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

BLUE CANYON WELL ASSOCIATION,

Plaintiff/Appellee,

Mag. Ct. Case No. M-49-CV-2012-00512
No. D-101-CV-2013-00870
COA No. 2015-34655

v.

COURT OF APPEALS OF NEW MEXICO
FILED
MAY 26 2016

DENISE JEVNE,

Defendant/Appellant

## APPELLANT'S BRIEF IN CHIEF

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Appeal from the District Court of Santa Fe County
The Hon. Francis J. Mathew

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**oral argument is not requested**

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## SUMMARY OF PROCEEDINGS

### I. Nature of the Case

This appeal seeks review of the following: the district court's Judgment that Plaintiff was entitled to judgment against Defendant in the amount of $3,129.41 and reasonable attorney fees and costs for asserting its claims. The issue presented by this appeal is whether Blue Canyon Well Association (Plaintiff or BCWA) could ever have existed or maintained suit as an unincorporated association, pursuant to Section 53-10-1, having never filed a statement and articles of incorporation with the county clerk. Alternatively, if BCWA existed, beginning in 1991 with the creation of the shared well agreement, it would have ceased to exist twenty years later, pursuant to Section 53-10-7, and therefore, lacked standing when the suit was filed.

### II. Course of Proceedings

This civil collection action was brought by Blue Canyon Well Association (Plaintiff or BCWA) against Defendant in Santa Fe Magistrate Court. The complaint sought damages related to a dispute about the accuracy of meter readings which Defendant contended were at least ten times too high given her status as a single part time resident without sufficient water pressure and upon which Plaintiff, through its purported members (who performed the reading), used

to assert breach of the shared well agreement. Defendant counterclaimed that the meter readings on their shared well were inaccurate and sought damages for well sharing maintenance costs. The proceedings were as follows:

On April 18, 2012, Plaintiff filed a complaint in Santa Fe Magistrate Court seeking damages. **[RP 72]** On May 23, 2012, Defendant acting pro se filed her answer and counterclaim. **[RP 69]** On March 11, 2013, trial was held with Karl H. Sommer representing Plaintiff, contrary to Plaintiff's assertion made by Lesley King that "no lawyers were involved" and Defendant appearing pro se. **[Hearing Tr. TR-244-245, August 19, 2013]** The Magistrate Court found in favor of Plaintiff. On March 12, 2013, the Magistrate Court entered judgment in the amount of $9297.02, including $6,697.02 of attorney fees. The majority of attorney fees allowed, $4897.02, were to previous counsel for drafting a new well share agreement, unrelated to the case. Trial counsel's fees were approximately $1800. The court denied recovery on Defendant's counterclaim. **[RP 76]**

On March 26, 2013, Defendant filed notice of appeal to the district court. **[RP 1]** On April 12, 2013, Frank Martinez, Billie Martinez, Leslie King, Joe Durr, and Anna Durr (collectively, "Movants"), also represented by counsel Karl H. Sommer, filed a "Motion to Amend Caption to Properly Identify the Individual Plaintiffs/Appellees" (hereinafter, "Motion to Amend the Caption"). **[RP 13]** The Motion to Amend the Caption sought to replace Plaintiff Blue Canyon Well

Association with the individuals Frank Martinez, Billie Martinez, Leslie King, Joe Durr, and Anna Durr. On May 17, 2013, Defendant filed a response by counsel James S. Rubin. **[RP 17]** On June 14, 2013, counsel Christopher L. Graeser filed a substitution of counsel and entry of appearance on behalf of Defendant, and Defendant filed an expedited request to amend notice of hearing so that the issue of the correct parties could be resolved to see if trial would be necessary. **[RP 39]** On June 20, 2013, the district court held a hearing regarding Plaintiffs' Motion to Amend Caption and requested additional briefing on the issue of its jurisdiction to substitute parties. On July 12, 2013, Movants filed additional briefing at the court's direction. **[RP 46]** On July 23, 2013 Defendant filed a response. **[RP 50]** On July 26, 2013 Movants filed a reply. **[RP 55]** On August 2, 2013, the district court issued a Memorandum Opinion and Order denying Movants' motion. **[RP 57]** The district court found that Plaintiff was a statutory unincorporated association pursuant to NMSA 1978, Section 53-10-1 (1937) and, as such, it could bring suit.

On August 19, 2013, trial was held in district court. Prior to trial, Defendant made oral motions to dismiss for lack of privity, to dismiss because Plaintiff was attempting to charge for water but is not a regulated entity, and for lack of standing. The court initially reserved judgment, and eventually denied the motions. **[Hearing Tr. TR-4, August 19, 2013].**

On September 18, 2013, after submission of proposed findings and conclusions by the parties, the district court entered judgment for Plaintiff in the amount of $3,129.41 and for Defendant in the amount of $1,202.62 on her counterclaim. Plaintiff was allowed reasonable fees and costs for pursuing its claim. **[RP 100, 106]** Counsel for Plaintiff submitted a bill, filed November 11, 2013, in the amount of $21,407.15. No fees have been awarded as of this filing.

On October 2, 2013, Defendant filed: 1) a "Motion to Amend Judgment" requesting that the district court's ruling from the bench, incorporated in Defendant's Findings, **[RP 114]** that BCWA is responsible to provide water with sufficient pressure and flow be incorporated into the final Order; and 2) a "Motion for a New Trial" based on new evidence indicating that her water line had been connected (and disconnected after trial) to that of another well user, thereby inflating the meter readings, and that her water line was intentionally contaminated. **[RP 113, 123]** On October 17, 2013, Plaintiff filed a response to both motions. **[RP 149, 156]** On November 1, 2013, Defendant filed replies to both responses. **[RP 160, 186]**

On December 2, 2013, Appellant timely filed a notice of appeal. **[RP 222]** On January 3, 2014, Appellant timely filed a docketing statement. **[RP 234]** On January 23, 2014, an In Person Mediation Conference Notice was issued. On February, 25, 2014, a Mediation Conference was held, without settlement. On July

9, 2014, the New Mexico Court of Appeals issued a Notice of Proposed Summary Disposition, proposing to dismiss the case for lack of appellate jurisdiction due to lack of a final order. **[RP 257]** On January 14, 2015, the Court of Appeals remanded the case to the district court. **[RP 261]**

On February 27, 2015, a hearing was held in the district court on Defendant's Motions for a New Trial and to Amend the Judgment. On March 9, 2015, the district court issued Orders denying both Motions. **[RP 265, 267]** On April 8, 2015, Defendant timely filed a notice of appeal. **[RP 271]** A docketing statement was timely filed on May 6, 2015. **[RP 284]**

## III. Summary of Facts

Only a narrow subset of the facts are relevant to this appeal.

1. In 1991, an Agreement to Share a Well was executed by predecessors in interest of Defendant, Movants King and Martinez, but not Movant Durr. **[RP 254, Exhibit C]**. That agreement provides for sharing of water from a water well, payment of costs proportional to metered water usage, management of the well and enforcement of the agreement.

2. Movants argued in the Motion to Amend Caption, the Reply to Response by Defendant/Appellant Denise Jevne to Motion to Amend Caption, and the Additional Brief Requested by the Court Regarding Plaintiff/Appellees Motion to

Amend Caption that BCWA was not a properly formed unincorporated association and did not legally exist because BCWA had not filed the requisite documents with the county clerk under NMSA 1978, Section 53-10-1 (1937). Further, Movants argued that because BCWA was not a legal entity properly formed under Section 53-10-1 NMSA, it was not the true owner of the right to be enforced (the magistrate court judgment), not the real party in interest, and therefore, not in a position to discharge the defendant from liability. **[RP 13, 36, 46]**

3. Defendant agreed with Movants that BCWA was not a legal entity properly formed under Section 53-10-1, as argued in Defendant's additional brief requested by the district court on the matter, filed July 23, 2013. Defendant noted that if Movant's Motion to Amend the Caption was unsuccessful, the Magistrate Court judgment as it existed was uncollectible, because it inured to the benefit of a nonexistent association. **[RP 50]** Defendant nevertheless opposed Movants' Motion to Amend the Caption because, properly construed, it was not a motion to amend the caption but, instead, an untimely motion to substitute the real parties in interest.

4. The district court, in its Memorandum Opinion and Order of August 2, 2013, found that, as a matter of law, Section 53-10-1 establishes that filing with the county clerk is permitted but not required for unincorporated associations, and

impliedly found that BCWA exists, although the court did not recite any facts in support of the putative members' intent to form an association. **[RP 57]**

5. At the August 19, 2013 trial, the district court reiterated that "there is an association," and that "there has been an association since 1991," pursuant to the 1991 Well Agreement. **[Hearing Tr. TR-3, August 19, 2013]**

6. At the February 27, 2015, hearing on the Motion to Amend Judgment and Motion for a New Trial, Defendant argued that even assuming BCWA existed pursuant to Section 53-10-1, it would cease to exist twenty years after it came into existence pursuant to NMSA 1978, Section 53-10-7 (1937). **[CD, 2-27-15, 02:44-03:22]** Defendant further argued that if BCWA was formed pursuant to an Agreement to Share Well made in 1991, BCWA ceased to exist prior to the filing of this suit and, therefore, lacked standing. **[id. 03:22-03:44]** The court declined to address the merits of the argument, instead stating that it preferred to wait for appellate review of that issue. **[id. 28:08-27]**

## SUMMARY OF THE ARGUMENT

The district court misinterpreted Section 53-10-1 in a way that conflicts with Section 53-10-7 when it found that an unincorporated association can exist and maintain suit if no statement and articles of incorporation are ever filed with the County Clerk. Under New Mexico's rules of rules of statutory construction, the

"may file" provision in Section 53-10-1 is mandatory rather than permissive. Section 53-10-7 supports the conclusion that, under Section 53-10-1, it is necessary to file a statement, articles, and any existing rules/regulations in the office of the county clerk in order to form a legally recognized unincorporated association.

Whether the words of a statute are mandatory or discretionary is a matter of legislative intention to be determined by consideration of the purpose sought to be accomplished. Interpreting the filing provisions in Section 53-10-1 as discretionary makes the clause requiring filing in Section 53-10-7 meaningless, and a statute must be construed so that no part of the statute is surplusage or superfluous.

Under our rules of civil procedure, every action must be prosecuted in the name of the real party in interest. Because BCWA did not exist it is not the real party in interest, and could not bring suit. Even assuming BCWA existed, it would cease to exist twenty years after it came into existence pursuant to Section 53-10-7. Because BCWA never existed at all, or ceased to exist prior to the filing of this suit, it was not an entity at the time of filing, and thus, cannot show an injury in fact and therefore lacks standing to bring suit.

## STANDARD OF REVIEW

An appellate court reviews de novo a district court's application of the law to the facts in arriving at its legal conclusions. Thus, the appellate court analyzes

the legal issues without any presumption in favor of the judgment of the court below. Issues of statutory construction and application are questions of law, which an appellate court reviews de novo. *Godwin v. Mem'l Med. Ctr.*, 2001-NMCA-033, ¶ 23, 130 N.M. 434, 25 P.3d 273; *Bd. Of Comm'rs v. Greacen,* 2000-NMSC-016, ¶ 4, 129 N.M. 177, 3 P.3d 672.

The issue on appeal is a pure question of the application of statutory law to the undisputed facts; specifically, whether the filing requirement in NMSA, Section 53-10-1 (1937) is mandatory or permissive, and if permissive, whether an association formed under Section 53-10-1 would cease to exist twenty years after it came into existence pursuant to NMSA 1978, Section 53-10-7 (1937), and thus, could not have had standing to file and maintain this suit.

## ARGUMENT

### I. THE DISTRICT COURT MISINTERPRETED SECTION 53-10-1 IN A WAY THAT CONFLICTS WITH SECTION 53-10-7 WHEN IT FOUND THAT AN UNINCORPORATED ASSOCIATION CAN EXIST AND MAINTAIN SUIT IF NO STATEMENT AND ARTICLES OF INCORPORATION ARE EVER FILED WITH THE COUNTY CLERK.

#### A. Standard of review

The question presented by this issue is one of statutory construction, which this Court reviews de novo. *See First Baptist Church of Roswell v. Yates Petroleum*

*Corp.*, 2015-NMSC-004, ¶ 9, 345 P.3d 310 ("Statutory interpretation is a question of law, which [is] review[ed] de novo."). *See also Zamora v. St. Vincent's Hospital*, 2014-NMSC-035, ¶ 9, 335 P.3d 1243 (stating that a district court's conclusions of law are reviewed de novo).

### B. Preservation in the court below

This issue arose in the district court's ruling on the Movant's Motion to Amend the Caption, filed April 12, 2013, and is preserved by Appellant Jevne's response to the additional briefing requested by the court, filed July 23, 2013. **[RP 13, 50, 57]** The Court has jurisdiction over this issue pursuant to Rule 1-072(P) NMRA.

### C. Under New Mexico's rules of statutory construction, the "may file" provision in Section 53-10-1 is mandatory rather than permissive.

Under Section 53-10-1, filing a statement and articles of organization is necessary to form a legally recognized unincorporated association:

> **Whenever two or more persons shall desire to form an association** for the promotion of their mutual pleasure or recreation of any hunting, fishing, camping, golf, country club, or association for a similar purpose, or an association not for the individual profit of the members thereof, and without incorporating the same as a corporation, or maintaining the title of its property in trust for the interest of its several members as they may exist from time to time, **the said persons or members desiring to form such an association or club may file in the office of the county clerk**

> of the county in which it may maintain its headquarters and pursue its objects and purposes, **a statement** containing the name of such association, its objects and purposes, the names and residences of the persons forming such association, **together with a copy of its articles of association and any rules and/or regulations** governing the transactions of its objects and purposes and prescribing the terms by which its members may maintain or cease their membership therein.
>
> (emphasis added).

Section 53-10-7 supports the conclusion that, under Section 53-10-1, it is necessary to file a statement, articles, and any existing rules/regulations in the office of the county clerk in order to form a legally recognized unincorporated association: "Any association or club formed under the provisions of this act may exist for such period of time not exceeding twenty years as may be fixed in **the statement required to be filed by Section 1 of this act.**" (emphasis added).

"When construing statutes, [an appellate Court's] guiding principle is to determine and give effect to legislative intent." *Baker v. Hedstrom,* 2013-NMSC-043, ¶ 11, 309 P.3d 1047 (internal quotation marks and citation omitted). *See also State ex. Rel Helman v. Gallegos,* 1994-NMSC-023, ¶ 25, 117 N.M. 346, 871 P.2d 1352 ("we believe it to be the high duty and responsibility of the judicial branch of government to facilitate and promote the legislature's accomplishment of its purpose.").

"The first guide to statutory interpretation is the actual wording of the statute." *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317. However, "where the meaning of the facial language of a statute is in doubt, the plain language approach may not lead to a correct interpretation of true legislative intent." *Id.* Despite the "beguiling simplicity" of parsing the plain meaning of a statute, our courts "must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction." *Id.* (internal quotation marks omitted); *accord* NMSA 1978, § 12-2A-18(A)(3) (1997) (stating statutes should be construed to "avoid an unconstitutional, absurd or unachievable result.").

In discerning the meaning of a particular statute or section of a statute, our courts read "legislation in its entirety and construe each part in connection with every other part to produce a harmonious whole[.]" *State v. Javier M.*, 2001-NMSC-030, ¶ 27, 131 N.M. 1, 33 P.3d 1 (internal quotation marks and citation omitted); s*ee also Starko, Inc. v. New Mexico Human Services Dept.*, 2014-NMSC-033, ¶ 35, 333 P.3d 947 (stating that statutory interpretation requires that the entire statute be construed as a whole with all provisions considered in relation to one another). Generally, under the rules of statutory construction set forth in NMSA 1978, Section 12-2-2(I) (Repl.Pamp.1988), "the words `shall' and `will' are mandatory and `may' is permissive or directory." In addition, a fundamental rule of

statutory construction states that in interpreting statutes, the words "shall" and "may" should not be used interchangeably but should be given their ordinary meaning. *Application of Sedillo*, 1959-NMSC-095, ¶ 12, 66 N.M. 267, 347 P.2d 162 (1960). Based on this canon of statutory construction, the provision regarding filing in Section 53-10-1 would, at first reading, appear to be permissive rather than mandatory.

However, "whether the words of a statute are mandatory or discretionary is a matter of legislative intention to be determined by consideration of the purpose sought to be accomplished." *Ross v. State Racing Commission*, 1958-NMSC-117, ¶ 9, 64 N.M. 478, 330 P.2d 701. In *Ross*, the court reviewed the entire statute on the regulation of horse racing in New Mexico, and concluded that the legislature had intended that the State Racing Commission's power to grant or refuse a license was discretionary. *Id.* ¶ 8. It was only after the court examined each of the statute's parts in relation to the whole that it came to its final determination, that the legislature intended that the racing commission had the discretion to grant or refuse a license. *Id.* ¶ 17.

Similarly, in *Winston v. New Mexico State Police Board*, 1969-NMSC-066, ¶ 6, 80 N.M.310, 454 P.2d 967, the court emphasized the importance of reading the parts of a statute in relation to the whole to determine legislative intent. "It is likewise a cardinal rule that in construing particular statutory provisions to

determine legislative intent, an entire act is to be read together so that each provision may be considered in its relation to every other part, and the legislative intent and purpose gleaned from a consideration of the whole act." *Id.* ¶ 5. (internal quotation marks and citations omitted). In *Winston*, a state police officer challenged a retirement rule promulgated by the State Police Board that resulted in mandating his retirement at age 57. On appeal, the court stated that "An examination of the whole act (§§ 39-2-1 to 39-2-26, N.M.S.A. 1953) convinces us that the retirement rule promulgated by the State Police Board is neither expressly nor impliedly authorized by statute." *Id.*

Here, as in *Ross* and *Winston*, legislative intent and purpose can only be gleaned by examining the whole act, reading each part of Sections 53-10-1 through 53-10-8 in relation to each of the other parts. When each part is read together, the language of the entire act makes clear that the legislature intended the "may file" provision in Section 53-10-1 to be mandatory rather than permissive. Although the word "may" is used with regards to filing, and "shall" is used with regards to two or more persons desiring to form an association, it is the decision to form the association that is intended to be voluntary, while the actual formation of the association requires filing with the county clerk. Section 53-10-1 specifically describes what must be filed: "a statement containing the name of such association, its objects and purposes, the names and residences of the persons forming such

association, together with a copy of its articles of association and any rules and/or regulations governing the transactions of its objects and purposes and prescribing the terms by which its members may maintain or cease their membership therein."

Section 53-10-1 must also be read in concert with Section 53-10-7, which clearly specifies that filing is mandatory, is "required": "Any association or club formed under the provisions of this act may exist for such period of time not exceeding twenty years as may be fixed in **the statement required to be filed by Section 1 of this act.** Interpreting the filing provisions in Section 53-10-1 as discretionary makes the clause requiring filing in Section 53-10-7, as well as its attendant 20-year maximum life, meaningless, and "a statute must be construed so that no part of the statute is surplusage or superfluous." *State v. Javier M.,* ¶ 32 (alteration omitted); *see also State v. Johnson*, 1998-NMSC-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 (We have always rejected an interpretation of a statute that would make parts of it mere surplusage or meaningless").

In addition, Sections 53-10-1 through 53-10-8 NMSA 1978 are compiled in Chapter 53, Article 10, NMSA 1978, Corporations, and any unincorporated association formed under this act must be expected to follow all of its provisions. The fact that the statute regulating unincorporated associations is found in Corporations presupposes a higher level of organization and some requirement of formalities than would a contract between a group of friends who come together to

buy a fishing or hunting lodge.

The remaining sections of the statute reinforce the idea that filing articles of association is required to form an unincorporated association, and that those articles govern how the association stands in the world pursuant to these sections of law. Section 53-10-2 describes how the "club or association may hold and acquire real or personal property by deed, lease or otherwise, in the name of such association by which it is known." Section 53-10-3 describes the process for the mortgaging or sale of any "property, real, personal or leasehold interest therein of any such club or association." Section 53-10-4 sets forth the process for and effect of establishing rules and regulations for the club and association. Section 53-10-5 establishes a club or association's right to "sue or be sued in its name" as well as its right to sue individual members. Section 53-10-6 states that "an unincorporated association may sue or be sued in its common name for the purpose of enforcing for or against it any substantive right." Section 53-10-7 describes the maximum term of existence for an unincorporated "association or club formed under the provisions of this act," as well as the dissolution or winding up process and the distribution of proceeds of property. Finally, the language of Section 53-10-8 confirms legislative intent in placing regulations for unincorporated associations within the laws governing corporations: "[t]his act (53-10-1 through 53-10-8 NMSA 1978) shall not be construed to repeal or modify any of the present laws of

this state relative to corporations formed or [for] any purpose, but the same shall be construed as supplementary thereto."

With respect to this statutory savings clause for existing laws, it is worth noting that the district court, relying on *Flanagan v. Benvie*, 58 N.M. 525, 531, 273 P.2d 381 (1954), found that "unincorporated associations were recognized in New Mexico prior to and apart from the passage of the Statute." **[RP 57]** However, the very text cited by the court states that the association in *Flanagan* "was a voluntary association having no legal entity separate and apart from its own members." **[RP 57]** The *Flanagan* court opined that "We recognize that unincorporated associations, clubs and societies, unless recognized by statute, have no legal existence." *Flanagan*, 58 N.M. at 529, 273 P.2d 381. Not being a legal entity separate from its members, BCWA faces the same infirmities discussed above. "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless some statute of this state provides to the contrary." Rule 1-017(C) NMRA 2016. Even if BCWA was "organized" under the common law and not under statute, the district court cites no authority as to its capacity to sue and be sued and we can find none.

Currently, there is no consistent approach nationwide to the formation of unincorporated associations. The Revised Uniform Unincorporated Nonprofit

Associations Act describes the "hodgepodge of common law principles and statutes governing some of their legal aspects." The Act points out that "(m)any of the existing statutes are designed to ameliorate some of the legal problems that arise from the basic common law concept that UNAs [unincorporated nonprofit associations] are merely aggregates of individuals and not legal entities. Under the traditional common law aggregate theory, for example, a UNA could not hold or convey property in its own name or sue or be sued in its own name." The Act allows for formation without filing, but New Mexico has not adopted it. Revised Uniform Unincorporated Nonprofit Associations Act, Prefatory Note, §2(8) (2008).

By interpreting the "may file" provision in Section 53-10-1 as permissive rather than mandatory, the district court neglected the requirement "that the entire statute be construed as a whole with all provisions considered in relation to one another," making the provision regarding "the statement required to be filed by Section 1 of this act" in Section 53-10-7 conflict with Section 53-10-1. The court erred when it misinterpreted Section 53-10-1 and found that an unincorporated association can exist and maintain suit if no statement and articles of association are ever filed with the county clerk. As consistently asserted by Appellant's counsel and by Appellee's counsel, as well, until the August 2, 2013, Memorandum Opinion and Order by the district court denying Movants' Motion to

Amend the Caption, **[RP 57]** BCWA is not a legally formed unincorporated association under Section 53-10-1, and does not exist.

**C. Because BCWA was not a legally formed unincorporated association under Section 53-10-1 through 53-10-8, and therefore, does not exist, it cannot be the Real Party In Interest.**

Rule 1-017(A) NMRA provides that "[e]very action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, . . . or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought;" *Crumpacker v. DeNaples*, 1998-NMCA-169, ¶ 19, 126 N.M. 288, 968 P.2d 799 ("A real party in interest is one who is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit." (internal quotation marks and citation omitted)).

*Crumpacker* notes that the distinction between the doctrine of standing and the doctrine of real party in interest is often blurred by courts and lawyers. See 6A Wright, Miller & Kane. Federal Practice and Procedure § 1542 (3d ed. 2010) (stating "it is not surprising that courts and attorneys frequently have confused the requirements for standing with those used in connection with real party in interest"). The two concepts are similar in that "both terms are used to designate a

plaintiff who possesses a sufficient interest in the action to entitle him to be heard on the merits." *Id.*

Standing turns on whether the plaintiff can show an "injury in fact" traceable to the defendant's conduct. *See John Does I Through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-NMCA-94, PP16-23, 122 N.M. 307, 924 P.2d 273. The concept of real party in interest, on the other hand, entails identification of the person who possesses the particular right sought to be enforced. *See Jesko v. Stauffer Chem. Co.*, 89 N.M. 786, 790, 558 P.2d 55, 59. Unlike standing, objections based on real party in interest status can be waived and, thus, are not jurisdictional. *See Town of Mesilla v. City of Las Cruces*, 120 N.M. 69, 70, 898 P.2d 121, 122 (Ct. App. 1995) (providing that standing is a jurisdictional question that may be raised at any time); 6A Wright, Miller & Kane, § 1542 (noting that challenges to standing, unlike Rule 17(a) objections, cannot be waived).

In this case, the action was filed in the name of a nonexistent association. This may well have been done to avoid personal liability for Defendant's counterclaims that would be available against the parties to the well agreement. Regardless, a plaintiff has the duty "to discover the identity of the correct party." *Ferraro v. McCarthy Pascuzzo* 777 A.2d 1128,1134 (Pa. 2001). As demonstrated by their Motion to Amend Caption, Movants, as parties to the

well share agreement, were in the best position to know that the "Blue Canyon Well Association" is a nonexistent entity. Counsel for Movants appeared as counsel for Plaintiff/Appellee at the magistrate court hearing and did not address the jurisdictional defect. In their Motion to Amend Caption to Properly Identify the Individual Plaintiffs/Appellees, Movants argued that BCWA was not a properly formed unincorporated association because BCWA had not filed the requisite documents with the county clerk under NMSA 1978, Section 53-10-1 (1937). By the Motion, Frank Martinez, Billie Martinez, Lesley King, Joe Durr and Anna Durr, as moving parties, sought to be substituted in the caption and in the case as the real parties in interest pursuant to Rule 1-017, NMRA, contending that the Plaintiff did not exist as an entity due to failure to comply with the Statute. Defendant Denise Jevne agreed with Movants that BCWA was not a legal entity properly formed under Section 53-10-1, but nevertheless opposed the Movants' Motion to Amend the Caption because, properly construed, it was not a motion to amend the caption, but, instead, an untimely motion to substitute the real parties in interest, in violation of Rule 1-025 NMRA. Movants' attempt at wholesale substitution of parties was an acknowledgment that BCWA did not exist, and that suing in the name of a non-existent unincorporated association would not enable them to appropriate the otherwise-uncollectable Magistrate Court judgment to their own benefit

despite the complete failure of jurisdiction *ab initio*. Because BCWA did not exist, pursuant to Section 53-10-1 through Section 53-8-1, it is not the real party in interest, and could not bring suit

## II. THE DISTRICT COURT ERRED BY FAILING TO FIND THAT, EVEN ASSUMING BCWA ONCE EXISTED PURSUANT TO SECTION 53-10-1, BCWA CEASED TO EXIST PURSUANT TO SECTION 53-10-7 PRIOR TO THE FILING OF THE SUIT AND, THEREFORE, LACKED STANDING BECAUSE THE AGREEMENT THAT PURPORTEDLY FORMED BCWA WAS MADE MORE THAN TWENTY YEARS PRIOR TO THE FILING OF THIS SUIT.

### A. Standard of review

The question presented by this issue is one of statutory construction, which this Court reviews de novo. *See First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, ¶ 9, 345 P.3d 310 ("Statutory interpretation is a question of law, which [is] review[ed] de novo."). *See also Zamora v. St. Vincent's Hospital*, 2014-NMSC-035, ¶ 9, 335 P.3d 1243 (stating that a district court's conclusions of law are reviewed de novo).

### B. Preservation in the court below

This issue arose at the hearing on the motion to amend judgment and for a new trial, held on February 27, 2015. Also, this issue goes to standing, and, under *Bank of New York v. Romero,* 2014-NMSC-007, ¶ 15, 320 P.3d1, standing cannot

be waived and may be raised at any time. The Court has jurisdiction over this issue pursuant to Rule 1-072(P) NMRA.

**C. Even if BCWA once existed, pursuant to Section 53-10-1, it ceased to exist twenty years after the 1991 Well Agreement which formed it, pursuant to Section 53-10-7.**

Even assuming BCWA existed pursuant to Section 53-10-1, it would cease to exist twenty years after it came into existence pursuant to NMSA 1978, Section 53-10-7 (1937).

Under Section 53-10-7, "Any association or club formed under the provisions of this act **may exist for such period of time not exceeding twenty years** as may be fixed in the statement required to be filed by Section 1 of this act." (emphasis added)

The district court, in its Memorandum and Opinion and Order of August 2, 2013, found that, as a matter of law, Section 53-10-1 establishes that filing with the county clerk is permitted but not required for unincorporated associations. At the August 19, 2013 trial, the court reiterated that "there is an association," and that "there has been an association since 1991," pursuant to the 1991 Well Agreement. **[Hearing Tr. TR-3, August 19, 2013]**.

If Blue Canyon Well Association was, in fact, formed pursuant to the 1991 Well Agreement, under Section 53-10-7, it ceased to exist twenty years later, in 2011.

**D. Because BCWA ceased to exist in 2011, twenty years after it was formed by the 1991 Well Agreement, it did not have standing to bring suit in 2012.**

Because BCWA was formed pursuant to an Agreement to Share Well made in 1991, BCWA ceased to exist prior to the filing of this suit and, therefore, lacked standing to bring suit.

Standing turns on whether the plaintiff can show an "injury in fact" traceable to the defendant's conduct. *See John Does I Through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-NMCA-94, PP16-23, 122 N.M. 307, 924 P.2d 273. *Bank of New York*, 2014-NMSC-007, ¶ 15 ("lack of [standing] is a potential jurisdictional defect which may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court") (internal quotation marks and citation omitted). Because BCWA ceased to exist prior to the filing of this suit, it was not an entity at the time of filing, and thus, cannot show an injury in fact and therefore lacks standing to bring suit.

## CONCLUSION

Blue Canyon Well Association does not exist as an independent entity capable of suing Jevne. Even if Blue Canyon Well Association did exist, it ceased to exist twenty years after it was created by the 1991 agreement and therefire no longer possesses the ability to sue Jevne. The Judgment issued by the district court on September 18, 2013 should be reversed with directions that the individuals responsible for filing the civil complaint in the magistrate court ("Anna & Joe Durr, Frank & Billie Martinez, Lesley King, President") **[RP 21]** pay Defendant's costs and fees for trial and appeal.

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested in this case.

Respectfully Submitted,

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