ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF NEW MEXICO

NEW MEXICO MILITARY INSTITUTE,

Plaintiff-Appellee,

vs.

Ct. App. No. 35,621
Dist. Ct. No. D-504-CV-2013-00339

NMMI ALUMNI ASSOCIATION, INC., a New Mexico non-profit corporation,

Defendant-Appellant.

BRIEF IN CHIEF OF NMMI ALUMNI ASSOCIATION, INC.

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE WITH RULE 12-213(F)(3)

This Brief-in-Chief complies with the type-volume limitation imposed by Rule 12-213(F)(3). The word count feature of the word processing system (Microsoft Word, Version 2013) used to prepare the brief indicates a word count of nine thousand two hundred eighty-nine [9289], excluding the cover page, table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance.

I. INTRODUCTION

The New Mexico Military Institute Alumni Association Inc., (the "Association") respectfully submits this brief in chief to demonstrate that the judgment entered against it should be reversed.

The Association is a 501(c)(3) nonprofit corporation, organized under the laws of the state of New Mexico. Since its original articles of incorporation in 1964, the Association has functioned as the alumni arm of the New Mexico Military Institute (the "Institute").

In 1993, the Association and the Institute entered into what would become of series of Memorandums of Agreement ("MOA") between the parties. The Institute believed that the MOA was required by state law.

In June of 2013, the Institute filed a law suit against the Association, alleging that the Association had violated certain portions of the MOA between the parties, and requesting a variety of injunctive relief. A full trial on the merits was held, where the Institutes factual allegations regarding the violation of the MOA were disproven. The court entered a judgment for the Institute and against the Association based on a theory of the case that was never pled or litigated. The

Association moves this court to reverse the judgment entered by the district court for the reasons below.

The Institute prevailed in a dispute with the Association concerning a MOA. The Institute's success however, resulted from several reversible errors by the district court. First, the Institute never pled, either before or at trial, or introduced evidence of any kind, suggesting that the MOA could be terminated at will. The district court entered judgment in favor of the Institute on a theory of the case that was not pled in the complaint, not argued in pretrial motions, not argued or advanced at trial, and never mentioned by the Institute until almost one year after the conclusion of the trial on the merits.

Second the Institute lacked standing to bring suit against the Association. Third, the district court erred in using a limited agency finding to order a constructive trust over the Association's funds. Fourth, the Institute did not present sufficient evidence to demonstrate an agency relationship existed prior to March 2012. Finally, the district court's final judgment alters the donative intent of numerous will and trusts in violation of New Mexico law.

II. SUMMARY OF THE PROCEEDINGS

A. Nature of the Case.

This appeal arises from a judgment for Appellees in an equity proceeding involving requests for a receivership, constructive trust mandatory injunction and accounting.

B. Course of Proceedings

The Institute filed suit against the Association alleging wide ranging financial mismanagement of scholarship funds held by the Association. [RP 00001-00069].

The Association filed a Motion for Summary Judgment for Lack of Standing [RP 00947-00974] as well as a Motion for Summary Judgment alleging that there was no evidence of financial mismanagement. [RP 00889-00946]. The Institute resisted both motions on the basis that because the MOA was terminated, the Association would no longer be able to achieve its corporate purpose of supporting the Institute and the cadets attending the Institute. [RP 01010-01130, 01131-01226]. The district court denied both motions. The district court denied the Motion based on standing without explanation. The district court denied the Motion

for Summary Judgment finding that there was a question of fact concerning the question of Agency. [RP 01468-01470].

The parties tried the case to the bench in December 2014[1]. At the close of the Plaintiff's case in chief, the Association moved for Judgment as a matter of Law on all counts and renewed its motion for lack of standing. Tr Vol IV pg. 131 ln: 7 through pg. 139 ln: 13. The district court denied the Associations Motions. Tr Vol IV pg. 149 ln: 1-3.

At the conclusion of the Trial, the district court asked that both parties submit requested Findings of Fact and Conclusions of Law. On April 21, 2015, the Court issued its Findings of Fact and Conclusions of Law. [RP 01764-01782]. The district court did not order any of the relief requested by the Plaintiff, and found that the MOA was improperly terminated and that the MOA was still in full force and effect. [RP 01781, ¶¶23-25]. The district court concluded its Findings and Conclusions by stating that any "parties' findings and conclusions of law not contained

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[1] The parties have agreed to supplement the audio recordings of the trial on the merits held from December 8, 2014 through December 12, 2014. The parties secured a complete transcript of the trial, which will be supplied to this Court for the convenience of all parties. The Association will cite to the transcribed record as Tr Vol pg. ln:

herein or not consistent herewith are hereby refused and denied." [RP 01782].

The parties were not able to agree on the form of order and a presentment hearing was held. On August 21, 2015 the district court entered its Judgment. [RP 01841-01842]. The Judgment stated that the Association was not in breach of the MOA and that it remained in full force and effect, but that the Association was at all times material, an agent of the Institute, and a fiduciary, and imposed a constructive trust over the funds held by the Association. *Id.* The district court concluded by ordering the Association to convey its funds to the Institute or the Institute Foundation if so directed. *Id.* The parties then submitted additional requested findings of fact and conclusions of law to the district court. The Institute, for the first time, requested a finding that the MOA was terminable at will. [RP 02769-02772]. The February 21, 2013 letter cited by the Institute as effecting an at-will termination, specifically states that the MOA is terminated for cause. [RP 02771, ¶6], *See also* Ex. EL.

On December 16, 2015, the district court issued Supplemental and/or Reiteration of Findings of Fact and Conclusions of Law. The

district court withdrew several findings and conclusions and entered several new conclusions. The district court's new conclusions stated that the MOA was terminable at will, and that the Institute's conduct was a clear manifestation of its intent to revoke the Association's authority to act as its agent. This appeal followed.

C. Summary of Facts Relevant to Issues on Appeal.

1. The Institute's Claims.

The Institute claimed in its Complaint that it was terminating the MOA and its relationship with the Association based on the Association's alleged failure to manage its corporate affairs or to achieve its corporate purpose of supporting the Institute its cadets and its alumni. [RP 00001-00002]. The Institute claimed that the purpose of the Association was to benefit the Institute, and as such, the Institute was the intended beneficiary of the funds held by the Association. [RP 00004]. The Institute also alleged that the Association had breached the MOA between the parties by failing to "[m]aintain a financial accounting system considered adequate under customarily and currently accepted governmental accounting standards...), and by failing to "[c]ause its

financial operations to be audited annually in accordance with generally accepted governmental accounting standards...) [RP 00012-00013].

The Institute also claimed that the Association, as its agent, held all of its funds for the benefit of the institute. It further alleged that the Association was no longer able to retain those funds because the Institute had terminated the MOA. [RP 00020, ¶¶106-108].

Appellee's sought a receivership, a constructive trust, a mandatory injunction and an accounting.

2. Pretrial Motion Practice.

The Association filed a Motion to Dismiss on the basis that the Institute had suffered no injury in fact and even if it had, it was not causally related to the conduct complained of. [RP 00947, 00950]. The Association argued that even if the Institute had been injured by the Association's conduct, the State Attorney General was the person charged with enforcing specific charitable gifts pursuant to the Charitable Solicitations Act, *See* NMSA 1978, § 57-22-1, *et seq.*, and under common law. [RP 00954].

The Association argued that the Institute had not shown any direct injury as required by *De Vargas Sav. & Loan Ass'n of Santa Fe v. Campbell,*

1975-NMSC-026, ¶ 11, 87 N.M. 469. [RP 00951]. The Association further argued that the injury claimed by the Institute was only a threatened injury and did not meet the standard set forth in *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 19, 130 N.M. 368. *Id.* The Association argued that the undisputed material facts demonstrated that there was no injury in fact, as the Association had continued to award scholarships and otherwise support the institute. [RP 00952]. It also argued that there was no evidence of any misuse or misappropriation of funds. [RP 00952].

The Institute argued that the Association was an agent of the Institute. [RP 01141-01142]. The Institute also argued that the Association was no longer able to fulfill its role as alumni agent for the Institute after the Institute had terminated the memorandum of agreement between the parties. [RP 01144]. The Institute further argued that the Association would be unjustly enriched if it were allowed to retain its funds, as the Institute maintained it could no longer accept scholarship payments from the Association. [RP 01146-01150].

The Association argued in its reply that it was not an agent of the Institute, but an independent charitable organization. [RP 01348]. The

Association argued that even if it was an agent of the Institute, such an agency did not identify an injury to confer standing. [RP 01347].

The Association challenged the undisputed material facts set forth by the Institute by showing facts that demonstrated that the Association was still supporting the Institute, and still awarding scholarships. [RP 01348-01349].

The district court denied the Association's motion to dismiss without elaboration. [RP 01676-01677].

The Association also filed a Motion for Summary Judgment stating that the undisputed material facts did not support the factual allegations made in the Complaint, and that the Association's was entitled to judgment as a matter of law. [RP 00889]. The Association argued that the undisputed material facts demonstrated that there was no financial impropriety, and no loss of funds as alleged by the Institute. [RP 00890-00892].

The Institute argued that summary judgment was not appropriate in cases where equitable relief is requested. [RP 01023]. The Institute also argued that there was a question of fact concerning the Association's legal relationship with the Institute, claiming that the Association was its

agent. [RP 01024]. The Institute relied on the relationship between the parties, the Associations use of the Institute's name and marks in its dealings, and the history of the Association's close ties to the Institute. [RP 01024-01027].

The district court ruled that the relationship between the parties would determine the disposition of the funds at issue. [RP 01468]. The district court further held that there was a question of material fact regarding the relationship between the parties that made summary judgment improper. [RP 01470].

A full trial on the merits was held from December 8, 2014 through December 12, 2014.

The district Court entered findings of fact and conclusions of law on April 21, 2015. [RP 01764-01782]. In the findings and conclusions, the district court did not grant any of the Institute's requested relief and instead found that the MOA was improperly terminated, and was therefore in full force and effect. [RP 01781, ¶23, RP 01782, ¶25]. The district court also stated that "[t]he respective parties' findings of fact and conclusions of law not contained herewith or not consistent herewith are hereby refused and withdrawn." [RP 01782]. After the

district court's findings and conclusions were entered, the parties were unable to agree on a form of order. A presentment hearing was held.

The district court entered its first judgment in this matter on August 21, 2015. [RP 01841]. In that judgment, the district court ordered that the Association had been, at all times material, an agent of the Institute. *Id.* The district court also ordered that the Association held funds for the benefit of the Principal, the Institute, and that those funds were subject to the direction and control of the Institute. [RP 01841-01842, ¶2]. The district court also stated that the MOA was in full force and effect, because the Association had not breached the agreement. [RP 01842, ¶4]. Finally the district court ruled that there was a fiduciary relationship between the Association and the Institute, and that the Institute could therefore demand transfer of the funds held by the Association. *Id.*, ¶5.

On September 18, 2015, the Institute requested additional conclusions of law. [RP 02429]. In that pleading, the Institute requested that the Court determine as a matter of law, that it had demonstrated its intent to terminate the agency relationship with its February 2013 notice of termination of MOA, and that sixty days thereafter, the Association's

authority to act as Institute's agent was terminated. [RP 02430, ¶1-2]. This requested conclusion directly conflicted the district court's initial findings and conclusions entered on April 21, 2015, specifically conclusions 23, 24 and 25 where the district court concluded that the Institute had improperly terminated the MOA; that the Association had not been in breach of the MOA; and that the MOA remained in full force and effect. [RP 01781-1782, ¶¶23-25].

The Association responded to the Institute's requested supplemental findings by pointing out that these new findings would be in direct opposition to the district court's findings of fact and conclusions of law. [RP 02726-02728]. The Association argued in its response that the district court had heard evidence about the termination of the MOA and had found that it was terminated without cause and was in full force and effect. *Id.*

The Institute again requested additional conclusions of law on October 27, 2015. For the first time in the course of litigation that had been ongoing since 2013, and almost a full year after a trial on the merits, the Institute requested that the district court find as a matter of law, that the MOA was terminable at will. [RP 02771]. Nowhere in the record

proper will this Court find any allegation, argument or evidence that the MOA was terminable at will until the pleading of October 27, 2015. Instead, the record documents vigorous litigation that the "for cause" termination of the MOA, and a five day trial conducted to resolve the issue. The Institute, in a footnote, acknowledged that adoption of its newest requested conclusions would require the deletion of the district court's prior conclusion of law, numbers 23, 24 and 25. [RP 02771].

On December 16, 2105, the district court entered what it titled "Supplemental, and/or Reiteration of Findings of Fact and Conclusion of Law. [RP 02866-02868]. The new conclusions reflected that the MOA was terminable at will and had been terminated by the Institute's letter of February 13, 2013. *Id.*, ¶7-8].

III. ARGUMENT

A. The District Court Erred in Finding that the MOA was Terminable at Will.

STATEMENT OF PRESERVATION: The Association preserved the issues of whether the MOA was terminable at will, whether the Association was an agent of the Institute, and whether the broad agency finding allows the Institute to demand the transfer of the

Association's legally held funds, before and after the judgment, as recounted in the Statement of Proceedings and Statement of Facts Relevant to Issues on Appeal, above.

STANDARD OF REVIEW: The MOA is a contract between the Institute and the Association. Questions of contract law are reviewed *de novo*. *Santa Fe N., Inc. v. Santa Fe Estates, Inc.*, 2008-NMCA-042, ¶ 70, 143 N.M. 811, 182 P.3d 794. "New Mexico courts long have held that the question of whether a contractual term or provision is susceptible to reasonable but conflicting meanings, *i.e.*, whether there is ambiguity, is one of law." *C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶ 17, 112 N.M. 504, 817 P.2d 238.

Granting equitable relief is reviewed under an abuse of discretion standard. *Credit Inst. v. Veterinary Nutrition Corp.*, 2003-NMCA-010, ¶ 17, 133 N.M. 248. An abuse of discretion is found where the court's decision is untenable and contrary to logic and reason. *Id.*

The Institute is charged with presenting its theory of the case to the fact finder. The theory of the case as submitted to the finder of fact, becomes the law of the case, binding upon the parties. *Haaland v. Baltzley*, 1990-NMSC-086, ¶ 14, 110 N.M. 585. "Each party to a lawsuit has only

one opportunity to present its case and challenge the case of its opponent; that occurs at trial...." *Hinger v. Parker & Parsley Petro. Co.*, 1995-NMCA-069, ¶ 24, 120 N.M. 430. "It is settled law that if a claim is not presented to the [fact finder] it is waived...." *Fleetwood Retail Corp. v. LeDoux*, 2007-NMSC-047, ¶ 33, 142 N.M. 150, 164 P.3d 31.

The complaint set forth the Institute's theories of relief, which depended on treating the MOA as terminable for cause. The complaint alleged that, the Association had mismanaged funds donated to the Association, and held by the Association for various purposes. [RP 00001-00023]. It alleged that because of the alleged financial difficulties, the Institute proposed to terminate the MOA and thereby the relationship between the parties. The Institute's case assumed a right to terminate for cause.

New Mexico precedent illustrates that the institute was not free to reverse its theory and assert that the MOA permitted an at will termination. In *Credit Inst.*, a customer purchased labels for dog food. The labels were not correct. The supplier instructed the customer to use some of the incorrect labels until replacements could be made. *Credit Inst.*, 2003-NMCA-010, ¶ 6. The seller continued to bill the customer for

the labels, eventually turning the matter over to the plaintiff, a debt collection company. *Id.*, ¶7. After a full trial on the merits, the district court found that the customer had been unjustly enriched in its use of the defective portion of the labels. *Id.*, ¶9. This was the first instance the theory of unjust enrichment had been discussed. *Id.* The court of appeals reversed, finding that the defending party musty have proper notice of the claim, and an opportunity to defend against it, either through the pleadings, or when tried with the consent of the parties. *Id.*, ¶¶22-25. Just as in *Credit Inst.*, the Institute's Complaint contained no facts to put the Association on notice that it believed it was terminating the MOA at will, nor did the Institute assert an at will right at trial. *Credit Inst.*, 2003-NMCA-010, ¶ 20. Instead, the Institute consistently claimed that the Association was in breach, and because of that breach, the Institute sought to terminate the MOA.

From the opening statement, it was clear that the Institute was seeking to terminate the MOA for cause as set forth in its Complaint. The Institute's counsel explained how the MOA was terminated for cause, how the Association was allegedly unable to cure, and how the evidence was going to support the Institute's decision to terminate the MOA

because of the Association's alleged breaches. TR vol I, pg. 15, ln: 12-24.[2] The Institute based its entire case on this theory of financial mismanagement and the termination of the MOA for cause.

On direct examination, General Grizzle, Superintendent of the Institute, testified that he was familiar with the letter of termination delivered to the Association. TR vol I, pg. 86, ln: 1-14. He further testified that the MOA between the parties was being terminated for the Association's financial difficulties. TR vol I, pg. 86, ln: 15-25, pg. 87, ln. 1-10. When General Grizzle was asked about the final letter of termination delivered to the Association on March 22, 2013, he testified, "in compliance with the terms of the memorandum of agreement where the first letter established the 60 day period for termination, but included in that was a 30 day period to allow for cure. When cure was not met, a second notice acknowledging the cure was not met and moving on to termination at the 60 day point." TR vol I, pg. 92, ln: 2-8.

[2] The Association recognizes that opening statements are not evidence, however, the opening demonstrated the Institute's consistent position that the MOA had been terminated for cause from the inception of this litigation until after the trial.

The breach of the MOA was the only ground ever advanced by the Institute to support the termination of the MOA until October 27, 2015, long after the trial ended. Consequently, the Association defended during trial on that basis. Although a party may advance positions not pled in the complaint, the position must be litigated at trial with the consent of the party against whom it is asserted. *Credit Inst.*, 2003-NMCA-010, ¶ 23. At trial, the Institute never claimed that the MOA was terminable at will, and never elicited testimony supporting such a theory. The Association never consented to the assertion of such a theory at trial because it was not asserted until long after the trial concluded.

When the district court entered its original findings of fact and conclusions of law, it found that the Association was working diligently to provide financial information before the termination of the MOA [RP 01774, ¶ 82], that the Institute "sought termination on the grounds that the Association had failed to maintain a financial accounting system considered adequate under current and customary governmental accounting standards and failure to provide an annual audit to NMMI." [RP 1774, ¶ 84]. The district court also found that the Association had not violated the MOA, that it had maintained a proper accounting system,

and had also provided an annual audit to the Institute. [RP 01775, ¶¶ 85-86]. It further found that "at all times material, the Association's investment accounts were secure and earning a reasonable return on investment. [RP 01775, ¶91. The district court also concluded "because the MOA was not violated, there was nothing for the Association to cure." [RP 01777, ¶ 104].

The district court found as a matter of law that the MOA was improperly terminated by the Institute, and that there was no breach and therefore no need to cure. [RP 01781, ¶¶ 23-24]. Lastly, the district court concluded that the MOA remained in full force and effect. [RP 01782, ¶25]. These findings and conclusions defeated each allegations in the Institute's complaint, and as the district court stated, forced the parties back together.

The Institute was not entitled to any relief, including any equitable relief, premised on the purportedly at-will nature of the MOA. The award of equitable relief is in the discretion of the trial court, however, "[s]uch discretion is not a mental discretion to be exercised as one pleases, but is a legal discretion to be exercised in conformity with the law. *Cont'l. Potash, Inc. v. Freeport-Mcmoran, Inc.*, 1993-NMSC-039, ¶ 26,

115 N.M. 690. "A court may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried." *Leonard Farms v. Carlsbad Riverside Terrace Apartments, Inc.*, 1977-NMSC-004, ¶ 3, 90 N.M. 34. *See also Fed. Nat'l Mortg. Ass'n v. Rose Realty, Inc.*, 79 N.M. 281, 282, 442 P.2d 593, 594 (1968). The Institute never requested a finding that the MOA was terminable at will in any pleading leading up to trial. The Institute also failed to introduce any evidence that the MOA was terminable at will, and as all of their pretrial pleadings demonstrate, the Institute clearly believed that it was only terminable for cause.

Allowing the Institute to prevail on an at-will theory would present notice and due process problems. "Due process still requires that the opposing party have notice and an opportunity to defend against the theory not stated in the pleadings." *Credit Inst. v. Veterinary Nutrition Corp.*, 2003-NMCA-010, ¶ 25. "It is true that, before a party may take a case to a jury on a particular theory, that theory must have been pleaded, or tried with the consent of the opponent." *Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 9, 109 N.M. 386. In New Mexico, pleadings give the parties

notice of the claims against them and the theory on which those claims are based. *Id.* ¶ 19.

Here, the Institute neither pled in its Complaint nor developed evidence at trial the theory that the MOA was terminable. Instead, the Institute consistently argued that the Association had breached sections 2.1(l) and 2.1(m) of the MOA between the parties, and because of this breach, the Institute was terminating the MOA. "Generally, the trial court "may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried." *Credit Inst.*, 2003-NMCA-010, ¶ 19.

The record confirms that the institute relied on a right to terminate for cause and never asserted a right to terminate at will until almost a year after the trial. In the Institute's Requested Findings of Fact and Conclusions of Law, filed one week before trial, the Institute asked the district court to find that under the MOA, a defaulting party has thirty days to cure following notice, and that failure to cure results in termination upon the sixtieth day. [RP 01627, ¶78]. The Institute also requested a finding of fact that the Institute had provided notice of its intent to terminate and specified the Association's defaults. [RP 01631,

¶109]. The Institute also requested a finding of fact that the Association failed to cure its defaults. [RP 01631, ¶112]. The Institute also requested conclusions of law that the Association had breached the MOA, and also failed to cure that breach. [RP 01639, ¶¶22-26].

On December 22, 2014, the Institute filed Supplemental Findings of Fact and Conclusions of Law, and in this pleading specifically noted that the 2001 MOA had been terminable at will, however the 2012 MOA had a cure provision that would allow the Association 60 days to cure its default. [RP 01716, ¶91, RP 01718, ¶103]. The Institute also again requested that the district court find that the Association had breached the MOA and was in default, even devoting a subsection of the pleading to the termination. [RP 01727-01729]. Nowhere in this pleading does the Institute suggest that the MOA is terminable at will. It does however, ask that the district court find that the MOA is a valid and enforceable contract. [RP 01738, ¶36].

The Institute never suggested that the MOA was terminable at will until nearly one year after the trial on the merits, and even then, submitted no evidence that would support that conclusion. Both the contractual language of the MOA and the actions taken by the Institute

demonstrate that it may only be terminated for cause. The fact that the MOA expressly includes a termination for cause provision logically forecloses an interpretation of the agreement as being terminable at will. The Association requests that this Court reverse the finding that the MOA was terminable at will, and order the immediate return of the Associations funds.

B. The Institute Failed to Establish an Injury in Fact, and Therefore Failed to Demonstrate Standing.

STATEMENT OF PRESERVATION: The Association preserved the issue of whether the Institute had proven an injury in fact sufficient to meet New Mexico's standing requirements before and after the verdict, as recounted in the Statement of Proceedings and Statement of Facts Relevant to Issues on Appeal, above. The Association also specifically renewed its standing argument at the end of the Institute's case and in motions for judgment as a matter of law.

STANDARD OF REVIEW: New Mexico courts review a district court's determination of standing under a substantial evidence standard. *Deutsche Bank Nat'l Tr. Co. v. Johnston*, 2016-NMSC-013, ¶ 28, 369 P.3d 1046.

In order to confer standing on a party, there must be a demonstrable injury in fact. *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 10, 144 N.M. 471. The Institute never demonstrated that the Association injured or harmed the Institute in any fashion. The Institute's alleged status as principal of the Association does not demonstrate standing.

The MOA imposed several affirmative duties on the Association. Ex. CE. One of those duties was to maintain a database of alumni information, accessible to the Institute. *Id.* Another required that the Association work with the Institute to execute homecoming activities. *Id.* The Institute presented no evidence that the Association had failed to accomplish any of those duties.

The evidence introduced at trial demonstrated that the Association had not misappropriated or misspent any of the funds in its possession, custody, or control. Former Association president, Mr. Brownfield, testified at trial that, when his tenure as president ended, he was not aware of any waste or abuse of funds by the Association, and that all the monies that were to be held by the Association were accounted for. TR vol II, pg. 160, ln: 3-10. He further testified that, since the end of his

tenure, the Association had received clean audits of their books and records. TR vol II, pg. 160, ln: 11-14. James Barnes, president and CEO of the NMMI Foundation also testified that, when the Association's bookkeeping was completely updated, there were no funds misappropriated, wasted or lost. TR vol III, pg. 97, ln: 12-17.

The sole justification for the Institute's argument that the Association must transfer the funds it holds to the Institute can be found in the Institute's Post Trial Memorandum of Law. [RP 01791-01798]. The Institute argued that, as its agent, the Association must return property that it can no longer rightfully possess after the termination of the agency relationship. [RP 01793-01794]. It failed to point to any injury suffered by the Institute. It also failed to elicit any testimony or introduce any evidence that would suggest that the Association was not the proper party to hold and administer the funds under its control. There is no language in the MOA that would suggest that the Institute is the proper owner or trustee of the Association's funds. There is also no law on point that holds that an agent must disgorge its own property to a principal absent any breach of fiduciary duty.

The Institute relies on *Union Bank v. Mandeville*, 1919-NMSC-039, 25 N.M. 387 and *Bustin v. Craven*, 1953-NMSC-103, 57 N.M. 724, for the proposition that the Association must transfer its funds to the Institute. [RP 01794]. Neither case is factually or legally similar to the case at bar, and neither supports the Institute's argument.

Union Bank deals with a bank president who was using his position to make improper commissions from the loans he approved as the bank's president. The case holds that an agent may not breach his duty of good faith and loyalty to the principal in order to make a profit for himself. *Union Bank,* 1919-NMSC-039, ¶ 6. The court found that where an agent breaches his duties to the principal, he may be required to reimburse the principal for the funds wrongfully acquired. *Id.*, ¶ 7.

Here, the undisputed evidence at trial was that the Association had maintained an accounting system as required, that its investments were secure and earning a reasonable return, and that there was no basis for the Institute to terminate the MOA. [RP 01775, ¶¶85, 86, 91], [RP 01781, ¶¶21-24], [RP 01782, ¶25]. The record demonstrates that the Association was fulfilling its corporate purpose and complying with the terms of the MOA. There was no finding of any breach of fiduciary duty or duty of

loyalty. Nothing in the record indicates that the Association wrongfully acquired the funds the Institute claims.

The Institute also cited *Bustin v. Craven*, 1953-NMSC-103, 57 N.M. 724. That case also has nothing in common with the case at bar. *Bustin* deals with the illegal sale and possession of an automobile. *Id.* The term "agent" is not mentioned anywhere in the decision. *Id.* Nothing about the Association's possession of the funds was illegal.

The undisputed evidence admitted at trial demonstrates that the Association was the lawful and proper owner and/or trustee of the funds it held. Ex. HN. The Association awarded scholarships throughout the time leading up to the termination of the MOA and after. Dan Whitfield, the executive director of the Association, testified at trial that the Association continued to provide scholarships to cadets, even after the Institute refused to accept checks from the Association. TR vol V, pg. 115, ln: 15-25, pg. 116, ln: 1-12. The Association also awarded funds to the winners of the Ruppert-Burton Speech contest in order to support the Institute and deserving cadets. TR vol V, pg. 119, ln: 20-24. There was no evidence presented at trial that the Association had ever misused funds,

or that the Association was not going to continue to award scholarships in line with the donor's original intent.

There was no evidence presented at trial that the Association was not legally entitled to hold and manage the funds in its possession. After a full trial on the merits, all allegations of financial misconduct were disproven, as shown in the district court's findings of fact and conclusions of law. [RP 01764-01782]. The district court found that, at all times material, the Association had properly managed its corporate affairs. [RP 01781 ¶ 22]. The district court further found that, at all times material the Association's investment accounts were secure and earning a reasonable return on investment. [RP 01775, ¶ 91]. These facts and conclusions have not been withdrawn by the district court and remain the law of the case.

The record affirmatively demonstrates the Association's rightful possession of scholarship funds. The testimony involving the source and origination of the funds in the Association's control was limited at trial, due to the allegations in the Institute's Complaint. However, the original scholarship documents themselves were admitted into evidence, and show that almost every scholarship is specifically given to the

Association. Ex. HN. There is also testimony from Mr. Marshall Pieczentkowski, a distinguished alumnus of the New Mexico Military Institute. Mr. Pieczentkowski has been inducted into the NMMI hall of fame for his professional excellence and also as an all-conference member of the 1959 NMMI football team. TR vol IV, pg. 7, ln: 2-6. Mr. Pieczentkowski has been an active alumnus, becoming the first lifetime member of the Cross Sabre Society for donating fifty thousand dollars or more to the school and also has a scholarship with the Association in the name of his son. TR vol IV, pg. 7, ln: 11-16. Mr. Pieczentkowski testified that he believed that the scholarship he created for his son, should be administered by the Association, saying "It should be administered by the Alumni Association, that's who I gave it to". TR vol IV, pg. 33, ln: 19-25, pg. 34, ln. 1-11. Mr. Pieczentkowski is the only witness that testified in regards his intent when he made his original donation to the Association. Nothing in the record suggests that the Association should not have possessed or controlled the scholarship funds.

The Institute cannot establish standing or injury based solely on its alleged status as the Association's principal. An agency relationship between the Institute and the Association, even if supported by

substantial evidence, would not justify the transfer of funds to the Institute. Nothing in the MOA entitles the Institute to control or possess the funds, even upon termination of the MOA. The law of agency does not support the Institute's claim to the funds, as confirmed by the Institute's failure to cite precedents supporting such a right. *See Wills v. Bd. Of Regents of Univ. of N.M.*, 2015-NMCA-105, ¶ 21, 357 P.3d 453 (following rule that, where party cites no authority supporting a proposition, the appellate courts will assume that no such authority exists) (citing *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329). Instead, the law of agency generally protects agents from unscrupulous principals and losses occasioned by their conduct. *See, e.g., Restatement (Third) of Agency* § 8.15 (recognizing principal's duty of good faith and fair dealing owed to agent), § 8.14 (recognizing principal's duty to indemnify agent when loss should be borne by the principal in light of their relationship).

Absent any finding of financial wrongdoing by the Association, the Institute cannot identify any injury in fact. The absence of injury means the Institute lacks standing.

C. The Institute's Failure to Demonstrate an Injury Also Forecloses the Imposition of a Constructive Trust.

The district court found that there was a fiduciary relationship between the Association and the Institute, and on that basis, ordered a constructive trust over the funds held by the Association. [RP 02907]. There was no evidence introduced at trial that the Association had breached a fiduciary duty in any way, and therefore no evidence of an injury in fact. The district court's own findings and conclusion completely vindicated the Association in regards to the allegations of financial mismanagement in the Complaint. [RP 01775, ¶¶ 85, 86, 90, 91, RP 01776, ¶¶ 96-102].

The record lacks any evidence of an injury in fact, and therefore provides no support for the imposition of a constructive trust. The record also lacks any support for the conclusion that the Association was unjustly enriched.

"A constructive trust will be imposed to prevent the unjust enrichment that would result if the person having the property were permitted to retain it." *Madrid v. Rodriguez (In re Estate of Duran)*, 2003-NMSC-008, ¶ 34, 133 N.M. 553. (Internal quotations omitted.) The

Institute argued that a constructive trust is appropriate where an entity holds property and has a duty to convey that property to another. [RP 01030]. *See also Bassett v. Bassett*, 1990-NMSC-070, 110 N.M. 559. The Institute argued that the Association could no longer achieve its corporate purpose because the MOA between the parties was terminated. The Institute alleged that if the Association could no longer provide scholarships or other support, it would retain those funds and therefore be unjustly enriched. [RP 01031]. This argument cannot be reconciled with the undisputed facts.

In order for a constructive trust to be appropriate, the Institute would have to demonstrate through admissible evidence that the Association was under a duty to convey the scholarships that it holds, but had failed to do so. *Bassett*, 1990-NMSC-070, ¶ 23. The undisputed evidence at trial showed exactly the opposite. Not only was the Association cleared of any mismanagement or waste of funds under its control, there was undisputed testimony that the Association was continuing to accomplish its corporate purpose by awarding scholarships. TR vol V, pg. 117, ln: 12-25, pg. 118, ln: 1-6. The Association has also supported the Institute by hosting an Alumni event in Southern

California. TR vol V, pg. 111, ln: 1-7. The Association has also supported the Institute by awarding checks to six cadets who had finished first, second and third in both the high school and junior college divisions of the Ruppert-Burton Speech contest. TR vol V, pg. 119, ln: 20-24.

The main difficulty the Association faced in continuing its corporate purpose resulted from the Institute's refusal to accept checks from the Association. The Association initially awarded scholarships, listing both the cadet and the Institute as payee. After accepting some of these checks, the Institute began reversing course and no longer accepting checks from the Association. TR vol V, pg. 115, ln: 19-25. The Institute claimed that this was done because there was no longer an MOA between the Institute and the Association. However, Major Rodriguez, of the financial aid office, testified that the Institute accepted similar checks from the Kiwanis club and other similar organizations without an MOA. TR vol IV, pg. 126, ln: 10-25, pg. 127, ln: 1-6.

The district court erred in imposing a constructive trust for the same reasons that the Institute lacked standing: the record does not reflect any injury. The Institute presented no evidence of fraud or unjust enrichment. The Association did not violate any provision of the MOA

between the Institute and itself, or fail to diligently award the scholarships it had in its control. General Grizzle admitted under cross examination that the Association continued to administer the scholarships under its control. TR vol II, pg. 66, ln: 15-18.

There are no grounds for requiring the Association to transfer its funds to the Institute. The Association respectfully requests an order from this Court reversing that district court order and ordering the immediate return of the Association's funds.

D. The District Court's Agency Finding is Not Supported by Substantial Evidence Because the Institute Did Not Demonstrate Control Over the Association.

STATEMENT OF PRESERVATION: The Association preserved the issue of whether the Institute had demonstrated the requisite level of control to support an agency determination, before and after the verdict, as recounted in the Statement of Proceedings and Statement of Facts Relevant to Issues on Appeal, above. The Association also specifically renewed its standing argument at the end of the Institute's case in chief in its motions for judgment as a matter of law.

STANDARD OF REVIEW: A finding of agency is generally a question of fact; however, it may be decided as a matter of law when the

material facts are not in dispute. *Res. Lighting v. Rohde, May, Keller, McNamara Architecture, P.C.*, 2011 N.M. App. Unpub. LEXIS 349, at *14 (N.M. Ct. App. Sep. 7, 2011), (*quoting Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 26, 131 N.M. 772, 42 P.3d 1221, *and Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶ 18, 135 N.M. 641, 92 P.3d 653).

The district court's finding that the Association is an agent of the Institute is not supported by the evidence introduced at trial. Specifically, there is no evidence to support the conclusion that the Institute exerted control over the work of the Association necessary to justify holding that the Association was an agent, as opposed to an independent contractor.

The district court initially found that there was an agency relationship between the Association and the Institute from at least the execution of the 2012 MOA. [RP 01780, ¶12]. However, the district court did not provide a specific date for the agency relationship, nor did the court address the parameters of the agency relationship. *Id.*

The record is insufficient to support the existence of a broad, and undefined agency relationship. The evidence demonstrates that the

Association is a non-profit corporation, organized under the laws of the state of New Mexico in 1964. Ex. A. The Articles of incorporation specifically set forth that the Association may hold and acquire by purchase, gift, devise or bequest, real and personal property of any kind to accomplish its corporate purpose. *Id.* The Association is to be governed by a board of directors who have the power to adopt by-laws to govern the affairs of the corporation. *Id.*

The Association has had a close relationship with the Institute in the years since its incorporation. Evidence introduced at trial shows that the Association's offices were located on the grounds of the Institute. [RP 01765, ¶4]. The Association had phone and internet services provided by the institute and, before 1993, the employees of the Association were paid by the Institute. *Id.*, ¶2. Though there is a close relationship between the parties, there was no evidence introduced at trial that would support the degree of control that would allow the district court to find that the Association was an agent of the Institute. The first time the parties attempted to memorialize their relationship in the MOA, each side agreed that the Association was "a separate and independent entity" and not an agent of the Institute. Ex. D, §4.3.

The Association is not under the control of the Institute. An agent is one who is under the control of the master or principal. *Romero v. Shelton*, 1962-NMSC-118, ¶ 7, 70 N.M. 425, 374 P.2d 301, (overruled on other grounds). "Agent is a word used to describe a person authorized by another to act on his account and under his control." *Id.* The Institute had no control over the actions of the Association, and did not exercise control over the operations of the Association. "A right to control the physical details as to the manner and method of performance of the contract usually but not always establishes a master and servant relationship, but control only of the ultimate results to be obtained usually results in an independent contractor relationship." *Jaramillo v. Thomas*, 1965-NMSC-156, ¶ 9, 75 N.M. 612.

The Association is an independent contractor of the Institute. New Mexico has adopted the reasoning in the *Restatement of Agency (2d)* in defining an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. *Harger v. Structural Servs.*, 1996-NMSC-018, ¶ 14, 121 N.M. 657. That definition accurately

describes the relationship between the Association and the Institute, as codified in the various MOA's.

John Phinizy, past president of the Association testified at length during trial that neither the New Mexico Military Institute Board of Regents, nor the Institute itself, instructed or directed the Association on how to accomplish the affirmative covenants contained in the MOA. TR vol V, pg. 50, ln: 1 through pg. 58, ln. 2. There was no control over the details of the Association's operations that would allow the district court to find an agency relationship. *Jaramillo,* 1965-NMSC-156, ¶ 9. The only control of the Association by the Institute is found in the affirmative covenants of the MOA, and can only be described as "ultimate results to be obtained." *Id.*

Mr. Phinizy also explained how the Association would manage its scholarships. He testified that the Association's executive secretary or executive director, would attend the Institute's scholarship committee meetings, and work with the committee to fit a cadet to an Association scholarship. TR vol V, pg. 10, ln: 17-25 through pg. 11, ln. 1-4. He also explained that once the scholarship committee had made its selections, the executive secretary of the Association would bring those

recommendations to the Association board for approval. TR vol V, pg. 9, ln: 19-25 through pg. 10, ln. 1-10.

Further, David Romero, the Association Executive Secretary immediately preceding Jim Lowe, testified that he reported directly to the Association board and received his direction from them. TR vol III, pg. 109, ln: 12-20. Mr. Lowe's testimony also demonstrates that he would also report to the Association board of directors, and take his instruction from them.

Even the Institute's own audited financial statement explains that the Association is not controlled by the Institute. The statement describes the Association as follows "This affiliated organization has a separately elected board of directors and provides support to the Institute. This organization is excluded from the reporting entity as a component unit because the Institute does not have the ability to exercise influence over its daily operations, approve budgets or provide funding. A separate audited financial statement is prepared for this entity." Ex. HO, pg. 29. The financial statement describes the NMMI Parent's Club Inc. in exactly the same manner. *Id.* Not only does this show that the Institute lacked the requisite control over the Association, the Institute itself

acknowledged that it does not have the power to influence the daily operations of the Association.

The best evidence of the relationship between the parties is the contract between them, the MOA. The first MOA was entered into in 1993 and stated that "[i]n the performance of its undertakings pursuant to this agreement and its other activities, the Association is acting as a separate and independent entity, and not as an agent of the institute". Ex. D, § 4.3. The MOA entered into by the parties in 2001 contained the same language about the status of the Association. Ex. G, § 4.3. While the contractual language alone may not conclusively determine the status of two parties, this Court may take into account the contractual language, along with the actions of both parties.

The testimony at trial, discussed above, demonstrates that there was no control by the Institute over the details of the Association's work.

The Institute did not present substantial evidence of control over the details of the Association's conduct. The record therefore does not support the conclusion that the Association was an agent of the Institute.

E. The District Court's Judgment Violates New Mexico Law on Testamentary Intent.

STATEMENT OF PRESERVATION: The Association preserved the issue of the district court's power to alter the terms of a testator's will or trust absent any showing that the trustee or beneficiary has violated any condition of the bequest, before and after the verdict, as recounted in the Statement of Proceedings and Statement of Facts Relevant to Issues on Appeal, above.

STANDARD OF REVIEW: In New Mexico, questions involving will contests are questions of law, reviewed *de novo*. *Redman-Tafoya v. Armijo (In re Estate of Armijo)*, 2006-NMCA-011, ¶ 48, 138 N.M. 836, 126 P.3d 1200. 12.

The review of trust language and the application of New Mexico's trust statute to the terms of the trust are reviewed *de novo*. *Cable v. Wells Fargo Bank N.M., N.A. (In re Cable Family Tr.)*, 2010-NMSC-017, ¶ 10, 148 N.M. 127, 231 P.3d 108.

The Institute did not make specific claims challenging either the will or trust documents and bequests. The district court's judgment essentially modifies their testamentary effect. In ordering the transfer of the funds held by the Association, the district court has essentially

entertained numerous will and trust contests and then overridden the original intent of the donors as set forth in the respective will and trust documents.

The district court's judgment frustrates the donative intent of testators who, through bequest or trust, donated funds to the Association to be administered by the Association. The basic principle behind trusts and estates is that a person may do what he or she wishes with his or her money. *Schwarzkopf v. Am. Heart Asso.*, 541 So. 2d 1348, 1349 (Fla. Dist. Ct. App. 1989) ("[T]he most fundamental principle of the law of trusts and estates: that, so long as no illegality is involved, anyone may do with his money as he wishes.") Similarly, under New Mexico law, "[t]he function of the court is to effect the testator's intent to the greatest extent possible within the bounds of the law." *Seymour v. Davis (In re Estate of Seymour)*, 1979-NMSC-069, ¶ 19, 93 N.M. 328, 600 P.2d 274. "If a provision in a will is in unambiguous language and reasonably susceptible to but one meaning which is consistent with all other provisions of the will, that meaning must prevail, and a different intention cannot be established by resort to rules of construction." *Id.*

The evidence introduced at trial demonstrates that the language in the will and trust documents is clear and unambiguous. The Last Will, and Testament of John S. Bell clearly and unambiguously states that one quarter of Mr. Bell's remaining estate will be given to the New Mexico Military Institute Alumni Association. See Ex. HN, Last Will and Testament of John S. Bell, pgs. 56-60. The will and codicil of Ernest Klein unambiguously states that "[t]wenty five thousand dollars is to be given to the New Mexico Military Alumni Association to be added to the scholarship fund already in place." Ex. HN, Will and Codicil of Ernest Bernard Klein, pgs. 89-128. The will documents are clear and unambiguous in their gifts to the Association.

A district court has no authority to alter the terms of a decedent's will, even if there is evidence that there is a more cost effective and efficient means of operation. *Nat'l City Bank v. N. Ill. Univ.*, 353 Ill. App. 3d 282, 291, 288 Ill. Dec. 765, 773, 818 N.E.2d 453, 461 (2004) (holding that a testator's intent to have a 50 year scholarship trust was to be given full effect, regardless of a more cost effective way to administer the scholarship funds.)

In *Nat'l City Bank* and *Schwarzkopf*, the courts upheld the testators original trust devises in spite of evidence that the trust could be managed in a more efficient and cost effective manner. *Nat'l City Bank*, 353 Ill. App. 3d 282, 291, *Schwarzkopf*, 541 So. 2d 1348, 1349. *Nat'l City Bank* is illustrative, in that it deals with a donative trust to award certain scholarship dollars to several colleges, and establishes a scholarship committee to meet those ends. 353 Ill. App. 3d at 284. The scholarship committee attempted to modify the terms of the trust in order to save certain tax liabilities and generally make the trust function more efficiently. *Id.* at 286. The court found that even though the proposed amendments would possibly save the trust expenses and be more efficient to operate, it would alter the original intent of the donor and was therefore improper. *Id.* at 289-290.

The last will and testament of John S. Bell explicitly devises one quarter of Mr. Bell's remaining estate to the New Mexico Military Institute Alumni Association. Ex. HN, pg. 56-59. The Godfrey Trust has explicit instructions that the funds are to be "held, administered and distributed by said Association as hereinafter provided." Ex. HN, pg. 75. The Application for Probate of Will of Ernest Bernard Klein states "[t]he

will named no state, governmental agency of state, or other charitable organization as a devisee. The Codicil names New Mexico Military Institute Alumni Association, an educational and charitable organization, as a devisee." Ex. HN, pg. 91. The codicil to the will states that twenty five thousand dollars will be "given to the NMMI Alumni Association to be added to the scholarship in place." Ex. HN, pg. 127.

In New Mexico, a court must attempt to give effect to the grantors wishes. *Cable v. Wells Fargo Bank N.M., N.A. (In re Cable Family Tr.)*, 2010-NMSC-017, ¶ 11, 148 N.M. 127. The district court's decision in this case defeats the wishes of the specific bequests noted above, and other gifts found throughout the Associations scholarship accounts.

The Institute has also argued that the Association may no longer support NMMI because there is no longer an MOA between the parties, and that the Association could no longer award scholarships in line with the donor's intent. At trial the Institute called Lieutenant Sonja Rodriguez to testify about the process of awarding financial aid scholarships at NMMI in an attempt to demonstrate that the Association would no longer be able to administer its own scholarships. Lieutenant Rodriguez testified that the Association had historically taken part in

meeting with the scholarship committee to award the scholarships it controlled. TR vol IV, pg. 100, ln: 1-16. She further testified that there were at least two other organizations that awarded scholarships but were not a part of the scholarship committee and do not have an MOA with the Institute. TR vol IV, pg. 126, ln: 10-25, pg. 127, ln: 1-6. On cross examination, Lieutenant Rodriguez admitted that it was still possible for the Association, or cadets and their families to get the information needed to apply for scholarships held by the Association. TR vol IV, pg. 123, ln: 15-23.

As the court in *Nat'l City Bank* ruled, a donor's intent may not be changed simply because there is a more efficient or expedient way to administer the trust. This rule accords with New Mexico law which requires that a court give effect to the donor's original intent. *Seymour*, 1979-NMSC-069, ¶ 19.

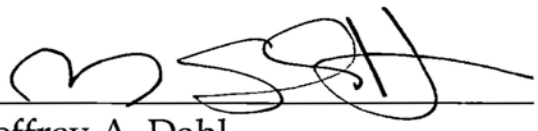
The district court's order improperly interferes with the donor's intent about the distribution and administration of their bequests. The Association respectfully requests that this Court reverse the constructive trust ordered by the district court, and order the immediate return of the Association's funds.

IV. CONCLUSION

The Association respectfully requests that the Court reverse the judgment entered by the district court, and order the immediate return of the funds which were transferred to the NMMI Foundation pursuant to the district court's order.

Respectfully submitted,

KELEHER & McLEOD, P.A.

By: 

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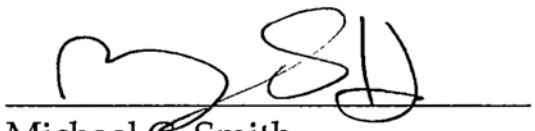

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