



COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

JUL 14 2016

*Monte R. Pate*

**IN THE COURT OF APPEALS  
OF THE STATE OF NEW MEXICO**

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

Plaintiffs-Appellees/  
Cross-Appellants,

v.

Court of Appeals No. 35,086  
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,

**DAVID J. FOGELSON AND CORINNE FOGELSON'S  
BRIEF IN CHIEF**

Appeal from the Thirteenth Judicial District Court  
The Honorable George P. Eichwald

Catherine F. Davis  
Julie J. Vargas  
HUNT & DAVIS, P.C.  
2632 Mesilla NE  
Albuquerque, NM 87110  
(505) 881-3191

*Counsel for David J. Fogelson  
and Corinne Fogelson*

**I. TABLE OF CONTENTS**

**I. TABLE OF CONTENTS.....i**

**II. TABLE OF AUTHORITIES.....ii**

**III. SUMMARY OF PROCEEDINGS**

**A. NATURE OF THE CASE.....1**

**B. COURSE OF PROCEEDINGS.....1**

**C. DISPOSITION IN THE COURT BELOW.....4**

**D. SUMMARY OF THE RELEVANT FACTS.....4**

**IV. ARGUMENT**

**A. STANDARD OF REVIEW.....9**

**1. Dismissal of Unfair Practices Act Claims  
under Rule 12(B)(6).....9**

**2. Dismissal of Conversion Claim under Rule  
41(B).....10**

**B. HOW PRESERVED BELOW.....11**

**1. Unfair Practices Act Claim.....11**

**2. Conversion Claims.....12**

**C. CONTENTIONS OF THE APPELLANT.....12**

**1. The trial court erred by dismissing Plaintiffs’  
claims under the Unfair Practices Act because  
Plaintiffs’ complaint properly asserted that the  
contract for the construction of their home  
constituted “goods and services” under the Act  
and the Defendants made false and misleading  
representations in the collection of monies due  
under the Contract.....12**

|     |  |           |
|-----|--|-----------|
| a.  | <b>The trial court erred by dismissing Plaintiffs’ claims under the Unfair Practices Act because Plaintiffs’ complaint properly asserted that the contract for the construction of their home constituted “goods and services” under the Act.....</b>  | <b>15</b> |
| b.  | <b>The trial court erred by dismissing Plaintiffs’ claims under the Unfair Practices Act because Plaintiffs’ complaint properly asserted that the Defendants made false and misleading representations in the collection of monies due under the Contract.....</b>   | <b>21</b> |
| 2.  | <b>The trial court erred by dismissing Plaintiffs’ conversion claim because substantial evidence does not support the result reached by the court, as Plaintiffs proved that the Defendants exercised dominion and control over the monies of the Plaintiffs in defiance of the Plaintiffs’ rights or in an unauthorized and injurious manner.....</b> | <b>23</b> |
| a.  | <b>The Fogelsons demonstrated ample evidence that the Defendants exercised dominion and control over the monies paid by the Fogelsons for the construction of the home; and substantial evidence does not support the trial court’s dismissal of those claims.....</b>   | <b>24</b> |
| V.  | <b>CONCLUSION.....</b>   | <b>32</b> |
| VI. | <b>REQUEST FOR ORAL ARGUMENT.....</b>  | <b>32</b> |

## II. TABLE OF AUTHORITIES

### NEW MEXICO STATUTES

|                    |    |
|--------------------|----|
| NMSA §57-12-2..... | 13 |
| NMSA §57-12-3..... | 13 |

### STATUTES FROM OTHER JURISDICTIONS

|  |    |
|--|----|
| Ohio Rev. Code Ann., Title XIII, Ch. 1345, Consumer Sales Practices..... | 19 |
|--|----|

### NEW MEXICO RULES

|                       |    |
|-----------------------|----|
| NMRA 1-012(B)(6)..... | 9  |
| NMRA 1-41(B).....     | 10 |

### NEW MEXICO CASES

|   |                |
|---|----------------|
| <i>Baldonado v. El Paso Natural Gas Co.</i> ,<br>2008-NMCA-010, 143 N.M. 297, 176 P.3d 286.....               | 10             |
| <i>Bryan v. Board of Loan Comm'rs</i> ,<br>1922-NMSC-069, 28 N.M. 319, 211 P.597.....                         | 21             |
| <i>Camino Real Mobile Home Park Partnership v. Wolfe</i> ,<br>1995-NMSC-013, 119 N.M. 436, 891 P.2d 1190..... | 10             |
| <i>Ledbetter v. Webb</i> ,<br>1985-NMSC-112, 103 N.M. 597, 711 P.2d 874.....                                  | 10             |
| <i>McElhannon v. Ford</i> ,<br>2003-NMCA-091, 134 N.M. 124, 73 P.3d 827.....                                  | 15, 16, 17, 18 |



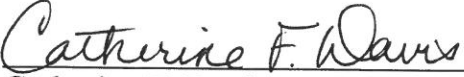
|  |        |
|--|--------|
| <i>Muncey v. Eyeglass World, LLC</i> ,<br>2012-NMCA-120, 289 P.3d 1225.....                | 24, 30 |
| <i>Roybal v. Morris</i> ,<br>1983-NMCA-101, 100 N.M. 305, 669 P.2d 1100 .....              | 10     |
| <i>Truong v. Allstate Insurance Co.</i> ,<br>2010-NMSC-009, 147 N.M. 583, 227 P.3d 73..... | 20     |
| <i>Wood v. Grau</i> ,<br>1951-NMSC-060, 55 N.M. 429, 234 P.2d 362.....                     | 31     |

### **CASES FROM OTHER JURISDICTIONS**

|  |        |
|--|--------|
| <i>Keiber v. Spicer Constr. Co.</i> ,<br>619 N.E.2d 1105 (Ohio, 1993) .....  | 19     |
| <i>Mace v. Pyatt</i> ,<br>691 S.E. 2d 81 (N.C. App. 2010).....   | 31, 32 |
| <i>Marine Trans. Serv. Sea-Barge Group v. Python High<br/>Performance Marine Corp.</i> ,<br>16 F.3d 1133 (11 <sup>th</sup> Cir. 1994)..... | 34     |

## STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A)(1)(x), Plaintiffs-Appellees/Cross-Appellants, David J. Fogelson and Corinne Fogelson, state 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 7,459 words. The word count is obtained using Microsoft Word 2007.

  
Catherine F. Davis

## STATEMENT OF ABBREVIATIONS

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".

### **III. SUMMARY OF PROCEEDINGS**

#### **A. NATURE OF THE CASE**

This case arises out of the Plaintiff/Cross-Appellant's execution of a Purchase Agreement with Wallen Development, Inc. and Developments by Wallen, LLP, (hereinafter "Wallen") for the construction and purchase of a home. Following mandatory arbitration with Defendants Wallen Development Inc. and Developments by Wallen (collectively, "Wallen"), the Plaintiffs/Cross-Appellants received a default judgment in the amount of \$330,222.00 in compensatory and punitive damages, plus pre and post judgment interest and attorneys fees against Wallen. Plaintiffs/Cross-Appellants subsequently filed suit against Wallen to enforce the arbitration award and to state additional claims against its officers and directors for their individual tortious conduct. Plaintiffs asserted claims for violations of the Unfair Trade Practices Act, conversion, civil conspiracy, prima facie tort, intentional interference with contractual relations and foreclosure of its transcript of judgment against Wallen.

#### **B. COURSE OF PROCEEDINGS**

Plaintiffs David J. Fogelson and Corrine Fogelson, husband and wife (hereinafter "Fogelsons") filed a Complaint to Compel Arbitration against Wallen Development, Inc. and Developments by Wallen, LLP, (hereinafter "Wallen") on June 22, 2009, in the Thirteenth Judicial District Court , Cause No. 01329-CV-

091472 (“Prior Litigation”). On March 11, 2010, the Court entered a judgment confirming the arbitration award against Wallen in the amount of \$165,111.00 in compensatory damages, \$165,11.00 in punitive damages, pre and post judgment interest and attorneys fees. The judgment confirming the arbitration award in the Prior Litigation was not appealed by Wallen.

Fogelsons filed the Complaint that gives rise to this appeal on September 16, 2010, in the Thirteenth Judicial District Court in Cause No. D 1329-CV-201002239 against Defendants Larry Filener, Eric Wallace, Garry Wallen, Mary Wallen, Jenice Montoya and GM Westside Investments, LLC for conversion, fraud, unfair trade practices, civil conspiracy and prima facie tort. RP 1-34. The claims were individual tort claims for actions Fogelsons alleged had been committed by the above-named Defendants.

After conducting initial discovery, Fogelsons moved for leave to file an amended complaint on December 21, 2011 and re-filed an unopposed motion for leave to file and amended complaint on March 8, 2012. RP 92-105. The Court granted Fogelsons' motion and Fogelsons filed their First Amended Complaint on March 26, 2012. RP 162-198. The First Amended Complaint named Eric Wallace (“Wallace”), Mark Bozzone (“Bozzone”), Wallen Development Inc. and Developments by Wallen (“Wallen”) as Defendants and abandoned the Fogelsons’ claims against the other defendants. The first amended complaint asserted tort

claims of unfair trade practices against Bozzone and Wallace, conversion, civil conspiracy and prima facie tort against all Defendants, intentional interference with contractual relations against Bozzone, and an alternate claim for foreclosure against Wallen.

On March 25, 2013, Bozzone filed a motion for partial dismissal with prejudice on Fogelsons' UPA claim. RP 424-427. After briefing and hearing on the motion, the Court granted the Motion for Partial Dismissal with Prejudice on Fogelsons' Unfair Practices Act Claim on November 19, 2013. RP 860-62.

The Fogelsons filed their second amended complaint on January 21, 2014, to add additional parties who claimed liens against the Property that was the subject of their Foreclosure claim. RP 869-889.

A trial on the merits was held on April 29, April 30 and May 1, 2014. At the close of the Fogelsons' case-in-chief, Defendant Bozzone submitted a Trial Brief in Support of defendant Mark Bozzone's Motion for Dismissal Under Rule 1-041(B) and moved for the dismissal of the Fogelsons' conversion claim. RP 1037-1049.

On May 21, 2014, following the trial on the merits, the Court entered an Order granting Bozzone's Motion for Dismissal under Rule 1-041(B) with respect to Fogelsons' claims against Defendant Bozzone for conversion and fraud. RP 1050-51.

The Court entered its Findings of Fact and Conclusions of Law on February 27, 2015. RP 1150-74. A Judgment was entered in favor of Fogelsons on their remaining claims on August 25, 2015. RP 1258-61. An Amended Judgment was entered on September 1, 2015 and a Second Amended Judgment was entered on September 3, 2015. RP 1262-93.

**C. DISPOSITION IN THE COURT BELOW**

The Court granted Defendant Bozzone's Motion for Partial Dismissal with Prejudice on Fogelsons' Unfair Practices Act Claim on November 19, 2013. RP 860-62.

On May 21, 2014, following the trial on the merits, the Court entered an Order granting Bozzone's Motion for Dismissal under Rule 1-041(B) with respect to Fogelsons' claims against Defendant Bozzone for conversion and fraud. RP 1050-51.

A Judgment was entered in favor of Fogelsons on their remaining claims on August 25, 2015. RP 1258-61.

**D. SUMMARY OF THE RELEVANT FACTS**

On May 25, 2008, the Fogelsons executed a Purchase Agreement ("Contract") with Wallen for the construction of a home and purchase of the Property. TR-I: 26 at 13-14; Exhibit 24. The Contract required the Fogelsons to

make progress payments when benchmarks in the construction were achieved.

Exhibit 24.

Jenice Montoya was the general manager of Wallen. TRI: 77 at 8. The trial court found that Jenice Montoya, who oversaw the day-to-day functions of Wallen, reported equally to Mark Bozzone, Eric Wallace and Larry Filener. TR-I: 77 at 14-18; TR-I: 78-79. Montoya provided weekly updates of sales information, cancellations and home starts to Bozzone, Wallace and Filener; and, Bozzone received traffic reports of traffic through the company's sales center. TR-I: 79-80, Exhibit 2.

Wallen began having financial problems in February, 2008 and began laying off employees at that time. TR-I: 83 at 1-21. By April, 2008, Wallace, Bozzone and Filener decided that payments to vendors should be delayed, notwithstanding that those vendors would be entitled to lien properties on which work was performed. TR-I: 93-94.

Three months after Wallen began having financial problems and a month or two after Bozzone, Wallace and Filener decided to delay payments to vendors, the Fogelsons signed the Contract for the construction and purchase of their home. TR-I: 26 at 13-14; Exhibit 24. The Contract provided that the Fogelsons would pay cash for the house by paying a non-refundable deposit and subsequent progress

payments when construction reached the benchmarks defined therein. TR-I: 28-30, Exhibit 24. The cash paid by the Fogelsons was to be applied toward the purchase of the home and it was reasonable for the Fogelsons to believe that subcontractors would be paid and their money would be used to build their home. TR-I: 103-104.

Wallace, Bozzone and Filener knew that Wallen had a single general operating account where all monies, including those of cash buyers like the Fogelsons, were deposited. TR-I: 104 at 5-20. Fogelsons paid Wallen \$2,500 on May 27, 2008 and an additional \$1,000 on June 8, 2008. TR-I: 31 at 6-18, Exhibits 25 and 26.

On August 24, 2008, Wallace sent an e-mail, copying Bozzone, advising that Wallen's policy was to be to continue to push back or delay payment to vendors and accumulate cash. Exhibit 46. One month later, the Fogelsons paid Wallen the sum of \$50,625 on September 23, 2008 for the construction of their home. TR-I: 32-33, Exhibit 53. Wallen, Bozzone and Filener received reports showing that the Fogelsons were cash buyers. Exhibit 65. At the time the Fogelsons paid the \$50,625 payment in September, 2008, Wallen had already been served with a foreclosure action by Bank of America. Exhibit 49. That same month, Wallen's construction financing from Wachovia was being cut off. Exhibit 55.



In October, 2008, Wallen's general manager, Jenice Montoya, was still receiving instructions to push payables out to 90 days; and, on October 30, 2008, in an e-mail copied to Bozzone, Wallace questioned Montoya as to why she was paying trades when they agreed to push payables. TR-I: 128-29, Exhibit 59. The decision to push payables and not pay vendors timely was made by Wallace and Bozzone collaboratively; and, Bozzone knew about and ratified the decision to push payables. RP 1270-93 at ¶¶51, 52, 53. The decision to push payables and not pay vendors timely and Bozzone's ratification was reckless and without regard to the rights of Fogelsons. RP 1270-93 at ¶54.

Less than a week after Wallace sent the e-mail to Montoya asking why she was paying trades, on November 5, 2008, the Fogelsons wrote another check to Wallen for \$55,493 for the construction of the house. TR-I: 33-34, Exhibit 61.

By December, 2008, Wallen was experiencing a huge cash crunch and their construction credit with Charter Bank and Compass Bank was expiring. Exhibit 67, Exhibit 68. In January, 2009, Bozzone was receiving reports showing outstanding payments due to vendors and how late their payments were; and, Montoya was instructed to keep Bozzone, Wallace and Filener specifically informed of the aging of the accounts payable. TR-I: 140-141, Exhibits 73-75. At that same time, Bozzone, Wallace and Filener received Wallen's Production Summary, listing the Fogelson's purchase and their status as cash buyers. TR-I:

83-84, 133, Exhibit 65. Jenice Montoya testified that Bozzone, Wallace and Filener knew or should have known that the Fogelsons had purchased the property and were paying cash for it. TR-I: 85-86.

On February 9, 2009, the Fogelsons wrote another check to Wallen in the amount of \$55,493 for the construction of the home and understood at the time that the estimated time for completion of their home was two weeks away. TR-I: 34-35. By this time, Wallace, Filener and Bozzone knew that unpaid vendors were contacting homeowners and Wallen was getting claims from vendors about liens. TR-I: 143, Exhibit 79. Bozzone became directly involved in decision about which liens to pay; and, notwithstanding that the Fogelsons had paid cash for the construction of their home, vendor payments on other homes were put ahead of the Fogelsons home at the instruction of Bozzone. TR-I: 146-48.

Soon thereafter, Bozzone told Jenice Montoya that Wallen would be closed down; and, Bozzone rejected Montoya's request to keep a skeleton crew to finish up the few homes, including the Fogelsons', that were within 30 days of completion. TR-I: 154-55. After learning that Wallen had closed, Fogelsons discovered that there were numerous claims of lien filed against the home being constructed for them, totaling approximately \$60,000.00. TR-I: 45. The Fogelsons received nothing in exchange for their payments totaling \$165,111. TR-I: 55.

The trial court found that Wallace and Bozzone actively participated in the tortious acts against Fogelsons by directing, approving, and ratifying late payments to vendors and that Bozzone, individually, took an active role in the management and decision making of Wallen. RP 1270-93 at ¶¶106, 107, 108.

After Wallen was shut down, lots it continued to own were moved into another company created by Wallace and Filener, sold, and the proceeds were used to pay bills of Wallen and to refund deposits. TR-III: 105-107. Other lots owned by Wallen were transferred to yet another Wallen company called GM Investments, which made a profit on the sale of those lots to DR Horton. TR-III: 134-35. The Fogelsons did not receive any of the monies from the sale of the lots; instead, Wallen management, including Wallace, Filener, and Bozzone, believed that refunding the construction deposits would prevent any further investigation by the Attorney General's Office. TR-III: 132-133.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

###### **1. Dismissal of Unfair Practices Act Claims under Rule 12(B)(6)**

In reviewing an order granting a motion to dismiss, the Court must accept as true all facts properly pleaded and affirm dismissal under [Rule] 1-012(B)(6) only if under no state of facts provable thereunder would a claimant be entitled to relief. The Court's review is limited to review of the law applicable to the claim, not the

facts which support it. *Baldonado v. El Paso Natural Gas Co.*, 2008-NMCA-010, ¶20, 143 N.M. 297, 176 P.3d 286, quoting *Rummel v. Edgemont Realty Partners, Ltd.*, 116 N.M. 23, 25, 859 P.2d 491, 493 (Ct. App. 1993).

## **2. Dismissal of Conversion Claim under Rule 41(B)**

Involuntary dismissal of a plaintiff's claims under Rule 41(B) for failure to carry a burden of proof is reviewed as any other judgment on the merits. The judgment of the trial court will not be disturbed on appeal if the findings of fact entered by the court are supported by substantial evidence, are not clearly erroneous, and are sufficient to support the judgment. *Camino Real Mobile Home Park Partnership v. Wolfe*, 1995-NMSC-013 at ¶12, 119 N.M. 436, 891 P.2d 1190 (S. Ct. 1995) citing *Mascarenas v. Jaramillo*, 111 N.M. 410, 412, 806 P.2d 59, 61 (1991) (stating that appellate court's duty is to interpret trial court's findings to determine whether they are sufficient to support judgment); *Roybal v. Morris*, 100 N.M. 305, 311, 669 P.2d 1100, 1106 (Ct. App. 1983) (stating that appellate court is "bound by the trial court's findings of fact unless they are demonstrated to be clearly erroneous or not supported by substantial evidence"). Appellate courts may also reverse a trial court's judgment when the judgment is based on an erroneous conclusion of law. *Ledbetter v. Webb*, 103 N.M. 597, 602-03, 711 P.2d 874, 879-80 (1985).

## **B. HOW PRESERVED BELOW**

### **1. Unfair Practices Act Claims**

On March 25, 2013, Bozzone filed his Motion for Partial Dismissal with Prejudice on Plaintiffs' UPA Claim. RP at 424-27. Plaintiffs/Cross-Appellants preserved these issues below as follows:

a. Plaintiffs/Cross-Appellants filed their Response to Defendant Mark Bozzone's Motion for Partial Dismissal with Prejudice on Plaintiffs' UPA Claim, opposing dismissal of that claim on April 10, 2013. RP at 441-48. The Court granted the Motion for Partial Dismissal with Prejudice on Fogelsons' Unfair Practices Act Claim on November 19, 2013. RP at 860-62.

b. At the trial on the merits of this matter, held on April 29, April 30 and May 1, 2014, Plaintiffs/Cross-Appellants Fogelsons made an oral motion asking the Court to reconsider its Order granting partial dismissal with prejudice on Fogelsons' Unfair Practices Act Claim entered on November 19, 2013, based on the evidence presented. The Court denied the oral motion. TR-III: 32-33.

c. Plaintiffs/Cross-Appellants further preserved their UPA claims by submitting proposed Conclusions of Law for those claims. RP 1058-88, Conclusions of Law at ¶¶3, 4, 6, 7, 8 and 38-46.

## 2. Conversion Claims

Following the completion of the Plaintiffs case, Defendant Mark Bozzone made an oral motion to dismiss Plaintiffs' claims under Rule 1-041(b), including their conversion claims. TR-III: 37-39. Counsel for Plaintiffs/Cross-Appellants opposed Defendant Bozzone's Rule 1-041(b) motion, arguing that the evidence presented in Plaintiffs' case-in-chief satisfied the elements for a conversion claim. TR-III: 56. Plaintiffs/Cross-Appellants further preserved their conversion claim by submitting proposed Conclusions of Law for that claim. RP 1058-88, Conclusions of Law at ¶¶3, 4, 6, 7, 8, 23 and 24. On May 21, 2014, the Court entered an Order granting Bozzone's Motion for Dismissal under Rule 1-041(B) with respect to Fogelsons' claims for conversion and fraud. RP at 1050-51.

## C. CONTENTIONS OF THE APPELLANT

- 1. The trial court erred by dismissing Plaintiffs' claims under the Unfair Practices Act because Plaintiffs' complaint properly asserted that the contract for the construction of their home constituted "goods and services" under the Act and the Defendants made false and misleading representations in the collection of monies due under the Contract.**

Plaintiffs raised claims that the Defendants breached the Unfair Practices Act by continuing to take progress payments from the Plaintiffs, knowing that those payments were not being used to pay for the goods and services of the subcontractors constructing the Fogelsons' home thereby allowing liens to be placed on the Property.

New Mexico law is clear that unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful. NMSA §57-12-3. An unfair or deceptive trade practice is a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the *sale of goods or services* or in the *collection of debts* by a person in the regular course of the person's trade or commerce, that may, tends to, or does deceive or mislead any person. NMSA §57-12-2(D). Similarly, the UPA prohibits "unconscionable trade practices" including acts or practices in connection with the sale of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment, takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree or results in a gross disparity between the value received by a person and the price paid. NMSA §57-12-2(E).

In the case before this Court, Plaintiffs filed their First Amended Complaint, alleging that the parties entered into a contract for the construction of a home. RP 162-98. Plaintiffs attached a copy of the Contract to their First Amended Complaint. The Contract between Wallen and the Fogelsons states that it "is for *the construction* and sale of the Lot and completed home." (emphasis added).

Wallen agreed to “*construct and sell*” the home to the Fogelsons. RP 175 at ¶1.0 (emphasis added).

The Contract imposes several duties and responsibilities on Wallen in performing its obligations to construct the home under the Contract. Pursuant to the terms of the Contract, Wallen was required to construct the home in accordance with the plans and applicable building codes. RP 175 at ¶1.0. It was also required to obtain building permits, have the property inspected, and obtain a certificate of occupancy. RP 175 at ¶1.0. It required Wallen to complete the work using certain finishes and install certain appliances and upgrades. RP 192-93, Change Order Addendum.

Furthermore, the Contract gave the Fogelsons certain rights that allowed them to dictate the quality of the construction by choosing materials to be installed, such as upgraded insulation and appliances, or eliminating unwanted amenities, such as heat lamps, thereby directing the manner in which Wallen performed its obligations under the Contract. RP 175-98. During the course of the construction, in addition to their right to choose options and upgrades to be installed in the home, they were entitled to make changes to the plans, and could require changes to the construction by issuing change orders. RP 175-98.

While not dispositive when considering an appeal of dismissal under Rule 1-012(B)(6), it is helpful to know that, at the time Wallen went out of business and



stopped construction, the home was missing many of the elements called out in the plans and specifications, including electrical fixtures, plumbing fixtures, carpeting, finish stucco coat, and landscaping. TR-I: 35 at10-15. Jenice Montoya, Wallen’s general manager, estimated that the home was 30 days from completion, with anywhere between 25 to 30 percent of the work to be completed. TR-I: 202 at13-20.

- a. **The trial court erred by dismissing Plaintiffs’ claims under the Unfair Practices Act because Plaintiffs’ complaint properly asserted that the contract for the construction of their home constituted “goods and services” under the Act.**

Relying on *McElhannon v. Ford*, 2003-NMCA-091, 134 N.M. 124, 73 P.3d 827, Defendant Bozzone filed his Motion to Dismiss the Plaintiffs’ UPA claims pursuant to NMRA 1-012(B)(6). Following briefing and argument, the Court granted Defendant’s motion.

In *McElhannon v. Ford*, the seller, a licensed general contractor, constructed a home and, after it was completed, listed it for sale. *Id.* at ¶¶2-3. The *McElhannon* defendants, however, had failed to obtain a permit for the construction of or a certificate of occupancy for the home. *Id.* at ¶2. Further, the Defendants failed to disclose the lack of a permit and certificate of occupancy to the buyers, or the fact that they had actually been denied a permit. *Id.* at ¶3. Following the closing on the purchase of the home, the buyers moved into the home and began to notice a number of defects. *Id.* at ¶5. Upon investigation,

they discovered the lack of a permit and certificate of occupancy. *Id.* Buyers filed suit, asserting claims under the UPA. *Id.* at ¶6. Concluding that the sale of a completed house does not constitute a “good” or “service” for purposes of liability under the UPA, this Court affirmed the trial court’s grant of summary judgment on the buyer’s UPA claims. *Id.* at ¶17.

According to the holding in *McElhannon*, “To the extent goods and services are combined to create a structure that is permanently affixed to realty, they are understood to have been ‘converted’ to realty.” *Id.*, citing 73 C.J.S. **Property** §23m at 293 (1983).

In determining that the UPA did not apply to a contract for the purchase of a completed house, the *McElhannon* Court reasoned,

"The word "goods" "is generally understood to mean personal estate as distinguished from realty." (citations omitted). The word "services" is generally understood to mean "work done by one person at the request of another."(citations omitted) (defining "services" as "all activities engaged in for other persons for a consideration").

*Id.* at ¶17.

Applying these definitions, the *McElhannon* Court determined,

***We are persuaded that in ordinary usage a completed house, as a form of realty, cannot be "goods." As tangible property, a house cannot constitute "services."*** We are unable to find any compelling reason elsewhere in the UPA for applying any meaning other than the ordinary meaning of goods and services. We therefore hold that a sale of a completed house is not a sale of goods or services for purposes of Section 57-12-2(D). Accordingly, we affirm the trial court's grant of summary judgment on the McElhannons' UPA claim.

*Id.* The facts before the Court in the *McElhannon* decision, however, are distinguishable from the case before this Court; and the trial court erred by dismissing the claims based on the holding of that case.

In the case before this Court, Plaintiffs alleged in their First Amended Complaint that the Fogelsons paid \$165,111.00 to Wallen to purchase the Property, including the new home being constructed thereon, but that prior to completing the construction of the home, Wallen abandoned the job and closed its doors. RP 162-98 at ¶¶12-14. At the time it closed, Wallen Development, Inc. had several unfinished homes which were under contract for sale, including the Fogelson home; and, the only homes that were eventually completed were homes on which Defendant Bozone had provided the construction financing, which homes were eventually sold and the construction financing, paid off. RP 162-98 at ¶¶15-16. Plaintiffs' First Amended Complaint further alleges that Wallen failed to pay for labor and materials used in the construction of the Fogelson home and allowed liens to be filed against the Property. RP 162-98 at ¶¶17-18. Instead, funds paid by the Fogelsons for construction of their home were used to pay charges on other homes and to pay salaries and expenses of Wallen with Defendant Bozone instructing Wallen employees as to which bills should be paid and which should not, with Bozone intentionally causing the Fogelsons' monies to be diverted from payment for the construction of Fogelson home. RP 162-98 at ¶¶19-21. These

facts, Plaintiffs, contended, constituted unfair and deceptive trade practices under the UPA because the goods and services that had been promised to the Fogelsons had not been provided in full and were incomplete.

While *McElhannon* held that a completed house, as a form of realty, cannot be "goods" and tangible property, a house cannot constitute "services," *McElhannon v. Ford*, 2003-NMCA-091, ¶17, the Fogelsons did not have a completed house. Indeed, pursuant to the terms of the Contract between Wallen and the Fogelsons, "Until all items required by the plans and specifications have been constructed and a certificate of occupancy is issued for the home, the home is not substantially complete." RP 175 at ¶3.1. In the instant case, the house was never finished. Unlike the *McElhannon* case, the house was never conveyed to the Fogelsons. As alleged in Plaintiffs' First Amended Complaint, the Fogelsons paid \$165,111.00 to Defendants and the Fogelsons received nothing in return. The property was never sold to the Fogelsons. Instead, the Fogelsons signed a purchase agreement to pay for the construction of a house on a lot owned by Wallen; however, the construction was never completed and the sale of the property to the Fogelsons was never consummated.

The New Mexico appellate courts have never addressed the applicability of the UPA to contracts for construction services and subsequent sale of the

completed improvements.<sup>1</sup> This question, however, has been decided in Ohio under the .Ohio Uniform Consumer Sales Practices Act ("OCSPA"), which is similar to the New Mexico UPA. The Ohio Act defines a consumer transaction as a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. Ohio Rev. Code Ann., Title XIII, Ch. 1345, Consumer Sales Practices.

In *Keiber v. Spicer Constr. Co.*, 619 N.E.2d 1105 (1993), the Ohio Court of Appeals considered the applicability of the OCSPA to a mixed transaction involving both the provision of construction and design services and the transfer of real property. Recognizing that the Act had been deemed inapplicable to a “pure” real estate transaction for the sale of a completed, pre-existing residence, the Ohio Court of Appeals found that a mixed transaction that included construction services was distinguishable because buyers of existing homes have the opportunity to inspect their purchases and evaluate the quality and extent of construction services and goods provided, whereas buyers of construction services have nothing to inspect at the time of the purchase; and, there was no express authority for the

---

<sup>1</sup> In the unpublished decision of *Mileta v. Jeffryes*, 2009 WL 6763602, this Court raised, but did not decide the distinction between contracts for the sale of a completed house and those involving materials and building services. However, because the Appellant failed to properly preserve the issue, the Court declined to decide it.

exclusion of residential construction from coverage under the Act. *Id.* at 1106.

Concluding that the OCSPA applies to a contract to provide construction services to build a new home, the Court stated,

A residential contractor, especially when engaged in the design, construction, and sale of multiple dwellings, is a supplier of consumer-oriented services for the purpose of the OCSPA. Purchasers of one window, or a home-improvement package, or repair services for air-conditioning machinery attached to the buyer's realty, are all considered consumers under Ohio law. The fact that the consumer is also purchasing the land upon which his house will be built would not seem to make either the buyer any less a consumer or the transaction any less a consumer transaction.

*Id.* at 1105.

The New Mexico UPA is similar to the OCSPA in that it prohibits unfair or deceptive trade practices made in connection with the sale of goods or services. Defendants argue that the construction and sale of the property pursuant to the Contract that is the subject of Plaintiffs' First Amended Complaint do not constitute goods or services under the Act. By passage of the UPA, however, the Legislature has provided for damages and other remedial relief for persons damaged by unfair, deceptive, and unconscionable trade practices. *Truong v. Allstate Insurance Co.*, 2010-NMSC-009, ¶30, 147 N.M. 583, 227 P.3d 73. As remedial legislation the UPA must be interpreted liberally to facilitate and accomplish its purposes and intent. *Id.*, quoting *State ex rel. Stratton v. Gurley Motor Co.*, 105 N.M. 803, 808, 737 P.2d 1180, 1185 (Ct. App. 1987).

As was the case with the *Keiber* Plaintiffs, the Fogelsons' contract for the construction of their new home was a mixed transaction involving the provision of design and construction services by the Defendants, including the acquisition of goods for such construction. The Fogelsons did not have anything to inspect at the time they executed the Contract. Indeed, the Contract contemplated consumer-oriented services that subjected it to the UPA. Furthermore, there is no express authority for the exclusion of residential construction from the services that are covered under the Act. Because the Act must be liberally construed to facilitate and accomplish its purposes and intent, construction and design services cannot be excluded, as to do so would rob consumers of those services of the remedial relief resulting from unfair, deceptive, and unconscionable trade practices. The trial court erred in dismissing Plaintiffs' UPA claim and its decision must be reversed.

- b. The trial court erred by dismissing Plaintiffs' claims under the Unfair Practices Act because Plaintiffs' complaint properly asserted that the Defendants made false and misleading representations in the collection of monies due under the Contract.**

In addition to misleading representations in the provision of goods and services, the UPA prohibits such representations in connection with the *collection of debts* by a person in the regular course of the person's trade or commerce, if those representations may, tend to, or do deceive or mislead any person. The words "debts and liabilities" are understood by all. *Bryan v. Board of Loan*

*Comm'rs*, 1922-NMSC-069 ¶15, 28 N.M. 319, 211 P. 597 (S. Ct. 1922). A “debt” is a sum of money due by certain and express agreement. *Id.*

Plaintiffs alleged in their First Amended Complaint that they entered into a Contract for the construction of their home. The Contract, attached to Plaintiffs’ First Amended Complaint, requires progress payments. The Fogelsons paid \$165,111.00 to Wallen toward the home construction. RP 162-98 at ¶¶12-14. Wallen, Plaintiffs allege, failed to pay for labor and materials used in the construction of the Fogelson home and allowed liens to be filed against the Property. RP 162-98 at ¶¶17-18. Instead, funds paid by the Fogelsons for construction of their home were used to pay charges on other homes and to pay salaries and expenses of Wallen with Defendant Bozzone instructing Wallen employees as to which bills should be paid and which should not, and intentionally causing the Fogelsons’ monies to be diverted from payment for the construction of Fogelson home. RP 162-98 at ¶¶19-21.

By alleging that Wallen continued to collect progress payments in the total amount of \$165, 111.00 pursuant to the terms of the Contract between the parties, Plaintiffs stated a claim that Wallen breached the UPA by making misleading representations in connection with the *collection of debts* by a person in the regular course of the person's trade or commerce. The trial court erred when it dismissed Plaintiffs’ UPA claims.



2. **The trial court erred by dismissing Plaintiffs' conversion claim because substantial evidence does not support the result reached by the court, as Plaintiffs proved that the Defendants exercised dominion and control over the monies of the Plaintiffs in defiance of the Plaintiffs' rights or in an unauthorized and injurious manner.**

At the close of the Fogelsons' case-in-chief, Defendant Bozzone submitted a Trial Brief in Support of defendant Mark Bozzone's Motion for Dismissal Under Rule 1-041(B) and moved for the dismissal of the Fogelsons' conversion claim. RP 1037-1049. Defendant Bozzone asserted two arguments in support of the dismissal of the Fogelsons' conversion claim. First, Defendant Bozzone argued that there was no evidence that Defendant Bozzone exercised dominion and control over the Plaintiffs' money, as he did not receive, deposit, or direct how the Plaintiffs' money was to be allocated. Second, Defendant Bozzone argued that, as he was not a party to the Contract between the parties, he owed no individual duty to the Plaintiffs.

On May 21, 2014, three weeks after the conclusion of trial, the Court entered an Order granting Bozzone's Motion for Dismissal under Rule 1-041(B) with respect to Fogelsons' claims against Defendant Bozzone for conversion and fraud.<sup>2</sup> RP 1050-51.

---

<sup>2</sup> Interestingly, the Order Granting Bozzone's Motion for Dismissal Under Rule 1-041(B) dismisses Plaintiffs' claims against Defendant Bozzone, only, and does not address Plaintiffs' claims against Defendant Wallace. RP 1050-51. The Court's Conclusions of Law, entered on February 27, 2015 make no mention of Plaintiffs'

- a. **The Fogelsons demonstrated ample evidence that the Defendants exercised dominion and control over the monies paid by the Fogelsons for the construction of the home; and substantial evidence does not support the trial court's dismissal of those claims.**

Conversion is the unlawful exercise of dominion and control over personal property belonging to another in exclusion or defiance of the owner's rights.

*Muncey v. Eyeglass World, LLC*, 2012-NMCA-120, ¶22, 289 P.3d 1225.

Conversion may also be proven by acts constituting an unauthorized and injurious use of another's property or the wrongful detention of that property after demand has been made. *Id.*

Following the trial on the merits, the trial court found a series of facts that show that Defendants Bozzone and Wallace controlled all of the monies of Wallen, including the monies tendered by the Fogelsons, that they used the Fogelsons money in a wrongful and injurious manner and wrongfully detained it after demand had been made for its return. Notwithstanding these findings, the trial court failed to conclude that Defendants Wallace and Bozzone converted the Fogelsons monies.

The trial court found that Jenice Montoya, who oversaw the day-to-day function of Wallen, reported equally to Mark Bozzone, Eric Wallace and Larry

---

conversion claims; however, Plaintiffs assume that the trial court intended to dismiss that claim as well. As such, Plaintiffs'/Cross-Appellant's Brief-in-Chief, is directed at Defendant/Cross-Appellee Wallace, as well.

Filener. RP 1270-93 at ¶¶3, 5. Montoya provided weekly updates of sales information, cancellations and home starts to Bozzone, Wallace and Filener, and Bozzone received traffic reports of traffic through the company's sales center. RP 1270-93 at ¶¶6,7.

Wallen began having financial problems in February, 2008 and began laying off employees at that time. RP 1270-93 at ¶¶11-12. By April, 2008, Wallace, Bozzone and Filener decided that payments to vendors should be delayed, notwithstanding that those vendors would be entitled to lien properties on which work was performed. RP 1270-93 at ¶¶18, 19.

Three months after Wallen began having financial problems and a month or two after Bozzone, Wallace and Filener decided to delay payments to vendors, the Fogelsons signed a purchase agreement for the construction and purchase of their home. RP 1270-93 at ¶22. The agreement provided that the Fogelsons would pay cash for the house by paying a non-refundable deposit and subsequent progress payments when construction reached the benchmarks defined by the contract. RP 1270-93 at ¶¶24-25. The cash paid by the Fogelsons was to be applied toward the purchase of the home and it was reasonable for the Fogelsons to believe that subcontractors would be paid and their money would be used to build their home. RP 1270-93 at ¶¶27, 28.

Wallace, Bozzone and Filener knew that Wallen had a single general operating account where all monies were deposited. RP 1270-93 at ¶30.

Fogelsons paid Wallen \$2,500 on May 27, 2008 and an additional \$1,000 on June 8, 2008. RP 1270-93 at ¶¶31, 32.

On August 24, 2008, Wallace sent an e-mail, copying Bozzone, advising that Wallen's policy was to be to continue to push back or delay payment to vendors and accumulate cash. RP 1270-93 at ¶35. One month later, the Fogelsons paid Wallen the sum of \$50,625 on September 23, 2008 for the construction of their home. RP 1270-93 at ¶37. Wallen, Bozzone and Filener received reports showing that the Fogelsons were cash buyers. RP 1270-93 at ¶39. At the time the Fogelsons paid the \$50,625 payment in September, 2008, Wallen had already been served with a foreclosure action by Bank of America. RP 1270-93 at ¶41. That same month, Wallen's construction financing from Wachovia was being cut off. RP 1270-93 at ¶44.

In October, 2008, Wallen's general manager, Jenice Montoya, was still receiving instructions to push payables out to 90 days; and, on October 30, 2008, in an e-mail copied to Bozzone, Wallace questioned Montoya as to why she was paying trades when they agreed to push payables. RP 1270-93 at ¶¶46, 47. The decision to push payables and not pay vendors timely was made by Wallace and Bozzone collaboratively; and, Bozzone knew about and ratified the decision to

push payables. RP 1270-93 at ¶¶51, 52, 53. The decision to push payables and not pay vendors timely and Bozzone's ratification was reckless and without regard to the rights of Fogelsons. RP 1270-93 at ¶54.

Less than a week after Wallace sent the e-mail to Montoya asking why she was paying trades, on November 5, 2008, the Fogelsons wrote another check to Wallen for \$55,493 for the construction of the house. RP 1270-93 at ¶48.

By December, 2008, Wallen was experiencing a huge cash crunch and their construction credit with Charter Bank and Compass Bank was expiring. RP 1270-93 at ¶¶55-56. In January, 2009, Bozzone was receiving reports showing outstanding payments due to vendors and how late their payments were; and, Montoya was instructed to keep Bozzone, Wallace and Filener specifically informed of the aging of the accounts payable. RP 1270-93 at ¶¶57-58. At that same time, Bozzone, Wallace and Filener received Wallen's Production Summary, listing the Fogelson's purchase and their status as cash buyers. RP 1270-93 at ¶39, 59. Bozzone, Wallace and Filener knew or should have known that the Fogelsons had purchased the property and were paying cash for it. RP 1270-93 at ¶60.

On February 9, 2009, the Fogelsons wrote another check to Wallen in the amount of \$55,493 for the construction of the home and understood at the time that the estimated time for completion of their home was two weeks away. RP 1270-93 at ¶64. By this time, Wallace, Filener and Bozzone knew that unpaid vendors were

contacting homeowners and Wallen was getting claims from vendors about liens. RP 1270-93 at ¶¶65, 68. Bozzone became directly involved in decision about which liens to pay; and, notwithstanding that the Fogelsons had paid cash for the construction of their home, vendor payments on other homes were put ahead of the Fogelsons home at the instruction of Bozzone. RP 1270-93 at ¶¶70, 71.

Soon thereafter, Bozzone told Jenice Montoya that Wallen would be closed down; and, Bozzone rejected Montoya's request to keep a skeleton crew to finish up the few homes that were within 30 days of completion. RP 1270-93 at ¶¶78, 79. After learning that Wallen had closed, Fogelsons discovered that there were numerous claims of lien filed against the home being constructed for them, totaling approximately \$60,000.00 RP 1270-93 at ¶¶95. The Fogelsons received nothing in exchange for their payments totaling \$165,111. RP 1270-93 at ¶¶102.

The trial court found that Wallace and Bozzone actively participated in the tortious acts against Fogelsons by directing, approving, and ratifying late payments to vendors and that Bozzone, individually, took an active role in the management and decision making of Wallen. RP 1270-93 at ¶¶106, 107, 108.

After Wallen was shut down, lots it continued to own were moved into another company, sold, and the proceeds were used to pay bills of Wallen and to refund deposits. RP 1270-93 at ¶¶109, 110. Other lots owned by Wallen were transferred to yet another company called GM Investments, which made a profit on

the sale of those lots to DR Horton. RP 1270-93 at ¶¶113, 114. The Fogelsons did not receive any of the monies from the sale of the lots; instead, Wallen management, including Wallace, Filener, and Bozzone, believed that refunding the construction deposits would prevent any further investigation by the Attorney General's Office. RP 1270-93 at ¶111.

Plaintiffs/Cross-Appellants do not take issue with the Findings of Fact adopted by the trial court. Indeed, these facts establish the Fogelsons' conversion claim. The trial court's findings of fact, set above, establish that the Defendants, who received regular updates of sales and construction information, directed which liens and vendors to pay and how to spend the cash Wallen had on hand, including cash received from cash buyers like the Fogelsons for the construction of their homes. The Defendants used cash on hand, including the cash it had received from the Fogelsons, to pay liens and vendors for other homes at the instruction of Bozzone. RP 1270-93 at ¶¶70, 71. Furthermore, after it closed its doors, Wallen transferred and sold its remaining assets and used the cash to pay other bills and refund deposits to avoid further scrutiny by the New Mexico Attorney General's Office.

In the four and one-half period from late-September, 2008 to early February, 2009, the Fogelsons paid more than \$160,000 to Wallen for the construction of their home. At the direction of Bozzone and Wallace, those funds were not used

for their intended purpose. Instead, Bozzone and Wallace directed that payments to vendors be pushed back and cash accumulated, with Bozzone instructing that liens on other homes that were scheduled to close be put ahead of payments due to vendors on the Fogelson home, notwithstanding that the Fogelsons had paid cash. RP 1270-93 at ¶¶70, 71.

The Fogelsons, the trial court determined, were reasonable in believing that subcontractors would be paid and their money would be used to build their house. RP 1270-93 at ¶28. By directing that monies in Wallen's general operating account, which included the monies received from the Fogelsons for the construction of their home, be used to pay vendors for homes that were ready to close, to return deposits to other purchasers, and to pay other bills of Wallen, Bozzone and Wallace exercised dominion and control over the Fogelson's personal property to the exclusion or in defiance of the Fogelson's rights. *Muncey v. Eyeglass World, LLC*, 2012-NMCA-120, ¶22, 289 P.3d 1225.

Conversion may also be proven by acts constituting an unauthorized and injurious use of another's property or the wrongful detention of that property after demand has been made. *Id.* The Fogelsons reasonably expected Wallen to use their monies to pay for the construction of their home. Bozzone and Wallace were not authorized to direct that those monies be used for any other purpose; and, by directing that those funds be used for purposes other than the construction of the



Fogelsons' home, Bozzone and Wallace converted those funds. Finally, after learning that Wallen had closed, the Fogelsons made demand that the house either be completed and transferred to them, or that their monies be returned to them. Rather than satisfy either of these demands, Wallace and Bozzone directed that those funds be wrongfully detained and used for other purposes.

Wallace and Bozzone argue that they are not liable to the Plaintiffs on their conversion claim because neither received the monies paid by the Fogelsons. In *Wood v. Grau*, 1951-NMSC-060, ¶19, 55 N.M. 429, 234 P.2d 362, the New Mexico Supreme Court, defining the tort of conversion, quoted with approval, 53 Am. Jur., p. 827, §34:

An action for conversion may be predicated upon an improper disposal, removal, transportation, delivery, or transfer of possession of property to one not authorized by the owner to receive the same. Indeed, it is sometimes declared that the gist of the action is disposing or assuming to dispose of another's goods without his authority.

Similarly, other jurisdictions have held that the essence of the tort is not the acquisition of the property; rather it is the *wrongful deprivation of the property from the owner*. *Mace v. Pyatt*, 691 S.E. 2d 81, 90 (N.C. App. 2010); *Marine Trans. Serv. Sea-Barge Group v. Python High Performance Marine Corp.*, 16 F.3d 1133, 1140 (11<sup>th</sup> Cir. 1994) It is of no importance what subsequent application

was made of the converted property or that the defendant derived no benefit from the conversion. *Mace v. Pyatt*, 691 S.E. 2d at 90

By directing that the Fogelsons' monies deposited into Wallen's general operating account be used for anything other than payment for the construction of the Fogelson home, Bozzone and Wallace improperly disposed of or transferred the Fogelsons' monies contrary to their authority, depriving the Fogelsons of that Property.

Finally, Defendants'/Cross-Appellees' also claim that, because he was not a party to the purchase agreement, he owed no individual duty to the Plaintiffs. As this was also the subject of Defendant Bozzone's appeal, the Fogelsons hereby incorporate their Response Brief to Bozzone's Brief-in-Chief, which is filed contemporaneously with this brief.

## **V. CONCLUSION**

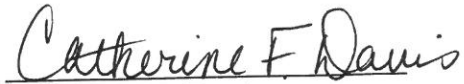
For the foregoing reasons, the Plaintiffs pray that this Court reverse the decision of the trial court to dismiss their claims under the UPA and for conversion and remand this matter for entry of judgment on Plaintiffs' conversion claims and for further proceedings on their UPA claims.

## **VI. REQUEST FOR ORAL ARGUMENT**

Plaintiffs request that this matter be set for oral argument before the Court, as at least one issue before the Court is a matter of first impression.

Respectfully submitted,

HUNT & DAVIS, P.C.



Catherine F. Davis  
2632 Mesilla NE  
Albuquerque, NM 87110  
(505) 881-3191

*Attorneys for Plaintiff-Appellee  
Cross-Appellants, David J. Fogelson  
And Corinne Fogelson*

I hereby certify that a copy of the foregoing Brief-in-Chief filed by was served by first class mail on July 14, 2016 on the following counsel of record:

Alice T. Lorenz, Esq.  
Lorenz Law  
2501 Rio Grande Blvd. NW  
Suite A  
Albuquerque, NM 87104  
(505) 247-2456

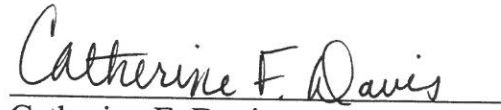
LeeAnn Werbelow, Esq.  
Lastrapes, Spangler &  
Pacheco, P.A.  
P.O. Box 15698  
Rio Rancho, NM 87174  
(505) 892-3607

*Attorneys for Defendant-Appellant Mark Bozzone*

Robert M. Koeblitz  
New Mexico Litigation Group, LLC

1100 Second Street NW  
Albuquerque, NM 87102

*Attorneys for Appellant Eric P. Wallace*

  
Catherine F. Davis