

IN THE NEW MEXICO COURT OF APPEALS

NO. 32,092

BTU BLOCK & CONCRETE, INC.,
a New Mexico corporation,

Plaintiffs-Appellees,

vs.

TONY C. ORTEGA,,

Defendant-Appellant.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

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ANSWER BRIEF

**Appeal from the Fourth Judicial District
County of San Miguel
The Honorable Eugenio S. Mathis, Presiding
Cause No. D-0412-CV-02006-00315**

Respectfully Submitted:

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ORAL ARGUMENT IS REQUESTED.

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STATEMENT OF RULE 12-313 PAGE/WORD COUNT COMPLIANCE:

This Brief is shorter than the 35 pages permitted. Counsel used NeoOffice Writer with a proportionally spaced Times New Roman typeface. The body of the document consists of 4,902 words total.

Nature of the Case:

This matter resolved the claim by Plaintiff-Appellee BTU Block & Concrete, Inc. (BTU) against Defendant-Appellant Tony C. Ortega (Ortega) for quiet title and adverse possession, trespass, declaratory judgment, and abatement of a private nuisance, concerning land in San Miguel County, New Mexico.

Response to Appellant's Factual Presentation:

Ortega's Brief in Chief does not provide the Court with a recitation of the evidence that supports the decision reached by the District Court; rather, Ortega sets forth the evidence he argues would support a decision in his favor. *See Hourigan v. Cassidy*, 2001-NMCA-085, ¶ 18, 131 N.M. 141, 33 P.3d 891; *citing Martinez v. Southwest Landfills, Inc.*, 115 N.M. 181, 185-86, 848 P.2d 1108, 1112-13 (Ct.App.1993) (discussing the policy rationale for the briefing requirement in the context of whole record review of an agency decision). This Court requires presentation of the fact-finder's view of the facts; in this case, the evidence that supports the District Court's decision in favor of BTU on its adverse possession claim. Properly regarded, the facts adduced at the bench trial dispense with Ortega's argument's on appeal.

It appears that Ortega did not designate any exhibits tendered at the bench trial. *See* Rule 12-212(A) NMRA (providing that “[a] designation of depositions

and exhibits that are documents, maps, charts, photographs, recordings, videotapes or the like, shall be made by the appellant within fifteen (15) days of the assignment of the case to the general calendar); *and see Williams v. Bd. of County Comm'rs*, 1998-NMCA-090, ¶ 10, 125 N.M. 445, 963 P.2d 522 (noting that appellant has responsibility to provide adequate record for appellate Court's review). Ortega did not subsequently file a notice of non-designation (see amendments to Rule 12-212 effective August 1, 2012) and BTU did not file a designation of additional exhibits or documentary evidence.

The testimony and references to exhibits reflected on the CD transcripts of the bench trial below establishes that the District Court's decision was based in all respects upon sufficient evidence, and resulted from a proper application of the law to the facts. However, BTU requests that the record on appeal be supplemented for this Court's review prior to entry of any opinion by this Court reversing the decision below. *See* Rule 12-212(C) (providing that this Court may, upon its own motion or upon motion of any party and for good cause shown, order or allow additional exhibits to be forwarded to the Court).

The Disputed Parcels

The litigation concerned two plots of land— Tract 1 and Tract 2— which are described as follows:

TRACT I

Commencing at a highway right-of-way marker being station 2986+00 along the westerly right-of-way line of Interstate Highway 25 within the City of Las Vegas, New Mexico; thence $S21^{\circ}34'12''W$, 572.20 feet to point marking northeasterly corner of Lot 8 of T.J.S. Industrial Subdivision No. 1 and point of beginning; thence $S13^{\circ}31'59''W$, 460.62 feet to a point marking the southeasterly corner of this tract; thence $N77^{\circ}21'35''W$, 188.76 feet to a point; thence $N76^{\circ}42'34''W$, 249.64 feet to a point; thence $N76^{\circ}54'14''W$, 148.74 feet to a point marking the southwesterly corner of this tract; thence $N13^{\circ}02'31''E$, 545.22 feet along the easterly right-of-way line of the A.T.&S.F. Railroad to a point; thence $S77^{\circ}06'38''E$, 209.41 feet to a point; thence $N12^{\circ}47'26''E$, 73.92 feet to a point; thence $N13^{\circ}25'00''E$, 133.82 feet to a point; thence $N76^{\circ}47'06''W$, 208.80 feet to a point; thence $N13^{\circ}02'48''E$, 757.16 feet along the easterly right-of-way line of the A.T.& S.F. Railroad to a point marking the northwesterly corner of this tract; thence $S76^{\circ}57'19''E$, 598.86 feet to a point marking the northeasterly corner of this tract; thence $S13^{\circ}31'55''W$, 484.03 feet to a point; thence $S13^{\circ}31'59''W$, 566.58 feet to the point of beginning, containing 19.579 acres, more or less.

TRACT II

A strip of land lying immediately east of and adjacent to Tract I being approximately 80 feet wide from east to west and 1500 feet in length from north to south.

[RP 2]

Ortega's Answer to the Complaint did not dispute BTU's claim of title to Tract I, but disputed BTU's claim of title to Tract II. [RP 26] In the middle of the trial, during presentation of the defense case, Ortega moved to amend his Answer to

include a challenge to BTU's claims regarding Tract I. [Tr. 11/28/2007, 3:38:19 – 3:46:05] The motion was granted over BTU's objection. [*Id.*]

BTU's Color of Title

BTU presented evidence that it purchased the land from the previous owner, T. Brown Construction, in 1983, after which a warranty deed showing the transfer of title was incorrectly filed without a property description. [Tr. 11/28/2007, 9:55:34 – 9:57:00; 10:20:46 – 10:23:39; 2:3:55ff] Exhibit A to the deed – which contained the legal description of the tracts being conveyed – was inadvertently omitted when the warranty deed was filed with the San Miguel County Clerk's office in 1983. [Tr. 11/29/2007, 10:26:51 – 10:29:23; RP 137] The deed was re-recorded, with the metes and bounds description included, in 1992. [Tr. 11/29/2007, 10:26:51 – 10:29:23; RP 137]

BTU presented evidence of its color of title in testimony from Edward (“Ted”) Winston, a professional land surveyor since 1973, first licensed as such in 1979, and who testified as an expert in this matter. [Tr. 11/28/2007, 9:48:30 – 9:50:05]. Mr. Winston identified and reconciled several surveys concerning the land, and identified the area of the BTU property. [*Id.* at 9:53:20] Mr. Winston also identified a warranty deed [*referencing* Plaintiff's Exhibit #1] conveying the property identified in Plaintiff's Exhibit #13 from T. Brown Construction, Inc. to

BTU. [Tr. 11/28/2007, 9:55:34; *referencing* Plaintiff's Exhibit #9] T. Brown Construction was the grantor in possession, having received title in 1981 from Saueressig. [Tr. 11/29/2007 9:30:17 – 9:35:41; *referencing* Plaintiff's Exhibit #14] Saueressig had obtained a decree of quiet title in 1976. [Tr. 11/29/2007 9:124:56 – 9:19:18; 9:45:08 – 9:51:21; *referencing* Plaintiff's Exhibits #24 and #25]

Regarding the element of payment of taxes, BTU proffered the testimony of San Miguel County Assessor Elaine Estrada. [Tr. 11/28/2007, 10:14:45 and 11/29/2007, 10:52:33] Ms. Estrada testified that the Assessor's Office records showed BTU to be the owner of the land in question for taxing purposes. [*Id.* 10:20:46 – 10:33:41]

BTU proffered the testimony of San Miguel County Treasurer Alfonso Ortiz. [Tr. 10:39:40] Mr. Ortiz testified to BTU's payment of taxes, specifically *referencing* Plaintiff's Exhibit #5, which Mr. Ortiz testified established that BTU had paid taxes going back to 1992 (which was as far back as the records went). [Tr. 11/28/2007, 10:41:29 – 10:44:26] Mr. Ortiz confirmed that BTU had paid taxes on the property on an annual basis; he noted that, since taxes for the present year cannot be paid until taxes for the previous year have been satisfied, the records showing payment by BTU as of 1992 establishes payment for the preceding years. [*Id.* at 10:43:21]

Carol Estrada, a sixteen year employee of BTU, testified about her observations of BTU's use of the property over the years, including for parking and storage for the BTU business. [*Id.* at 10:58:38 – 11:14:38] No other use of the property had ever been made than by BTU and its associates. [*Id.*]

Wayne Sonchar, BTU's Treasurer and one of its principal owners, testified that he was involved in the purchase of the land from T. Brown from the start. [*Id.* at 1:39:42 – 1:44:33] Mr. Sonchar testified that he always believed the ownership of the lands included Tract II – the land between the railroad right of way and I-25. [*Id.*; 2:44:45 – 2:45:52]

Mr. Sonchar testified about the open, notorious, exclusive and continuous use BTU had made of the disputed tract through the years, including use for the storage of concrete blocks, parking for employees and visitors, and as access for visitors and customers. [*Id.* at 1:49:35 to 2:05:10 and 2:46:52 – 2:49:15] Mr. Sonchar testified about his good faith payment of taxes in accordance with bills from the county treasurer on the property since BTU took over ownership. [*Id.* 2:14:24 – 2:16:05 and 2:34:54 – 2:36:16] The county treasurer confirmed payment of taxes by BTU. [Tr. 11/28/2007, 10:41:29 – 10:44:26]

Proceedings Before and Disposition by the District Court:

The evidence outlined above was heard by Judge Eugenio Mathis in a bench trial that lasted one and one half days. [Tr. 11/28/2007 – 11/29/2007] Following the trial, each party submitted proposed findings of fact and conclusions of law. [RP 119 – 129 (Ortega) and RP 136 – 141 (BTU)] The District Court found that BTU had acquired title through a warranty deed from T. Brown Construction, Inc., which was re-recorded to reflect the legal description. [RP 178] The District Court found that, when it acquired title in 1983, BTU “believed in good faith that the warranty deed from Brown transferred all of the lands” from the railroad to I-25, including both Tract 1 and Tract 2. [RP 178]

The District Court found that, “[i]mmediately upon acquiring Tract 1 in 1983, [BTU] began to use Tract 1 and a portion of Tract 2 as its site for the manufacturing of concrete and the sale of concrete block and bulk materials, and has done so continuously since 1983 to the present.” [RP 178] The District Court noted that no fences separated Tract 1 from Tract 2. [RP 178]

As to Ortega's claims, the District Court found – based on the evidence adduced at trial – that Ortega acquired Tract 2 in 1998, but did not pay taxes on Tract 2 until October 2007. [*Id.*; see Tr. 11/28/2007, 10:26:17 – 10:30:39 (testimony of assessor Estrada)] The District Court expressly found that BTU's use

and occupancy of Tract 2 was “never questioned or disputed by Defendant until 2005”. [RP 179] The District Court then expressly rejected any requested findings that are contrary or inconsistent with the Court's findings of fact. [RP 179]

Based on these findings of fact, which were supported by the evidence adduced at trial, the District Court concluded that BTU's record title to Tract 1 was uncontested, and that BTU had proven all of the elements of adverse possession over Tract 2 by clear and convincing evidence. [RP 179] The District Court entered its Final Judgment and Decree of quiet title on July 15, 2008. [RP 195]

Ortega filed a Motion for Reconsideration, which attached excerpts from an uncertified transcript, purportedly of the proceedings at trial. [RP 200-240] The Motion for Reconsideration challenged the District Court's decision on the basis of the conflicting evidence. [*Id.*]

BTU responded in opposition to the Motion for Reconsideration [RP 245-255], noting the conflicting evidence [RP 245], and attaching exhibits that had been adduced at trial in support of the District Court's findings [RP 249-255, referencing Plaintiff's trial exhibits #2, #3, and #5]. On September 9, 2008, the District Court denied Defendant's Motion for Reconsideration. [RP 256]

Ortega filed an initial appeal [RP 257 – 261], which was eventually dismissed for lack of a final order on BTU's claims for declaratory judgment and to

abate a private nuisance. [RP 338-340] The parties subsequently stipulated to dismissal of the remaining claims. [RP 411] This appeal followed.

ANSWERING ARGUMENT AND AUTHORITY:

**ISSUE 1: The District Court Properly Resolved the
Conflicting Evidence Regarding Color of Title for Tract 2 In
Favor of BTU.**

Standard of Review:

Where evidence in an adverse possession claim is conflicting, and there is substantial evidence to support the trial court's decision, that decision will not be set aside on appeal. *Smith v. Borradaile*, 30 N.M. 62, 227 P. 602 (1922). In a quiet title action, the New Mexico Supreme Court has stated: "This Court will not disturb findings, weigh evidence, resolve conflicts or substitute its judgment as to the credibility of witnesses where evidence substantially supports findings of fact and conclusions of law of the [district] court." *Sternloff v. Hughes*, 91 N.M. 604, 608, 577 P.2d 1250, 1254 (1978). "Substantial evidence" is defined as "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). In reviewing a district court's order that includes findings of fact and conclusions of law, an appellate Court defers to the findings of fact and reviews the

conclusions of law *de novo*. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000–NMSC–033, ¶ 7, 129 N.M. 698, 12 P.3d 960.

Preservation:

BTU raised briefed and preserved its arguments in its verified Complaint for Quiet Title, Declaratory Judgment, Trespass, and to Abate a Private Nuisance [RP 1-9], in its Proposed Findings of Fact and Conclusions of Law [RP 136-141]; in Plaintiff B.T.U. Block & Concrete, Inc's Closing Argument [RP 142 – 149]; in Plaintiff's Response to Motion [for] Reconsideration [RP 245-255]; and in testimony and arguments at trial on November 28 & 29, 2007. *See also Cordova v. World Fin. Corp. of N.M.*, 2009–NMSC–021, ¶ 18, 146 N.M. 256, 208 P.3d 901 (noting that, “[g]enerally, an appellee has no duty to preserve issues for review and may advance any ground for affirmance on appeal.”).

Argument and Authority:

a. The Conflicting Evidence of Color of Title Was Resolved in Favor of BTU.

A party claiming ownership of land by adverse possession must prove by clear and convincing evidence continuous adverse possession for ten years under color of title, in good faith, and payment of taxes on the property during these years. *Marquez v. Padilla*, 77 N.M. 620, 624, 426 P.2d 593, 596 (1967); *see also* NMSA 1978, § 37–1–22. Where evidence in an adverse possession claim is

conflicting, and there is substantial evidence to support the trial court's decision, that decision will not be set aside on appeal. *Smith v. Borradaile*, 30 N.M. 62, 227

P. 602 (1922). The New Mexico Supreme Court has stated:

The establishment of title by adverse possession is said to be based on the theory or presumption that the owner has abandoned the land to the adverse possessor. It has also been said that the doctrine of maturing title by adverse possession under color of title is that where one, in the exercise of ordinary care, is induced to enter upon and improve land because he has some written evidence of title that would naturally induce a layman to believe that it vested in him what it professed to pass, it would be unjust to enforce the right of another who brings no action until the end of the statutory period. [T]he doctrine of adverse possession * * * protects those who honestly enter and hold possession of land in the full belief that it is their own.

Brylinski v. Cooper, 95 N.M. 580, 583–84, 624 P.2d 522, 525–26 (1981). In New Mexico, adverse possession requires color of title supported by a writing or conveyance of some kind and payment of taxes during the period of possession. NMSA 1978, § 37–1–22; *Currier v. Gonzales*, 78 N.M. 541, 434 P.2d 66 (1967); *Platt v. Martinez*, 90 N.M. 323, 324, 563 P.2d 586, 587 (1977); *see also In re Estate of Duran*, 2003–NMSC–008, ¶ 20, 133 N.M. 553, 66 P.3d 326 (observing that a void deed will satisfy the color of title requirement as a claimant under a valid deed “would hardly need to rely on the doctrine of adverse possession”).

BTU presented ample evidence of its claim to title based upon the chain of title from T. Brown Construction, in 1983, when a warranty deed showing the

transfer of title was incorrectly filed without a property description. [Tr. 11/28/2007, 9:55:34 – 9:57:00; 10:20:46 – 10:23:39; 2:3:55ff] Exhibit A to the deed – which contained the legal description of the tracts being conveyed – was inadvertently omitted when the warranty deed was filed with the San Miguel County Clerk's office in connection with the sale. [Tr. 11/29/2007, 10:26:51 – 10:29:23; RP 137] To correct this omission, in 1992, the deed was re-recorded, with the metes and bounds description included. [Tr. 11/29/2007, 10:26:51 – 10:29:23; RP 137]

BTU presented evidence of its color of title in testimony from Edward (“Ted”) Winston, a professional land surveyor since 1973, first licensed as such in 1979, and who testified as an expert in this matter. [Tr. 11/28/2007, 9:48:30 – 9:50:05]. Mr. Winston identified and reconciled several surveys concerning the land, and identified the area of the BTU property. [*Id.* at 9:53:20] Mr. Winston also identified a Warranty Deed [*referencing* Plaintiff's Exhibit #1] conveying the property identified in Plaintiff's Exhibit #13 from T. Brown Construction, Inc. to BTU. [Tr. 11/28/2007, 9:55:34; *referencing* Plaintiff's Exhibit #9] T. Brown Construction was the grantor in possession, having received title in 1981 from Saueressig. [Tr. 11/29/2007 9:30:17 – 9:35:41; *referencing* Plaintiff's Exhibit #14] Saueressig had obtained a decree of quiet title in 1976. [Tr. 11/29/2007 9:124:56 –

9:19:18; 9:45:08 – 9:51:21; *referencing* Plaintiff's Exhibits #24 and #25] BTU offered sufficient documentary and testimonial evidence that it relied upon the deed in claiming title to the land encompassed by both Tract I and Tract II.

BTU also offered evidence of its good faith reliance upon the warranty deed. Good faith, in the context of color of title, is “freedom from a design to defraud the person having the better title,” and it does not require the claimant to be ignorant of other claims to the property. *Thurmond v. Espalin*, 50 N.M. 109, 115, 171 P.2d 325, 329 (1946). Bad faith concerns the methods used in the acquisition of such instrument, not the relative appearance of validity of the instrument demonstrating color of title. *In re Estate of Duran*, 2003–NMSC–008, ¶ 21, The District Court specifically found that BTU had believed in good faith in the validity of the warranty deed, and generally rejected any requested finding of bad faith. [RP 178-179]; *see also Palmer v. Denver & Rio Grande W. R.R. Co.*, 75 N.M. 737, 740, 410 P.2d 956, 958 (1966) (noting that the color of title of one claiming by adverse possession would be presumed to have been acquired in good faith).

The evidence regarding color of title was conflicting, and both sides presented evidence of their competing claims based upon deeds during the bench trial. [Tr. 11/28/2007 to 11/29/2007] The District Court's finding that BTU

operated in good faith was supported by substantial evidence, and should be affirmed.

b. The District Court's Findings Encompassed Color of Title.

Findings are to be liberally construed to support the judgment and are sufficient if a fair consideration of them, taken together, justifies the judgment. *Robertson v. Carmel Builders Real Estate*, 2004 -NMCA- 056, ¶ 26, 135 N.M. 641, 92 P.3d 65; *Kincaid v. WEK Drilling Co.*, 109 N.M. 480, 486, 786 P.2d 1214, 1220 (Ct.App.1989). Generally, a District Court is not required to adopt evidentiary findings—only findings of ultimate fact. *Jaramillo v. Jaramillo*, 103 N.M. 145, 148, 703 P.2d 922, 925 (Ct.App.1985). Where the District Court does not specifically state which facts are related to each of the elements, the claim is established if the Court defines a “general nexus between the findings of fact and conclusions of law” sufficient to establish that the Court found a particular claim to have been proved. *Robertson*, 2004 -NMCA- 056, ¶ 26, citing *Register v. Roberson Constr. Co., Inc.* 106 N.M. 243, 246, 741 P.2d 1364, 1367 (1987).

Here, based on the evidence presented below and the District Court's findings of fact, the District Court properly found validity in BTU's good faith reliance upon a chain of title. There was evidence that the recording of the deed in 1983 omitted information, and that the attempt was made to correct this in 1992.

[Tr. 11/28/2007, 9:55:34 – 9:57:00; 10:20:46 – 10:23:39; 2:3:55ff] Exhibit A to the deed – which contained the legal description of the tracts being conveyed – was inadvertently omitted when the warranty deed was filed with the San Miguel County Clerk's office in connection with the sale. [Tr. 11/29/2007, 10:26:51 – 10:29:23; RP 137] To correct this omission, in 1992, the deed was re-recorded, with the metes and bounds description included. [Tr. 11/29/2007, 10:26:51 – 10:29:23; RP 137] The strong evidence was that BTU had occupied the lands subject to dispute continuously since 1983, and had rejected any other claims to or use of either Tract. The District Court's findings, taken together, establish an unequivocal determination that BTU's claim to adverse possession had been established.

Moreover, even assuming that the District Court's failure to use the words “color of title” in its findings of fact somehow creates ambiguity, doubt, or a deficient record of what the District Court intended, the remedy is not outright reversal of the District Court's determination in favor of BTU, but remand to the District Court to amend its findings. *See Varela v. Arizona Pub. Serv.*, 109 N.M. 306, 309, 784 P.2d 1049, 1052 (Ct.App.1989) (noting that, where doubt or ambiguity obscures the basis for the judge's ruling, or where the findings are insufficient to permit the reviewing court to properly decide the issues raised on

appeal, justice may require that the cause be remanded for adoption of additional findings and conclusions so as to clarify a determinative issue); *Corlett v. Smith*, 106 N.M. 207, 210, 740 P.2d 1191, 1195 (Ct.App.1987) (remanding for adoption of specific findings of fact and conclusions of law).

Based upon a review of the findings, there can be no reasonable doubt that the District Court – after hearing the conflicting evidence – intended to and did rule in favor of BTU on its adverse possession claim, and found the element of color of title established. [RP 177-179] The District Court's decision is supported by substantial evidence and should be affirmed.

**ISSUE 2: The Conflicting Evidence of Payment of Taxes
Was Properly Resolved in Favor of BTU.**

Standard of Review:

The fact that Plaintiffs were required to produce clear and convincing evidence to persuade the trier of fact, does not alter the principle that it is for the finder of fact, rather than the reviewing court, to weigh conflicting evidence and decide where the truth lies. *Quarles v. Arcega*, 114 N.M. 502, 513, 841 P.2d 550, 561 (Ct.App. 1992); *see also In re R.W.*, 108 N.M. 332, 335, 772 P.2d 366, 369 (Ct.App.1989). Although a greater quantum of evidence is required of Plaintiffs than if only a preponderance of evidence had been required, “the appellate court's

primary task is to determine if the decision reached at trial is justifiable on the facts and the law.” *Id.* at 336, 772 P.2d at 370.

Where evidence in an adverse possession claim is conflicting, and there is substantial evidence to support the trial court's decision, that decision will not be set aside on appeal. *Smith v. Borradaile*, 30 N.M. 62, 227 P. 602 (1922). In a quiet title action, the New Mexico Supreme Court has stated: “This Court will not disturb findings, weigh evidence, resolve conflicts or substitute its judgment as to the credibility of witnesses where evidence substantially supports findings of fact and conclusions of law of the [district] court.” *Sternloff v. Hughes*, 91 N.M. 604, 608, 577 P.2d 1250, 1254 (1978). “[T]he issue on appeal is not whether there is sufficient evidence to support an alternative finding, but whether the court's determinations were supported.” *Pucci Distrib. Co. v. Nellos*, 110 N.M. 374, 376, 796 P.2d 595, 597 (1990).

Preservation:

BTU raised briefed and preserved its arguments in its verified Complaint for Quiet Title, Declaratory Judgment, Trespass, and to Abate a Private Nuisance [RP 1-9], in its Proposed Findings of Fact and Conclusions of Law [RP 136-141]; in Plaintiff B.T.U. Block & Concrete, Inc's Closing Argument [RP 142 – 149]; in Plaintiff's Response to Motion [for] Reconsideration [RP 245-255]; and in

testimony and arguments at trial on November 28 & 29, 2007. *See also Cordova v. World Fin. Corp. of N.M.*, 2009–NMSC–021, ¶ 18, 146 N.M. 256, 208 P.3d 901 (noting that, “[g]enerally, an appellee has no duty to preserve issues for review and may advance any ground for affirmance on appeal.”).

Argument and Authority:

In *Pratt v. Parker*, 57 N.M. 103, 255 P.2d 311 (1953), the Supreme Court noted that payment in good faith of taxes assessed by the taxing authorities is sufficient, even where the assessment on which the payment is made erroneously describes the land intended to be assessed. *Id.* at 107-108, 255 P.2d at 313-14. A tax sale was thus averted due to the defense of payment in good faith. *Id.* The same rationale should apply in the instant case. Where BTU occupied and used the lands in question, and paid the taxes as billed by the authorities, the presumption must arise that the payment of taxes requirement of NMSA 1978, Section 37-1-22 was met. *See also* Wood, H.A., 132 A.L.R. 216 *Annotation: Sufficiency of compliance, as regards payment of taxes, with limitation statute requiring payment of taxes as a condition of adverse possession* (noting that, if the taxes as to the particular land claimed adversely are in fact paid, the fact that such land has not been accurately described in the assessment or in the tax receipts will not affect the efficacy of the payment as a compliance with the statute).

San Miguel County Assessor Elaine Estrada testified that the Assessor's Office records showed BTU to be the owner of the land in question for taxing purposes. [Tr. 11/28/2007, 10:20:46 - 10:33:41 and 11/29/2007, 10:52:33ff] At most, there was conflict regarding the proper protocols for determination of tax assessments based on surveys and deeds proffered. Clearing up the controversy regarding the competing claims between the parties is precisely why a quiet title action was necessary in the instant case.

BTU proffered the testimony of San Miguel County Treasurer Alfonso Ortiz. [Tr. 10:39:40] Mr. Ortiz confirmed BTU's payment of taxes, specifically referencing Plaintiff's Exhibit #5, which established that BTU had paid taxes going back to 1992 (which was as far back as the records went). [Tr. 11/28/2007, 10:41:29 – 10:44:26] Mr. Ortiz confirmed that BTU had paid taxes on the property on an annual basis; he noted that, since taxes for the present year cannot be paid until taxes for the previous year have been satisfied, the records showing payment by BTU as of 1992 establishes payment for the preceding years. [Id. at 10:43:21]

Substantial evidence supported the District Court's decision that BTU had met all of the elements required to establish its adverse possession claim, and was entitled to quiet title. This Court should affirm the District Court's decision.

ISSUE 3: Any Conflicting Claim of Title to Tract 1 Was Properly Resolved by the District Court in Favor of BTU.

Standard of Review:

Where evidence in an adverse possession claim is conflicting, and there is substantial evidence to support the trial court's decision, that decision will not be set aside on appeal. *Smith v. Borradaile*, 30 N.M. 62, 227 P. 602 (1922).

“Substantial evidence” is defined as “such relevant evidence that a reasonable mind would find adequate to support a conclusion.” *Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). The reviewing Court will not disturb findings, weigh evidence, resolve conflicts or substitute its judgment as to the credibility of witnesses where evidence substantially supports findings of fact and conclusions of law of the District Court.” *Sternloff v. Hughes*, 91 N.M. 604, 608, 577 P.2d 1250, 1254 (1978).

Preservation:

BTU raised briefed and preserved its arguments in its verified Complaint for Quiet Title, Declaratory Judgment, Trespass, and to Abate a Private Nuisance [RP 1-9], in its Proposed Findings of Fact and Conclusions of Law [RP 136-141]; in Plaintiff B.T.U. Block & Concrete, Inc's Closing Argument [RP 142 – 149]; in Plaintiff's Response to Motion [for] Reconsideration [RP 245-255]; and in testimony and arguments at trial on November 28 & 29, 2007. *See also Cordova v.*

World Fin. Corp. of N.M., 2009–NMSC–021, ¶ 18, 146 N.M. 256, 208 P.3d 901

(noting that, “[g]enerally, an appellee has no duty to preserve issues for review and may advance any ground for affirmance on appeal.”).

Argument and Authority:

The evidence related to BTU's claims to adverse possession of Tract I and Tract II was overlapping. The intent and purpose of BTU's quiet title claim, and the proofs offered at trial, encompassed both Tracts. The evidence at trial was that, since 1983, BTU had openly, visibly, exclusively, and hostilely, occupied both Tract I and Tract II on a continuous basis since 1983. There was evidence that BTU paid taxes as they were notified of the assessment for both Tracts.

Indeed, BTU's occupation of Tract I was so actual, visible, exclusive, hostile, and continuous that Ortega did not even dispute BTU's claim to Tract I in his Answer [RP 26], and did not articulate or attempt to prove a claim against Tract I until the presentation of the defense case at the bench trial. [Tr. 11/28/2007, 3:38:19 – 3:46:05] The evidence supported the District Court's decision that BTU had occupied Tract I and properly paid taxes, and was entitled to judgment.

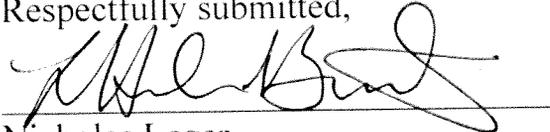
ORAL ARGUMENT IS REQUESTED.

The Court may benefit from an oral presentation by counsel of the issues presented herein.

CONCLUSION:

The District Court's findings of fact and conclusions of law were supported as to both tracts at issue. The District Court's decision that BTU established its claim to adverse possession must be affirmed in all respects.

Respectfully submitted,



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I certify that a true copy of the foregoing was mailed via first class mail, postage prepaid, this 1st day of November 2012 as follows:

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