ORIGINAL

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



NEW MEXICO MILITARY INSTITUTE,

Plaintiff-Appellee,

vs.

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

Defendant-Appellant.

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

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## APPELLANT'S REPLY BRIEF

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## ORAL ARGUMENT REQUESTED

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## I. INTRODUCTION

The New Mexico Military Institute Alumni Association Inc., (the "Association") respectfully submits this reply brief to respond to the arguments addressed in New Mexico Military Institute's (the "Institute") Answer Brief.

NMMI's assertion that this "Case is about the Association's failure, as a terminated agent, to account and return property to NMMI, as the principal, following the parties separation" is revisionist history at best. *See* Answer, pg. 1. The Complaint in this case describes the nature of the case, and a brief review of that document will show that NMMI alleged a multitude of financial wrongs committed by the Association, which NMMI used as grounds to terminate the MOA between the parties. [RP 00001-00069.] Once those allegations were completely disproven at trial, NMMI switched course, post-trial, to assert that the MOA was terminable at will. [RP 2769-2772.] This case is about the desire NMMI to take the property of the Association by whatever means necessary.

NMMI also argues in its introduction that the Association would be unjustly enriched were it allowed to retain its funds. *See* Answer, pg. 1. The unchallenged and undisputed evidence at trial showed that the Association

continued to award scholarships to cadets and support the cadets and NMMI, in spite of NMMI's interference. What this case is truly about is NMMI's desire to eliminate the independent alumni voice at the school and take control of the funds belonging to that voice.

### A. NMMI Has Failed To Show Any Injury Or Provide Any Support For The Constructive Trust Order By The District Court.

NMMI asserts that it was injured by the Association failing to transfer funds in its possession to NMMI. *See* Answer Brief, pg. 37. NMMI has failed to provide this Court with any citation in the record to an injury in fact suffered by them and caused by the Association. Instead, NMMI resorts to citation to the Restatement of Agency in an effort to support the district court's decision. What it has not done is show any evidence of injury in fact in the record. Further, the Association had a duty to the donors who explicitly gave funds to the Association to manage, to honor those requests. Without any breach of fiduciary duty or any evidence that the Association misused the funds entrusted to it, there is no injury to NMMI.

NMMI has failed to provide this court with any citation to the record that demonstrates that it suffered any injury in fact. *See* Answer Brief, pg. 35-40. NMMI variously claims that the Association's failure to give to NMMI

the funds which were donated to the Association is an injury. It is not. NMMI alleged a number of injuries in its complaint, each and every one was disproven at trial. [RP 01764-01782.] NMMI also attempts to argue that the injury of which it complains is the funds spent by the Association in defending the lawsuit brought by NMMI. This can also not support an injury in fact. "[T]he party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 19, 144 N.M. 471.

The district court specifically held that "at all times material, the Association's investment accounts were secure and earning a reasonable return on investment. [RP 01775, ¶91.] As noted above and in the Association's Brief in Chief, all of the allegations of wrongdoing were disproven at trial. The undisputed testimony at trial was that the Association was still awarding scholarships in spite of obstruction from NMMI. 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. NMMI has not directed this Court to any evidence introduced at trial to challenge these findings.

NMMI continues to rely on the premise that despite each of NMMI's factual allegations being disproven at trial, it can simply demand the transfer of funds from an independent 501(c)(3) corporation because it desires them. NMMI's entire Answer Brief argues that this Court should uphold the district court's ruling because of a broad and vague finding of agency, that the court itself admitted it could not properly define.

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

Due to NMMI's failure to provide this Court with any evidence of an injury in fact, the district courts imposition of a constructive trust over the Association's funds must be reversed.

**B. There Was No Evidence Introduced At Trial That The MOA Was Terminable At Will.**

NMMI argues that the MOA was terminable at will as a matter of law. *See* Answer Brief, pg. 29. What NMMI fails to demonstrate to this Court to is any testimony or evidence to support that legal conclusion. As the record

clearly reflects, the parties both read and understood the contract as being terminable only for cause. This is supported by the pleadings leading up to trial and the complete record of the trial itself. It is also supported by NMMI's post trial requested findings and conclusions. [RP 01704-01745.] Specifically, NMMI requested findings of fact that the 2012 MOA was negotiated by the parties, [RP 01716, ¶89] and that as part of the negotiation, a cure provision was added to the 2012 MOA, where the 2001 MOA was terminable without case. [RP 01716-17, ¶¶91, 92]. A thorough review of NMMI's requested Findings and Conclusions demonstrates that it believed that the MOA was terminable only for cause, and argued that it in fact terminated the agreement for cause. [RP 01704-01745.]

If NMMI had believed that the MOA was terminable at will, it was required to have brought that to the attention of the Association and the district court at trial so the parties could have litigated any possible ambiguity in the MOA. In New Mexico, courts have "abandoned the four-corners standard in recognition of the difficulty of ascribing meaning and content to terms and expressions in the absence of contextual understanding." *Benz v. Town Ctr. Land*, LLC, 2013-NMCA-111, ¶ 29, 314 P.3d 688 (internal quotations omitted). "Even if the language of the contract

appears to be clear and unambiguous, "a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance," in order to decide whether the meaning of a term or expression contained in the agreement is actually unclear. *Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 11, 114 N.M. 778.

NMMI has provided no citation to any evidence in the record, other than the document itself, to demonstrate that the MOA between the parties was terminable at will. In light of how NMMI pled and prosecuted its case at trial, there is no evidence of the understanding of the parties. What the court may review is the conduct of the parties in relation to that contract.

The construction of the contract "as evidenced by their conduct and practices, is entitled to great weight, if not the controlling weight", in ascertaining their intention and their understanding of the contract. *Schultz & Lindsay Constr. Co. v. State*, 1972-NMSC-013, ¶ 5, 83 N.M. 534. The court went on to say that the conduct of the parties was the most compelling in trying to resolve ambiguities in the contract. *Id.* It is clear that based on the Judge's first Findings and Conclusions, it was determined that the contract could only be terminated for cause. [RP 01781-82, ¶¶ 23-25.] The district

court further held that the Association had not breached the contract, and therefore it remained in full force and effect. *Id.*

This Court may also look at the conduct of the parties in its effort to determine if the contract was terminable at will as a matter of law. A review of the entire record of this case from the initial complaint through trial and for nearly a year after trial, show that NMMI believed that the MOA was only terminable for cause, and it is on that basis that the case was tried.

NMMI cites *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶ 19, 106 N.M. 726 for the proposition that an agency contract is terminable at will. A closer look at that case shows that the court determined that the contract was unambiguous and the language allowed for termination without cause by either party. Here, the only evidence of the contract between the parties pertained directly to termination for cause. The language of the contract is clear that it could only be terminated for cause. Ex. CE. If there was any ambiguity surrounding the termination clause, or had it been susceptible to another meaning, the district court would have required evidence to support that understanding, including the expectation of the parties.

NMMI also cites *Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 2002-NMSC-004, ¶ 23, 131 N.M. 607 for the proposition that contracts are terminable at will, however, Trujillo deals with at-will employment, and an alleged implied contract. It has nothing to do with the written contract at issue in this suit. Trujillo could only argue that he had an implied contract for continued employment. *Id.*, ¶24. Here, there is a contractual provision that states that the contract can only be terminated for cause and provides a cure period. MOA. Ex. CE.

NMMI argues that there was testimony regarding the termination of the MOA at will, specifically, that Mr. Bouchier testified that the MOA was terminable at will. NMMI is correct However, Mr. Bouchier was testifying about the previous, 2001 MOA, which was in effect until the 2012 MOA was entered. *See* Answer Brief, pg. 30, *see also* Ex. G. In fact, the 2001 MOA is arguably terminable at will, but it has no bearing on the matter in question as it was replaced by the 2012 MOA which is the subject of this litigation. When Mr. Bouchier testified, he was asked about the MOA that was in effect in 2011 when he became a member of the Association Board of Directors. Mr. Bouchier was first asked if he knew that there was an existing MOA at the time he was elected to the board in 2011. *See* TR vol III, pg. 157, ln: 8-20; pg.

158, ln: 22-25. Mr. Bouchier responded that he did not know about the current MOA when he was elected, but learned of the 2001 MOA sometime later in January of 2012, months before the MOA which is the subject of this litigation was executed by the parties. *See* TR vol III, pg. 159, ln: 1-13. When he testified that be believed that either party could terminate the MOA, he was being asked about and referring to the 2001 MOA, not the MOA at issue. *Id.*

In fact the change from the 2001 MOA being terminable at will to the 2012 MOA being terminable for cause was one of the concessions made by NMMI in negotiating the MOA that eventually became the subject of this suit. Though NMMI failed to address it in its Answer brief, there was testimony concerning the change from at-will to for cause termination. While Mr. Pieczentkowski was being cross examined, Mr. Olsen asked "Okay. Now let me ask you this: There was in fact, and you already testified to it, a cure provision that was put in the MOA that was adopted in March of 2012. That's correct, is it not?" *See* TR vol IV, pg. 44, ln: 2-5. To which Mr. Pieczentkowski answered, "Yes, They—I asked for two cures, and evidently they put in one." *See* TR vol IV, pg. 44, ln: 6-7. Mr. Olsen continued, "And the MOA that existed prior to this didn't have any cure provisions; isn't that right?" *See* TR

vol IV, pg. 44, ln: 8-9. Mr. Pieczentkowski answered, "That's correct." *See* TR vol IV, pg. 44, ln: 10.

The 2012 MOA which is the subject of this suit, and the basis for NMMI terminating the relationship between the parties, is terminable only for cause as demonstrated by the MOA itself, and the testimony elicited by NMMI's attorney during trial. The testimony cited by NMMI in its answer brief regarding the prior 2001 MOA, either by mistake or as an effort to mislead the court, is only relevant in that it demonstrates that the operative MOA was changed to allow termination only for cause.

There is no evidence in the record to support the district court's conclusion that the MOA is terminable at will, therefore the district court's imposition of a constructive trust must be reversed.

**C. The Parties Written Separation Apart From The MOA Does Not Support NMMI's Verdict In The District Court.**

NMMI again argues that the district court's broad agency finding supports the termination between the parties, in spite of the more limited and explicit contractual relationship willingly entered into and negotiated by both parties. [RP 01767 ¶ 20].The district court specifically held that the MOA between the parties was bargained for, was not illusory or

unconscionable or a contract of adhesion. [RP 01780 ¶¶ 9, 10.] The district court also found that the "2012 MOA is a valid and enforceable contract between NMMI and the Association." [RP 01780 ¶ 11.]

New Mexico contract law requires that courts enforce contractual obligations as written. *United Props. Ltd. Co. v. Walgreen Props., Inc.*, 2003-NMCA-140, ¶ *12*, 134 N.M. 725, *quoting Nearburg v. Yates Petro. Corp.*, 1997-NMCA-069, *123 N.M. 526.* This presumption is especially strong in cases such as this where the contractual language is clear, and there is no suggestion that the terms of the contract are unconscionable. *Id.*

The MOA between NMMI and the Association is clear and the district court specifically found that it was not unconscionable. [RP 01780 ¶ 10.] The court must therefore enforce the terms of the contract.

> Parties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits. When a contract was freely entered into by parties negotiating at arm's length, the duty of the courts is ordinarily to enforce the terms of the contract which the parties made for themselves. Although a contract may be declared void where it is unconscionable and oppressive in its terms, nevertheless, the fact that some of the terms of the agreement resulted in a hard bargain or subjected a party to exposure of substantial risk, does not render a contract unconscionable where it was negotiated at arm's length, and absent an affirmative showing of mistake, fraud or illegality. A court should thus not interfere with the bargain reached by the parties unless the court concludes that the policy favoring freedom of contract ought to give way to one of the well-defined

equitable exceptions, such as unconscionability, mistake, fraud, or illegality.

*United Props. Ltd. Co. v. Walgreen Props., Inc.*, 2003-NMCA-140, 134 N.M. 725, *quoting Nearburg v. Yates Petro. Corp.*, 1997-NMCA-069, ¶ 31, 123 N.M. 526.

The parties' relationship is governed by the 2012 MOA. To allow the relationship between the parties to be terminated in clear contradiction to the contract between the parties would violate New Mexico law in giving contractual relationships as agreed to by the parties. *Walgreen Props., Inc.*, 2003-NMCA-140, ¶ 12.

Finding the relationship between the parties terminable in spite of the contractual agreement would be acutely unfair in this instance, as that argument was not raised or argued at trial. "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.

Even assuming for the sake of argument that the parties' relationship could be severed in violation of the valid contract between

the parties, it still fails to provide the legal basis to impose a constructive trust over the Associations funds absent seem fiduciary breach or some unjust enrichment. "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.) NMMI has not provided this Court with any citation to the record that demonstrates that the Association is retaining any of the scholarship funds it is charged with administering or otherwise breaching a fiduciary duty. In fact, the district court found the opposite to be true. [RP 01775, ¶¶85, 91.] The district court also concluded that as a matter of law, the Association had properly managed the corporate affairs of the Association. [RP 01781, ¶22.] These findings and conclusions have not been changed by any subsequent order of the district court and are undisturbed.

Absent a breach of fiduciary duty, there are no legal grounds to support the transfer of the Association's funds.

### D. The District Court Erred In Finding Sufficient Control To Support An Agency Relationship Between The Association And NMMI.

NMMI ignores the Association's argument in regards to the district court's agency ruling. In its brief in chief, the Association specifically challenged the district court's agency finding based on the lack of evidence of control by NMMI over the Association. In its Answer Brief, NMMI agrees that in order for an agency relationship to exist, the principal must exert control over the agent. *W. Elec. Co. v. N.M. Bureau of Revenue*, 1976-NMCA-047, ¶ 12, 90 N.M. 164, *See* Answer Brief, pg. 20.

Instead of addressing the Association's argument on a lack of control, NMMI instead continues to rely on general evidence of the parties close working relationship. The sole reference to the record NMMI makes to demonstrate control is the MOA itself and it makes it in a footnote. *See* Answer Brief, pg. 26, fn. 14. The MOA does not demonstrate control; it is the contract that governs the relationship between the parties. The affirmative covenants set forth the obligations of the Association and NMMI under the contract.

The Association presented evidence from the record that show that the Association was an independent entity, governed by a board of directors,

and managed by an executive secretary. 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.

There is also no reference to the record to show that NMMI exerted any control over any of the affirmative covenants that the Association was tasked with providing, including such endeavors as printing the Sally Port magazine, a large and expensive undertaking. *See* Ex. CE, Art. II, 2.1.

The legal principal of agency covers a wide range of relationships. *See e.g. Montgomery Cty. v. Microvote Corp.*, CIVIL ACTION No. 97-6331, 2000 U.S. Dist. LEXIS 4021, (E.D. Pa. Mar. 31, 2000). In order to determine what type of agency relationship is at issue, a court must examine the evidence of control. *Id.*

The district courts broad agency finding cannot be maintained in light of the lack of control of the Association by NMMI and the lack of evidence regarding the relationship between the parties in accomplishing the Association's tasks.

The agency finding is not supported by substantial evidence and must be reversed.

### E. Transferring The Association's Funds To NMMI Violates The Donor's Intent, And New Mexico Testamentary Law.

NMMI continues to completely ignore the unchallenged evidence introduced at trial regarding the donations received by the Association. The evidence showed that in a large number of cases, the funds were not solicited at all, but given to the Association with the specific intent that the Association would administer the funds. *See* Ex. HN. The documentary evidence contained in the scholarship documents themselves also supports the Association's position that the funds were given directly to the Association, in will bequests and trust documents, to be administered by them. *Id.*

NMMI points to no evidence in the record regarding any specific instances where a donor testified that it was contacted by the Association, and a scholarship was solicited. *See* Answer Brief, pg. 40-44. As argued in its Brief in Chief, the only testimony regarding the intent of a donor in establishing a scholarship with the Association was Marshall Pieczentkowski. He testified that the Association should be the entity to administer the scholarship, because the funds were given directly to the Association. *See* Brief in Chief, pg. 29.

NMMI cites to the Restatement (Third) of Trusts § 66 for the proposition that a court may modify a trust "if the modification or deviation will further the purposes of the trust." NMMI only argues that it is the proper party to administer the trust, and that NMMI's administration would be more efficient. That is not evidence of furthering the purposes of the trust, in fact a trust may not be changed simply for efficiency sake. *See 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.) NMMI has submitted no evidence that the modification of the trust funds held by the Association will further the interests of the trust.

The district court's imposition of a constructive trust over the Association's funds violates the donor's intent and New Mexico testamentary law, and must be reversed.

## 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, and remand this case to the district court to enter judgment in accordance with the evidence adduced at trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Chief was mailed to the following individuals by first-class mail on May 5, 2017:

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