every agent "in one way or another, acts for its own financial advantage when it acts for its principal..," there is no exception simply because a breach may be in the agent's financial interest, as well as that of the corporation. *Mintz*, 92 Cal.Rptr.3d at 429; *see also* 44B Am.Jur. 2d *Interference* § 29 (Database updated May 2016) (absent malice or illegality, a third party with an economic interest in an entity is privileged to interfere with an existing contract between the plaintiff and that entity).

An agent is said to be justified, or to have a privilege to interfere with his or her principal's contract, unless the agent acts outside the scope of his authority, and with improper motive and by improper means. *Ettenson*, 2001-NMCA-003, ¶¶ 14-18. Plaintiffs themselves established that Mark acted within his authority as a Wallen agent.

Improper means are actions that are "innately wrongful or predatory." *Kelly v. St. Vincent Hosp.*, 1984-NMCA-130, ¶ 30, 692 P.2d 1350 (citing the *Restatement (Second) Torts* § 766A, *comment e*). Plaintiffs claimed non-existent duties to disclose Wallen's confidential information, and to put Plaintiffs' interests ahead of Wallen's, while failing to prove any innately wrongful or predatory conduct. Thus, Mark's privilege to interfere was established. *Diversey Corp. v. Chem-Source Corp.,* 1998-NMCA-112, ¶ 20, 965 P.2d 332 (plaintiff must show improper motive or improper means).

Because absence of justification or privilege is one of the requisite elements of a claim for intentional interference with contract, Plaintiffs claim failed as a matter of law. *Bogle*, 2005-NMCA-024, ¶¶ 18, 20 (reversing judgment for plaintiff where agent acted to benefit his principal, as well as himself); *Mintz*, 92 Cal.Rptr.3d at 429 ("[c]orporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract." (citation omitted)); *Gregory Rockhouse Ranch, L.L.C. v. Glenn's Water*

Well Service, Inc., 2008-NMCA-101, ¶ 45, 191 P.3d 548 (reversing judgment for plaintiff).

H. Plaintiffs' claim also failed because there was no evidence that Mark knew of their specific contract, and because he did not participate in post-closing decisions

Absence of justification or privilege is just one of the required elements of Plaintiffs' claim that went unmet. Plaintiffs also failed to prove that Mark knew of Plaintiffs' specific contract. As explained in *Lihosit v. I &W, Inc.*, 1996-NMCA-033, ¶ 20, 913 P.2d 262, it is not sufficient that a party has means of information in situations where, to be held responsible, the act must be done with actual knowledge. *See* NMSA 1978 § 54-2a-103 ("A person knows a fact if the person has actual knowledge of it"); *see also Deflon*, 2006-NMSC-025, ¶ 16 (identifying knowledge of the specific contract as an element of the claim). To have known the terms of Plaintiffs' contract (and most importantly its fifth addendum), Mark would have had to obtain a copy of it. He never did that. Neither Montoya nor Wallace knew the status of Plaintiffs' contract in February 2009, and so could not have provided that information to Mark [Tr.I:183-85; Tr.III:111, 124-25, 141].

Yet a third element, that defendant "played an active and substantial part in causing plaintiff to lose the benefit of the contract" also went unproved. *Bogle*, 2005-NMCA-024, ¶ 20. Mark participated in the decision to close Wallen after its funds were appropriated by Charter Bank, having concluded that, without funds,

Wallen could not continue [Tr.I:154]. But there was no evidence that Mark knew Plaintiffs' house was one of the houses Wallen would be unable to complete, and it was undisputed that Mark was not involved in the post-closing Trust or the decisions and actions that resulted in Plaintiffs' funds not being returned, or alternatively, their house completed or deeded to them when the Trust managed to sell lots and so had some funds to work with [Wallace Exhibit T; Tr.II:67-68, 85-86, 99, 101-05; Tr.III:111, 137].

Mark's testimony that he played no role in post-closing decisions that affected Plaintiffs not only stood un-contradicted, it was corroborated by Filener, Wallace and the exhibits [*See Id. and see* Exhibits 96, 111-113, 118; Wallace Exhibits T, U]. And it was established that Plaintiffs' and their lawyer's attempts to reach Mark post-closing failed because they sent emails to incorrect addresses. Thus, there was no evidence that Mark knew of Plaintiffs' situation at any point in time when he could have acted either for or against their interests [*see* Exhibits 98, 105].

I. The findings required for intentional interference are missing and the findings and conclusions adopted are erroneous

While the court, in Finding 18(e), [RP 1171], which is actually a conclusion, stated that Mark acted without justification or privilege, there are no *factual* findings that would support that conclusion. No such findings were possible given that Plaintiffs established that Mark was acting as Wallen's agent. That agency,

which carried with it fiduciary duties to Wallen and Wallen's owners, also precluded any finding of innately wrongful or predatory action.

The conclusions of law are erroneous on their face because they base the determination of intentional interference on: (1) the privileged decision to delay payments to vendors when there was not enough cash to pay timely, (2) Mark's failure to disclose confidential information of his principal, (3) the business decision to close Wallen, (4) a non-existent duty to exercise reasonable care towards Plaintiffs, (5) Mark's non-existent role in Plaintiffs' exclusion from the list of buyers whose funds were returned and Filener, Wallace and Wallen's handling of their claim, and (6) a unpleaded claim, viable only in the context of *physical* harm, of creating an unreasonable risk of harm to Plaintiffs.

The absence of the necessary factual findings and of evidence that would have supported such findings, along with multiple erroneous legal conclusions, requires reversal and entry of judgment for Mark on the intentional interference with contract claim. *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 1994-NMSC-027, ¶ 8, 872 P.2d 346, 348 (1994) (findings must be sufficient to support the judgment).

J. The prima facie tort claim should have been dismissed

To state a claim for *prima facie* tort plaintiff must show an intentional lawful act by defendant, intent to injure the plaintiff, injury and "insufficient justification

for defendant's acts." *Bogle*, 2005-NMCA-024, ¶ 22; UJI 13-1631. The claim is intended to provide a remedy for persons "harmed by acts that are intentional and malicious, but otherwise lawful" and that fall outside of the "rigid traditional intentional tort categories." *Prima facie* tort cannot be used to "evade the stringent requirements of other established doctrines of law." *Bogle*, 2005-NMCA-024, ¶¶ 22.

Prima facie tort may be pleaded in the alternative, but if "at the close of the evidence, plaintiff's proof is susceptible to submission under one of the accepted categories of tort, the action should be submitted...on that cause and not under prima facie tort." *Bogle*, 2005-NMCA-024, ¶ 23 (*quoting Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 48, 785 P.2d 726).

Where intentional interference with contract is the appropriate cause of action, the plaintiff cannot resort to *prima facie* tort because that would be a classic case of trying to avoid the "stringent requirements of other doctrines of law." *Bogle*, 2005-NMCA-024, ¶ 22 (where intentional interference was the appropriate tort action, case should not have been submitted under *prima facie* tort, even though Plaintiff was unable to establish its intentional interference claim).

Here the district court erroneously permitted the claim to proceed when it was based on the same facts as the intentional interference claim and should have

been dismissed [*see* RP 1163-67, 1169-72, Findings 107, 115, Conclusions 2, 4, 5, 7, 16, 19].

Even if *prima facie* tort could have been pursued, it would have failed because its elements could not be established. A person cannot commit a *prima facie* tort against persons of whose existence they are unaware. It was undisputed that Mark did not know the Plaintiffs and was unaware of their situation. "Should have known" does not suffice. There was simply no basis for a conclusion of "malice." And the justification for Mark's action—his duty to Wallen—also justified his actions in the context of a *prima facie* tort claim. Thus, the judgment based upon *prima facie* tort must be reversed.

K. There was no viable conspiracy claim

1. Introduction and standard of review

Civil conspiracy is an intentional tort, requiring specific intent to accomplish the contemplated wrong. "One cannot agree, expressly or tacitly, to commit a wrong about which he or she has no knowledge." For a civil conspiracy to arise the parties must be aware of the harm or wrongful conduct *at the beginning of the combination or agreement*. 16 Am. Jur. 2d *Conspiracy* § 51 (Database updated May 2016) (emphasis added).

The elements of the claim are: (1) a conspiracy between two or more individuals; (2) specific wrongful acts carried out by the defendants pursuant to the

conspiracy; and (3) damage to plaintiff 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). This intentional tort requires proof that the defendant "knowingly and voluntarily participated in a common scheme to commit an unlawful act or a lawful act in an unlawful manner." *Id.* (internal quotation and citation omitted). "Accidental, inadvertent, or negligent participation in a common scheme does not amount to conspiracy." *In re Hearthside Baking Co., Inc.*, 402 B.R. at 247, 249 (*quoting Adcock v. Brakegate, Ltd.*, 645 N.E.2d 888 (Ill. 1994)). Injury to the plaintiff must be the object of the conspiracy. *Kimbrell v. Kimbrell*, 2013-NMCA-070, ¶ 15, 306 P.3d 495.

A conspiracy itself is not actionable "nor does it provide an independent basis for liability "'unless a civil action in damages would lie against one of the conspirators.'" *Armijo v. National Sur. Corp.,* 1954-NMSC-024, ¶¶ 28-31, 268 P.2d 339; *Vigil v. Public Service Company of NM*, 2004-NMCA-085, ¶ 20, 94 P.3d 813 (civil conspiracy fails as a matter of law when no actionable civil case exists against defendants). Where defendants "have committed no independent unlawful act, a conspiracy claim fails as a matter of law." *Bauer v. College of Santa Fe*, 2003-NMCA-121, ¶ 16, 78 P.3d 76 (where judgment was granted on underlying breach of contract claims, defendants were also entitled to judgment as a matter of law on conspiracy claim).

A person can only be held liable as a coconspirator if he is "legally capable" of committing the underlying tort. *Valles v. Silverman*, 2004-NMCA-019, ¶ 27, 84 P.3d 1056; The question raised, whether Mark was legally capable of committing the underlying tort, is a question of law, and so is reviewed de novo. *Kokoricha v. Estate of Keiner*, 2010-NMCA-053, ¶ 11, 236 P.3d 41.

"The gist of a civil conspiracy" is the resulting damage from the injurious wrong, not the conspiracy itself. *THPD, Inc. v. Continental Imports, Inc.*, 260 S.W.3d 593, 604-05 (Tex.App. 2008). Failure to prove that the damages resulted from the conspiracy (as opposed to the underlying tort), is a failure to prove an essential element. *Id.* Plaintiffs' conspiracy claim failed for at least as many reasons as the claim has elements.

2. The intra-corporate conspiracy immunity doctrine bars the claim

The fact that a corporate entity can act only through its agents, and that their acts on its behalf are corporate acts, prevents agents of a corporation from meeting the plurality requirement of an actionable conspiracy claim. *Harp v. King*, 835 A.2d 953, 971, 974 (Conn. 2003) (under the intra-corporate conspiracy immunity doctrine wholly intra-corporate conduct does not satisfy the plurality requirement); *Fasoli v. City of Stamford*, 2014 WL 6808679, * 20 (D. Conn. 2014) (officers, agents and employees of an entity are legally incapable of a conspiracy); *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1261 (11th Cir. 2010) (acts of corporate agents

are attributable to the corporation itself, which negates the multiplicity of actors necessary for formation of a conspiracy); *McMillan v. Oconee Memorial Hosp., Inc.*, 626 S.E.2d 884, 886-87 (S.C. 2006) ("civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because, by virtue of that relationship, such acts do not involve separate entities").

The intra-corporate conspiracy immunity doctrine derives from basic principles of agency law. Thus, for a claim of intra-corporate conspiracy to be actionable, the complaint must allege that the agents acted outside the scope of their employment and engaged in conspiratorial conduct to further personal purposes, not of benefit to their principal. *Id.* at 886-87; *Mintz*, 92 Cal.Rptr.3d at 431 (duly acting agents and employees cannot be held liable for conspiring with their own principals).

Here Plaintiffs claimed and proved that Wallen and its agents, Wallace and Mark, were acting within the scope of their duties to Wallen and its owners. Because these Defendants are not legally capable of conspiring with each other, or with their principals, plaintiffs' conspiracy claim failed as a matter of law. *Valles*, 2004-NMCA- 019, ¶ 27; *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984) (rejecting claim of conspiracy between parent company and subsidiary or division because of their complete unity of interest); *Siegel Transfer, Inc. v. Carrier Exp. Inc.*, 54 F.3d 1125, 1135 (3d Cir. 1995) (no

conspiracy possible where the parties' economic interests were "entirely congruent"); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir 2008) (affiliated or sister companies, commonly owned, were legally incapable of conspiring).

3. Plaintiffs failed to show specific intent, at the outset, to accomplish a contemplated wrong through tortious conduct.

Plaintiffs failed to even allege a beginning date for the claimed conspiracy—a fatal flaw given that they were obligated to show a "specific intent to accomplish a contemplated wrong" and awareness of the harm or wrongful conduct *at the beginning of the alleged agreement*. *Allen v. Allison*, 155 S.W. 3d 682, 689 (Ark. 2004); 16 Am. Jur. 2d *Conspiracy, supra,* § 51; *Guilbeault v. R. J. Reynolds Tobacco Co.*, 84 F.Supp.2d 263, 268 (D.R.I. 2000) (civil conspiracy requires specific intent to do something illegal or tortious).

Plaintiffs' identified Wallen's breach of contract as the object to be accomplished [*see e.g.* RP 1061, 1065, 1067-68, 1071, Plaintiffs' Proposed Findings 21-28, 59-60, 69-71, 79, 82, 106 and RP 1073-75, 1080-82, Plaintiffs' Proposed Conclusions 4, 6, 7, 9, 17-18, 20-22; *and* RP 1165, Court's Conclusion 5]. But plaintiffs introduced no evidence that would support the notion that Wallen entered into the contract with specific intent to injure Plaintiffs by breaching it in an illegal or tortious manner. In fact, no evidence was adduced that either individual defendant had actual knowledge of Plaintiffs' specific contract. And no

evidence was adduced that any Defendant knew in May 2008, that some months later a cascade of events—wrongful foreclosure by one bank, a negative shift in the relationship with other banks with which Wallen had long-term working relationships, a surprisingly severe and long-lasting recession, in conjunction with decreased revenues and the final blow, appropriation of Wallen's funds—would result in Plaintiffs' house being left unfinished.

Finally, Montoya is the one who created the list of persons whose deposits were to be refunded and chose to list only persons whose homes were not yet under construction [*see* Tr.I:156; Exhibit 96]. There was no evidence that Mark had any input into that list. Thus, there was no basis upon which to conclude that Plaintiffs' omission was more likely than not based on a decision made by Mark, let alone made out of injurious intent.

Plaintiffs failed to identify any unlawful acts undertaken in the course of the alleged conspiracy. To the contrary it was undisputed that, in winding up Wallen's affairs, Filener and Wallace acted on the advice of counsel and so as to protect Wallen's interests and its owners [Tr.II:74; Tr.III:106, 109, 111, 132-33, 141]. That does not amount to the "unlawful" action required for a conspiracy claim.

L. No evidence supports punitive damages

An intentional breach of contract ordinarily cannot form the predicate for punitive damages, not even when the breach is flagrant, and the other party will

clearly be injured by the breach. *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs., L.P.*, 1998-NMCA-005, ¶ 43, 952 P.2d 435 (Hartz, C.J., concurring in part and dissenting in part). The evidence must show a culpable state of mind. *Bogle*, 2005-NMCA-024, ¶¶ 22, 23.

There was no evidence that Mark acted with malice, utter indifference, or recklessly towards Plaintiffs. Instead it was undisputed that he was unacquainted with them and their circumstances. All of the evidence was that he and the other agents of Wallen, in accordance with their fiduciary duties, worked to keep Wallen afloat for as long as that was a reasonable option. The decision not to finish houses that were near completion was based on the sudden, unexpected inability to pay for additional work, not animus towards anyone who had contracted with Wallen.

The absence of any duty to Plaintiffs, Mark's fiduciary duties to the Wallen entities and their owners, which included a duty not to disclose their private information or internal affairs to creditors, and which gave him a privilege to interfere with Wallen's contracts, all preclude his having had any duty to disclose to Plaintiffs or otherwise protect Plaintiffs' interests. Thus, his supposed failure to do so cannot form the basis for a punitive damages award.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth herein the Judgment should be reversed and the matter remanded with instructions to enter judgment for Mark Bozzone.

Respectfully submitted.

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