IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CECILIA TAFOYA and
CHARLES TAFOYA,

Plaintiffs-Appellants,

v.

Ct. App. No. 34,465
Santa Fe County
(No. D-101-CV-2011-01707)

PAMELA MORRISON and
LEON MORRISON,

Defendants-Appellees.

ANSWER BRIEF

Civil Appeal from the First Judicial District Court, County of Santa Fe
The Honorable Raymond Z. Ortiz, District Judge

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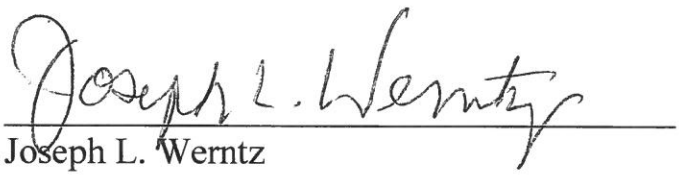
STATEMENT OF COMPLIANCE

The body of this Brief in Chief does not exceed the 35 page limit set forth in Rule 12-213(F)(3) NMRA.

As required by Rule 12-312(G) NMRA, I certify that this Brief uses a proportionally spaced typeface and that the body of the Brief contains 7,035 words, which is less than the 11,000 word maximum permitted by Rule 12-312(F)(3). This Brief was prepared using Microsoft Office Word, and the word count was obtained from that program.



Joseph L. Werntz

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SUMMARY OF PROCEEDINGS

This action is the latest edition in the seemingly unending saga of the Tafoyas' attempt to claim an easement over the driveway located on property owned by Pamela and Leon Morrison located at 444 Camino De Las Animas ("Lot 1"). The driveway runs south along the west boundary of Lot 1. According to Cecilia Tafoya, her father, Alex Armijo, created the driveway when he built his house in 1960 on the rear portion of Lot 1. **(2 RP 298 ¶ 4).**

The 1993 Family Lot Split Plat.

In 1993, Alex Armijo subdivided his property and created Lot 2 as shown on the Family Lot Split plat recorded August 13, 1993 ("1993 Plat"). **(1 RP 24).** Mr. Armijo reserved an easement over the west 5' of Lot 2 for access and utilities to his residence on Lot 1. The Tafoyas acknowledge correctly in their Brief in Chief that the 1993 Plat did not grant an easement over the driveway for the benefit of Lot 2, and no other document was ever recorded that purported to grant an easement over the driveway to Lot 2. **(BIC 5).**

The 2001 Lot Consolidation Plat.

The Lot Consolidation Plat affected Lot 1 in two significant ways. The Plat consolidated Tract A, located immediately to the west of Lot 1, with Lot 1. A note on the Plat recites the driveway width was reduced from 20' to 15'. **(1 RP 25-26).** As explained in the Brief in Chief, the Tafoya house when built encroached eight

inches into the 20' driveway width and created an impediment for the Estate to sell Lot 1. **(BIC 8-10).** This impediment was resolved by obtaining a variance from the City of Santa Fe that reduced the driveway width to 15 feet. There is no wording on the Lot Consolidation Plat that indicates Lot 2 is benefited by an access easement over the reduced width of the driveway.

The Probate Proceeding.

After Alex Armijo passed, a probate proceeding was filed on June 2, 1997 in Santa Fe County. **(2 RP 331 ¶ 5).** It is the probate proceeding or the "Prior Action" the Morrisons claim bars the Tafoyas' claim of an express or implied easement. **(2 RP 331-332; 3 RP 510).**

Five years after the probate action was filed, the Estate filed a motion to disinherit Cecilia Tafoya. As the Brief in Chief notes, the driveway was the primary cause of the conflict that arose between the Estate and Cecilia Tafoya. **(BIC 8).** In describing the flavor of the conflict with Cecilia Tafoya during the probate proceeding, the Court of Appeals in *Redman-Tafoya v. Armijo,* 2006-NMCA-011, 138 N.M. 836, 126 P.3d 1200 (the ***"Opinion"***), upon review of the record and transcript of proceedings, observed:

> We think it relatively helpful in tasting the flavor of this litigation to note a number of circumstances reflecting Tafoya's demonstrably agitative and contentious attitude during this near five-year saga. Tafoya, who in one of her many letters stated that she had worked with attorneys in New Mexico and elsewhere for twenty-eight years, went

> through six separate lawyers or law firms. She considered the first four to have been dismissed for "good cause." Further not including the twenty-one court filed documents authored by Tafoya that were stricken from the probate record, the exhibits in this case contain twenty-three letters that Tafoya personally wrote to the City, Armijo, Armijo's lawyers, and others dating from 1998 to 2002, several of which are lengthy. She also filed a good number of pro se documents in two litigations....In October 2002, Tafoya requested the judge in the quiet title action [James Hall] to voluntarily recuse himself for allegedly humiliating her and her husband, implying that she and her husband were liars, ignoring everything they presented to him, denying a request for a continuance, causing Tafoya great stress, and showing that he would not be a fair and impartial judge.

***Opinion* ¶ 29.**

The Brief in Chief suggests the scope of the driveway controversy was limited to the encroachment of the Tafoyas' house and a fence into the 20-foot driveway. **(BIC 10).** But that was not the only controversy. Whether Tafoya had an easement over the driveway to access the rear of Lot 2 was a primary issue early in the process. Cecilia Tafoya requested that the Lot Consolidation Plat show an easement over the driveway to the rear of her property as part of a variance application that Tafoya and the Estate jointly submitted to the City of Santa Fe. **(1 RP 218; 2 RP 304 ¶ 17).**

Several of the filings in the Prior Action on behalf of Cecilia Tafoya show she advanced her claim of an easement over the driveway on multiple occasions before and during the evidentiary hearing:

- Tafoya motion for summary judgment – undisputed material facts. **(2 RP 355 ¶ 16; 2 RP 357 ¶ 20)**

- The affidavit of Lidia Morales in support of Tafoya's summary judgment motion **(2 RP 492-493 ¶¶ 8-9)**

- Tafoya's opening statement **(3 RP 566)**

- Tafoya's trial testimony **(3 RP 637-638)**

- Tafoya's requested findings of fact **(2 RP 370 ¶¶ 17, 21; 2 RP 373 ¶ 45)**

- Tafoya's requested conclusion of law **(2 RP 375 ¶ 5)**

- Tafoya's closing argument **(2 RP 379-381)**

And in this action, Cecilia Tafoya reiterated her claim of an easement over the driveway was an issue in the probate proceeding. **(2 RP 449-451 ¶¶ 26, 30-32)**

The record shows Cecilia Tafoya anticipated litigation on the easement issue well before the evidentiary hearing, even to the point of having prepared a complaint setting forth the facts upon which she based her easement claim. **(1 RP 197; 1 RP 208).**

The easement issue was tried with Tafoya's consent at the evidentiary hearing. **(3 RP 566).** Tafoya and her probate counsel made conscious litigation decisions on what exhibits to introduce and testimony to elicit. For example, in her pleadings and summary judgment submittals in this action, the Tafoyas have attached a writing dated August 3, 1993 signed by Alex Armijo, which they contend in this action was

an express written grant of easement. **(1 RP 86; 2 RP 428; 2 RP 447 ¶¶ 7-8; RP 478).**

Ms. Tafoya abandoned any claim for express easement in the Prior Action. Tafoya and her probate counsel made the strategic decision not to introduce the August 3, 1993 writing as an exhibit at the evidentiary hearing. **(2 RP 450-451 ¶¶ 30-32).** During her testimony at the evidentiary hearing, Ms. Tafoya testified she had no writing that showed she had an easement across the driveway. **(3 RP 648:11 to 649:16; 3 RP 652:7 to 653:15).** Instead, Tafoya pursued only an implied easement claim at the evidentiary hearing.

Several witnesses were examined on the easement issue at the evidentiary hearing by Tafoya's counsel, including Estate attorney, Jack Burton **(3 RP 569, 592)**, real estate broker, Roman Maes **(3 RP 582)**, the Estate's personal representative, Anthony Armijo **(3 RP 602, 614)**, the contractor who built the Tafoya house, Steve Pike, **(3 RP 617)**, former assistant city attorney, Lidia Morales **(3 RP 622)**, and Cecilia Tafoya **(3 RP 627).**

After evidence was elicited through these witnesses on the easement issue, counsel for Cecilia Tafoya asked the court not to rule on the easement issue to which counsel for the Estate objected. **(3 RP 638-639).** The Tafoyas suggest that the probate court agreed that the easement issue could not be decided without the Morrisons. **(BIC 15).** The record indicates otherwise. **(3 RP 640)** ("I will attempt

to resolve this issue"). The probate court noted that depending on how it ruled, the Morrisons very well could have a claim against the Estate. **(3 RP 640).**

The district court's rulings on summary judgment in this action.

The district court ruled on two separate summary judgment motions filed by the Morrisons – the first ruling was on dismissal of the Tafoyas' easement claims **(2 RP 535, 713)**, and the second ruling on the Morrisons' request to quiet title. **(2 Supp. RP 1119).** In its first summary judgment ruling, the district court dismissed the Tafoyas' express and implied easement claims with prejudice. **(3 RP 535).** The district court later amended this ruling to include dismissal with prejudice of the easement by necessity claim. **(3 RP 713).** The Tafoyas' prescriptive easement claim was dismissed without prejudice. **(3 RP 535).**

The second summary judgment ruling was based on the Morrisons' amended counterclaim to quiet title filed April 8, 2014. **(2 Supp. RP 991).** The Tafoyas did not file a responsive pleading. The Morrisons filed for summary judgment on October 24, 2014. **(2 Supp. RP 995).** The Tafoyas filed a response in opposition. **(2 Supp. RP 1047).** After the Morrisons filed a reply on November 21, 2014 **(2 Supp. RP 1071)**, the Tafoyas submitted a further lengthy response that attached many of the documents submitted on a multiple of prior occasions. **(2 Supp. RP 1085-1110).** The district granted summary judgment, which included a dismissal of the prescriptive easement claim. **(2 Supp. RP 1119).**

ARGUMENT

Standard of Review: The Morrisons agree that the standard of review is de novo. Whether the elements of claim preclusion are satisfied is a legal question, which this Court can review de novo. *Potter v. Pierce*, 2015-NMSC-002, ¶ 8, 342 P.3d 54 (citation omitted). Similarly, this Court can determine de novo whether collateral estoppel applies. *Ideal v. Burlington Res. Oil & Gas Co. LP,* 2010-NMSC-022, ¶ 10, 148 N.M. 228, 233 P.3d 362. Where facts are not in dispute, this Court can review a grant of summary judgment de novo. *Zamora v. St. Vincent Hosp.,* 2014-NMSC-035, ¶ 9, 335 P.3d 1243. This Court can determine de novo whether the law of the case doctrine applies. *Alba v. Hayden*, 2010-NMCA-037, ¶7, 148 N.M. 465, 237 P.3d 767.

I. The trial court correctly determined that Tafoyas' express and implied easement claims were barred by res judicata.

The purpose of res judicata is well-established in New Mexico law. It is designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions and encourage reliance on adjudication. *Turner v. First New Mexico Bank*, 2015-NMCA-068, ¶ 6, 352 P.3d 661. As discussed in detail below, that purpose is upheld by denying this appeal.

A claim that reasonably could have, and should have, been brought as part of the earlier proceeding is barred as long as the litigant had a full and fair opportunity

to litigate the claim. *Potter v. Pierce*, 2015-NMSC-002, ¶ 10. The type of proceeding is not determinative of whether res judicata applies. *Id.* ¶ 10.

As noted in *Deflon v. Sawyers,* 2006-NMSC-025, ¶4, 139 N.M. 637, 137 P.3d 577, determining whether parties are in privity for purposes of res judicata requires a case-by-case analysis. There is no definition of privity that can be applied automatically in all cases involving the doctrines of res judicata and collateral estoppel. *St. Louis Baptist Temple v. Federal Deposit Ins. Corp.,* 605 F.2d 1169, 1174 (10th Cir. 1979). Privity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same. *Id. St. Louis Baptist* further explained that parties are in privity where they represent the same legal right or where they have a "mutual or successive relationship to the same rights of property." *Id.* at 1175.

The concept of privity was clarified and expanded in *Lowell Staats Mining Co. v. Philadelphia Electric Co.,* 878 F.2d 1271 (10th Cir. 1989). "Privity has been held to exist in the following relationships: concurrent relationship to the same property right (i.e. trustee and beneficiary); successive relationship to the same property or right (i.e. seller or buyer); or representation of the interests of the same person." *Id.* at 1275.

Tafoya challenges two requirements for res judicata – whether the parties to this action and the Prior Action are the same or in privity, and whether the causes of

action are different. Tafoya does not contest the remaining two requirements. **(BIC 2).**

A. <u>The intent of the privity requirement is satisfied because Cecilia Tafoya was a party to the Prior Action</u>.

The Tafoyas' argument that that there is no privity between the Morrisons and the Estate is flawed because the argument turns the privity requirement on its head. Privity, as required to establish res judicata, is intended to protect the interests of a plaintiff in response to the defense of res judicata in which a defendant asserts that the plaintiff is bound by a judgment issued in a prior action to which the plaintiff was not a party. *See Wheeler v. Beachcroft*, 320 Conn. 146, 166-168, ___ A.3d ____ (2016) ("When res judicata is asserted against a nonparty to a prior action, privity must be established to ensure that that the nonparty's rights were sufficiently protected in the action."). If privity is established between the plaintiff and a party to the prior action, res judicata prevents the plaintiff from re-litigating the claim that was adjudicated in the prior action. As the Court of Appeals stated in *Deflon*: "Res judicata prevents *a party or its privies* from repeatedly suing another for the same cause of action." *Deflon,* 2006-NMSC-025, ¶4 (emphasis added). In this case, the defense of res judicata was asserted by the Morrisons (i.e., the defendants), who argued that res judicata prevented the Tafoyas (i.e., the plaintiffs) from re-litigating the claims that were decided in the Prior Action. The intent of the privity requirement, and the interests to be served by it, are necessarily satisfied because

Cecilia Tafoya was a party to the Prior Action and so the Tafoyas' rights, relative to the outcome of the Prior Action, are sufficiently protected. For the reasons explained below, the privity requirement is satisfied, in any event, as between the Morrisons and the Estate.

B. <u>There was privity between the Estate and the Morrisons</u>.

One of the covenants given in the warranty deed from the Estate to the Morrisons was a covenant against encumbrances. *See* NMSA 1978, § 47-1-37 (1995). A grantor warrants under this covenant that no third party has an easement that diminishes the right of the grantee. *Tabet Lumber Co. v. Golightly*, 1969-NMSC-091, ¶ 6, 80 N.M. 442, 457 P.2d 374 (easements generally constitute encumbrances within the meaning of a covenant against encumbrances) (citation omitted).

Deed covenants are a matter of contract and may be structured as desired by the grantor and grantee. Powell on Real Property, § 81.A.06 [1] p.81A-113 (2015). The covenant against encumbrances is a present covenant that is breached at the time of conveyance, if at all. Powell on Real Property, § 81.A.06 [2] [c] p.81A-120 (2015). For the Estate to have breached the covenant against encumbrances, the Tafoyas had to prove an express or implied easement over the driveway before the conveyance to the Morrisons.

One effect of a deed covenant is to impose a duty on the grantor to defend an action where a third party claims an encumbrance against the land conveyed, in this case an easement over the driveway. *See* § 47-1-37. That is what occurred here. The Estate successfully defended against the Tafoya easement claim in the probate action.

The Tafoyas overlook the full nature of privity that exists between a grantor and grantee. A grantor and its immediate grantee have privity in contract and privity in estate. The Brief in Chief correctly notes that privity of estate ends once title to the land has transferred. But privity of contract remains between the grantor and grantee based on the present covenants contained in the warranty deed. The record shows that the Tafoyas' express and implied easement claims predated the conveyance of Lot 1 to the Morrisons.

The Morrisons and the Estate had the same interest in seeing that those claims were defeated – the Morrisons because they bargained for a conveyance free of encumbrances and the Estate because it warranted that Lot 1 was free of encumbrances. In fact, it was the identity of interests between the Estate and Morrison that caused the Estate to proceed with the adjudication of Tafoya's easement claims in the Prior Action. Counsel for the Estate stated at the evidentiary hearing in the Prior Action that the easement claims should be decided because

Cecilia Tafoya would sue the Morrisons, if these claims were not resolved. **(2 RP 562).**

The Brief in Chief suggests a conflict existed in the position between the Morrisons and the Estate. There was never a conflict in interest on Tafoyas' express and implied easement claims. The fact that the Tafoya easement claim was litigated after the conveyance to the Morrison is immaterial. A grantor and grantee under a warranty deed are in privity of contract with one another in defending a claim that implicates the covenant against encumbrances regardless of when the claim is raised or litigated.

Tafoyas' reliance on *Bloom v. Hendricks,* 1991-NMSC-005, 111 N.M. 250, 804 P.2d 1069 is inapposite for three reasons. First, *Bloom* concerned a prescriptive easement claim that ripened years after the conveyance to the grantee. There was no prescriptive easement claim litigated in the Prior Action. The district court only dismissed Tafoyas' express and implied easement claims based on res judicata. The district court initially dismissed Tafoyas' prescriptive easement claim without prejudice because it was not ripe.

Second, the grantee in *Bloom successfully* defended the easement claim and then sought reimbursement from a remote grantor, the Hendricks, for litigation costs. The Hendricks were not parties to the lawsuit in which the easement claim was defeated. In dicta, the New Mexico Supreme Court held that the Hendricks, as

predecessors in title, were not subject to the res judicata effect of the decision obtained by the Blooms. That is not the situation here. The Estate, as the Morrisons' grantor, litigated the easement claim in the Prior Action. Moreover, unlike the Hendricks in *Bloom*, Cecilia Tafoya was a party to the Prior Action in which her easement claims were adjudicated. She cannot escape the effect of the outcome in the Prior Action simply because Lot 2 had been transferred to the Morrisons at the time the decision was rendered.

Third, the prescriptive easement claim was dismissed in the Morrisons' second motion for summary judgment because the Tafoyas failed to raise an issue of material fact. The Tafoyas failed to show that their prescriptive easement claim could satisfy all elements of a prescriptive easement as discussed more specifically in Section V below.

A decision on the express and implied easement claims was binding on the Morrisons. *See also Ward v. Davis*, 765 S.W.2d 5 (Ark. 1989) (successor grantee barred by res judicata from re-litigating an issue in a prior quiet title action in which her grantor was a party and had chance to litigate the issue). The factual bases for these claims, if any, arose before the conveyance to the Morrisons. If the Estate failed in its defense of these easement claims, it stood in breach of its warranty covenant against encumbrances. The Morrisons deferred to the Estate and their capable trial counsel to defend the easement claims. Privity in res judicata exists if

a nonparty agrees to be bound by the determination of issues in an action between others or is adequately represented by someone with the same interests who was a party in the earlier suit. *N.M. Consol. Constr., LLC v. City Council of the City of Santa Fe*, 97 F. Supp. 3d 1287, 1307 (D.N.M. 2015) (stating that the Supreme Court of the United States recognizes six exceptions to the general rule against non-party preclusion including when the nonparty agrees to be bound by the determination of issues in an action between others, or was adequately represented by someone with the same interests); *Pelt v. Utah*, 539 F.3d 1271, 1281 (10th Cir. 2008).

The analogy to the Estate as a mere indemnitor ignores the contractual promise a grantor makes when using the phrase "with warranty covenants" in a warranty deed. Under New Mexico law, a grantor is called upon under Section 47-1-37 to "defend ... the grantee ... against the lawful claims and demands of all persons."

Finally, the argument based on *Bloom* that a predecessor in title is not in privity to a successor in title, and the argument based on *Lopez v. Townsend*, 1933-NMSC-045, 37 N.M. 574, 25 P.2d 809 that a grantor under a warranty deed is an indemnitor, were not raised below or in the docketing statement. Issues not raised in the docketing statement and preserved below are not considered on appeal. *See* Rule 12-208(E) NMRA (the docketing statement shall contain a statement of each issue to be presented on appeal); Rule 12-216(A) NMRA (to preserve a question for

review, it must appear that a ruling or decision by the district court was fairly invoked); *State v. Barrera*, 2001-NMCS-014, ¶ 20, 130 N.M. 227, 22 P.3d 1177 (holding that raising an issue in the docketing statement will not preserve it for appeal, if the issue was not raised below).

C. **The causes of action were the same.**

New Mexico uses a transactional approach in analyzing whether the causes of action are the same in both lawsuits. *Potter v. Pierce*, 2015-NMSC-002, ¶ 11. This approach considers all issues that arise out of a common nucleus of operative facts as a single cause of action. *Id., citing Anaya v. City of Albuquerque*, 1996-NMCA-092, ¶ 8, 122, N.M. 326, 924 P.2d 735. The common nucleus of operative facts are identified pragmatically by whether (1) they are related in time, space and origin, (2) taken together, they form a convenient trial unit, and (3) treatment as a single unit conforms to the parties' expectations. *Anaya v. City of Albuquerque,* ¶ 12. "The fundamental determination is the fairness of preclusion under the totality of the circumstances in each case." *Potter v. Pierce*, 2015-NMSC-002, ¶ 16. Underlying the application of the transactional approach to this action is the need to balance whether the Tafoyas are entitled to another bite of the apple on their driveway easement claims with the interests of the Morrisons in bringing repeated litigation to a close.

The record shows the Tafoyas pursued their driveway easement claim before the conveyance to the Morrisons. In late 2000 or early 2001, Cecilia Tafoya joined in the variance application for a reduction of the driveway width. She continued to request that the Estate recognize her driveway easement when the Lot Consolidation Plat was approved in December 2001. She provided discovery on her easement claim. She filed a summary judgment motion that addressed the easement issue. She consented through counsel to have the court decide the issue. She submitted requested findings of fact, conclusions of law and closing argument on the easement issue. She elicited testimony from witnesses at trial on the issue. And when she lost in the probate court, she failed to appeal the ruling on the easement issue. Nor did she appeal or seek to overturn the fact that the district court in the Prior Action permitted her easement claims to be adjudicated in that action.

II. Alternatively, this Court should find that either collateral estoppel or the law of the case doctrine bars the express and implied easement claims.

If the Court disagrees that the elements of res judicata were satisfied, the district court was correct in ruling that the Tafoyas' express and implied easement claims were barred by collateral estoppel. Collateral estoppel, or issue preclusion, bars re-litigation of the same issue if: (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually

litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation. *Ideal v. Burlington Res. Oil & Gas Co. LP,* 2010-NMSC-022, ¶ 10 (citation omitted).

The Tafoyas challenge only whether the express and implied easement claims were actually litigated and determined, and whether the Tafoyas had a full and fair opportunity to litigate the issue in the Prior Action. **(BIC 27).**

A. The express and implied easement claims were actually litigated in the Prior Action.

The Tafoyas argue the sole cause of action in front of the probate court was whether Cecilia Tafoya should be disinherited **(BIC 26)**, and that the easement issues were not actually or necessarily determined. Those arguments ignore that Cecilia Tafoya's probate counsel agreed that the probate court should decide the easement issue. **(3 RP 566).** "When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section." Restatement (Second) of Judgments, § 27 cmt. d (1982).

The Estate's motion to disinherit Cecilia Tafoya was based on her actions, and those of her husband, which interfered with the personal representative's administration of the Estate. ***Opinion* ¶ 23.** Those actions included her prior interference with the sale of Lot 1. ***Opinion* ¶¶ 9-21**. The driveway easement claim was one aspect of the interference. Ms. Tafoya continued to pursue the driveway

easement claim after the conveyance to the Morrisons as shown by the 2003 letters sent to the Morrisons and the Estate's counsel. **(1 RP 196, 208).**

There is no dispute that the probate court entered judgment against Ms. Tafoya on her easement claim. That ruling was not discussed on appeal. The ***Opinion*** reversed the probate court ruling on disinheritance, but not its ruling on the easement claim.

B. The Tafoyas had a full and fair opportunity to litigate her easement claims in the Prior Action.

The Tafoyas argue they were unprepared to litigate the easement claims. The argument ignores the fact that establishing an easement over the driveway was in the forefront of their minds. Probate counsel for Tafoya sent letters to the Morrisons well before the evidentiary hearing seeking their consent to an easement. **(1 RP 196).** Probate counsel also sent a letter to the Estate's attorney demanding their assistance in confirming an easement over the driveway, going as far as having prepared a verified complaint setting forth the basis on which the easement claim was based. **(1 RP 208).**

Cecilia Tafoya responded in the probate action to written discovery claiming an easement over the driveway. **(2 RP 346-347 ¶¶ 1, 2).** She filed a summary judgment on the Estate's motion to revoke her inheritance and as part of her statement of undisputed facts, reiterated that Lot 2 was benefited by an easement over the driveway. **(2 RP 355 ¶ 16, 357 ¶ 20).**

The Tafoyas agreed at the evidentiary hearing to try the easement claim. **(3 RP 566).** They were represented by counsel and given an opportunity to present evidence and argument. Testimony was elicited from several witnesses on the claim. The Tafoyas even made calculated litigation decisions not to use the August 3, 2003 writing signed by Alex Armijo as an exhibit or to offer testimony about it.

After the hearing concluded, the Tafoyas submitted a post-hearing closing brief that included argument that Lot 2 was benefited by a driveway easement. Ms. Tafoya took full advantage of the opportunity she had in the Prior Action to litigate the easement claim.

C. Alternatively, this Court should dismiss the appeal under the law of the case doctrine.

In the ***Opinion***, the Court addressed only one issue on appeal, namely whether Cecilia's conduct or actions constituted a contest of the will in violation of the no-contest clause in the father's will. **(*Opinion* ¶ 45).** The Opinion did not address the probate court decisions that Cecilia had no easement over the driveway or a right to a parking space at the rear of her house, which decisions were made on the merits. A decision on an issue made at one stage of the proceeding is binding precedent in successive stages of the same litigation. *Alba v. Hayden*, 2010-NMCA-037, ¶ 7 (citation omitted).

The probate court rulings on the driveway easement and parking space remained in place after the appellate court reversed the decision and judgment that

disinherited Cecilia Tafoya. And unlike a consent judgment where a judicial determination of the issues raised in an action never occurs, there was a judicial determination of Tafoyas' easement claims in the Prior Action. The Settlement Agreement and Mutual Release did not set aside the probate court decision on the easement and parking space claims. Law of the case applies not only to questions that are expressly or by necessary implication raised and ruled upon in the prior appeal, but also to questions which might have been, but were not raised or presented. *Varney v. Taylor,* 1968-NMSC-189, ¶ 4, 79 N.M. 652, 448 P.2d 164 (citations omitted).

III. Cecilia Tafoya settled and released any claim for an easement across the driveway in the Prior Action.

To settle the Prior Action, Cecilia Tafoya signed a broadly worded Settlement Agreement and Mutual Release dated January 5, 2006 that was intended as "a complete bar to any and every suit, at law or in equity, which ... Tafoya might or could file or assert, now or in the future ... on account of the claims released hereby. **(2 RP 407 ¶ C).** Tafoya specifically released the Estate "from all claims which relate to the issues raised or claims alleged, or which could have been raised, alleged or brought in the Lawsuit." **(2 RP 403 ¶ C).** The Estate and Tafoya intended their settlement and release "to secure a complete mutual release and dismissal with prejudice of any and all claims that were brought or could have been brought" in the Prior Action. **(2 RP 401 ¶ J).**

By signing the Settlement Agreement and Mutual Release, the Tafoyas waived any claim to an express, implied, or prescriptive easement over the driveway. To determine whether a party to a settlement agreement has waived his or her right to a claim, New Mexico courts look at the plain language of the document and the context in which the agreement was made, to determine whether a claim was released. *See Branch v. Chamisa Dev. Corp.*, 2009-NMCA-131, ¶¶ 32-39, 147 N.M. 397, 223 P.3d 942.

New Mexico has a strongly stated public policy favoring the enforcement of settlement agreements, and a compelling basis is required to set them aside. *Builders Contract Interiors, Inc. v. Hi Lo Indus.*, 2006-NMCA-053, ¶ 8, 139 N.M. 508, 134 P.3d 795 (recognizing and enforcing the strong public policy of favoring settlement agreements, such that there must be a compelling basis to set aside a settlement agreement); *see also Smith v. Price's Creameries*, 1982-NMSC-102, ¶ 13, 98 N.M. 541, 650 P.2d 825 (providing that "[e]ach party to a contract has a duty to read and familiarize himself with its contents before he signs and delivers it, and if the contract is plain and unequivocal in its terms, each is ordinarily bound thereby").

Multiple provisions in Settlement Agreement and Mutual Release amplified the broad scope of the claims that the Tafoyas agreed to waive and release. Paragraph 2.A.1 states that Tafoya relinquished "[a]ny and all claims which relate in any way, shape or form to the transactions, occurrences or claims referred to in

the Lawsuit, or result from the issues raised or claims alleged, or which could have been raised or alleged in the Lawsuit." **(2 RP 403).**

Paragraph 3.D of the Settlement Agreement states that the parties intended to come to a complete settlement of all claims that were or could have been brought against each other, including all claims asserted in the Lawsuit. **(2 RP 405).**

Paragraph 5 states it is the intent of the parties that the settlement will forevermore resolve all claims and disputes that were filed or could have been filed in the Lawsuit. **(2 RP 405).**

Paragraph 8.B says the mutual release covers all past, present and future claims, demands, actions and disputes at law or in equity. **(2 RP 407).**

Paragraph 8.D says the mutual release includes "all and any future claims ... not now known to the parties, but which are later developed or discovered, including the effects or consequences of those already known and including all causes of action therefor relating to claims brought or which could have been brought in the Lawsuit." **(2 RP 407).**

The parties intended the mutual release to bind their successors and assigns. Paragraph 8.H provided the Settlement Agreement and Mutual Release was binding upon the successors and assigns of the parties. **(2 RP 408).**

The Morrisons are successors to the Estate of Alex Armijo by virtue of the warranty deed from the Estate that conveyed title to Lot 1. **(2 RP 344).** As such,

they are entitled to benefit of the release signed by Cecilia Tafoya, which not only encompassed the express and implied easement claims, but also "all...future...claims...which may later develop...." **(2 RP 407 ¶ 8D).** This provision includes her prescriptive easement claim.

IV. <u>There is no basis on which the Tafoyas can pursue an easement by necessity claim</u>.

The Tafoyas argue that res judicata and collateral estoppel do not preclude an easement by necessity claim against the Morrisons. **(BIC 34-35).** As discussed in Section I(A) above, privity existed between the Estate and the Morrisons on the express and implied easement claims.

Even without applying res judicata or collateral estoppel, the Tafoyas cannot satisfy the elements of an easement by necessity. To establish an easement by necessity to land under New Mexico law, Plaintiffs must prove (i) unity of title, indicating that the dominant and servient estates were owned as a single unit at the time the tracts were severed, (ii) that as a result of the severance, the dominant estate is cut off from access to and from a public roadway, and (iii) a reasonable necessity for access existed at the time of severance. *Hurlocker v. Medina,* 1994-NMCA-082, ¶ 5, 118 N.M. 30, 878 P.2d 348. Necessity must exist at the time of the severance. *Id.* ¶ 14.

The record shows that the Tafoya's Lot 2 was severed from the remaining property in 1993 when Alex Armijo recorded the Family Transfer Lot Split Plat. **(1**

RP 24). The Lot Split Plat shows at the time of this severance, the dominant estate (Lot 2) had direct access to Camino de Las Animas, and Cecilia Tafoya acknowledged that the Tafoyas use Camino de Las Animas for ingress and egress to and from Lot 2. **(2 RP 446 ¶¶ 5, 7).** Consequently, the Tafoyas cannot satisfy the second element of an easement by necessity.

V. The Tafoyas have no viable claim for prescriptive easement.

The Morrisons agree that the Prior Action has no res judicata or collateral estoppel effect on Tafoyas' prescriptive easement claim. But the prescriptive easement claim is barred by the terms of the Settlement Agreement. (*See* **AB 18-21**).

If the Court disagrees that the Settlement Agreement encompassed the prescriptive easement claim, the Tafoyas lost on that claim before the district court. After the district court dismissed the prescriptive easement claim without prejudice in its July 26, 2012 order, the Morrisons amended their counterclaim to seek quiet title. **(2 Supp. RP 991).** They filed a second motion for summary judgment which in part sought a ruling that the Tafoyas had no claim for a prescriptive easement. **(2 Supp. RP 995).** The Tafoyas failed to make any factual showing in their summary judgment response that would support a prescriptive easement. **(2 Supp. RP 1047).** The district court properly granted summary judgment on the prescriptive easement claim. And the Tafoyas have not asked in their Brief in Chief that this decision be

reversed. *State v. Cearley*, 2004-NMCA-079, ¶ 7, 135 N.M. 710, 92 P.3d 1284 ("[T]he appellant must brief all the issues that he or she wishes the court to review. The docketing statement alone does not provide a basis for review of an issue, and issues listed in the docketing statement but not briefed are deemed abandoned."); *see also State v. Gonzales*, 1991-NMCA-007, ¶ 3, 111 N.M. 590, 808 P.2d 40.

A. The elements necessary for a prescriptive easement did not exist at the time of the Prior Action.

The record does not support a factual basis for the Tafoyas' prescriptive easement claim. To establish a prescriptive easement, Tafoya must show by clear and convincing evidence that all elements of a prescriptive easement are satisfied for a ten year period. *E.g. Maloney v. Wreyford,* 1990-NMCA-124, ¶¶ 7-8, 111 N.M. 221, 804 P.2d 412. The New Mexico Supreme Court clarified the elements required for a prescriptive easement in *Algermissen v. Sutin,* 2003-NMSC-001, 133 N.M. 50, 61 P.3d 176. "[A]n easement by prescription is created by adverse use of land that is open or notorious, and continued without effective interruption for the prescriptive period [of ten years]." *Id.* ¶ 10. "[A]n adverse use is a use made without the consent of the landowner." *Id.* ¶ 11. When "a use has its inception in permission, express or implied, it is stamped with such permissive character and will continue as such until a distinct and positive assertion of a right hostile to the owner is brought home to him by words or acts." *Id.* ¶ 12. (Emphasis omitted) (Internal quotation marks and citation omitted).

"If [use of a road is] permissive in its inception . . . , no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one of an opposite nature ...." *Hester v. Sawyers,* 1937-NMSC-056 ¶ 26, 41 N.M. 497, 71 P.2d 646 (internal quotation marks and citation omitted); *Algermissen v. Sutin,* 2003-NMSC-001 ¶ 12, 133 N.M. 50, 61 P.3d 176. A permissive use no matter how long continued cannot ripen into a prescriptive easement. *Garmond v. Kinney,* 1978-NMSC-043 ¶ 3, 91 N.M. 646, 579 P.2d 178; Bruce & Ely, *Law of Easements and Licenses in Land,* § 5.9, pages 5-23 (2002).

In the Prior Action, the parties did not litigate a prescriptive easement claim, and for good reason. The Tafoyas admitted their use of the driveway was permissive in its inception, and that their use was interrupted on at least two occasions.

The Tafoyas state in their Affidavits in opposition to summary judgment in this action they "had written permission to use the driveway...." **(2 RP 451 ¶ 32; 37; 2 RP 476 ¶¶ 16-18).** Ms. Tafoya's Affidavit further avers that Alex Armijo gave her an express written grant of easement over the driveway. **(2 RP 447 ¶¶ 8-9).** To support this statement, Tafoya relies on an unrecorded document signed by Alex Armijo dated August 2, 1993. This is the same document attached to the Second Amended Complaint that the Tafoyas rely on to claim an express and

implied easement **(1 RP 79 ¶ 6; 1 RP 86 Ex. 3)**; and the same document Tafoya chose not to rely on in the probate action as evidence of an easement. **(AB 4-5).**

Ms. Tafoya testified in the probate proceeding that the personal representative interrupted her use of the driveway in 2001. **(3 RP 632:8-15).** Ms. Tafoya filed findings of fact in the probate proceeding dated October 16, 2003 in which she said the Morrisons were blocking her access to the second parking space in the rear of her property by locking a gate. **(2 RP 373 ¶ 43; 2 RP 373 ¶ 40).**

B. The elements necessary for a prescriptive easement did not exist when the district court decided the Morrisons' summary judgment motions.

The Tafoyas alleged that their use of the driveway was adverse after November 29, 1998. **(BIC 6).** Other than a citation to an allegation in the Second Amended Complaint, there is no evidence in the record to support that allegation. To the contrary, the record shows that Cecilia Tafoya repeatedly argued in the Prior Action that her use of the driveway was permissive and interrupted on at least two occasions.

It is not clear from the Second Amended Complaint when the Tafoyas claim the ten year period of uninterrupted use of the driveway easement may have begun. In their first motion for summary judgment, the Morrison argued the ten year period began no earlier than March 29, 2004 when the probate court entered its Final Judgment. **(2 RP 398).** Given that the Morrisons blocked the Tafoyas from using

the driveway as of October 16, 2003, the earliest the Tafoyas could possibly show continuous and uninterrupted use for ten years would be sometime after October 16, 2013. Therefore, any claim for prescriptive easement was not ripe when the district court granted summary judgment on July 26, 2012.

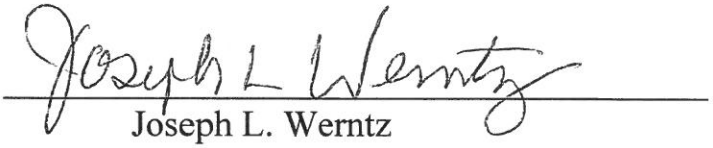
Even assuming the Tafoyas could prove all other elements of a prescriptive easement by clear and convincing evidence, the record below established that the Morrisons interrupted Tafoyas continuous use by erecting a fence in September 2013 that prevented the use of the driveway to the alleged second parking space at the rear of Lot 2. **(2 Supp. RP 1077 ¶¶ 3 and 4).** Based on this undisputed fact, the Tafoyas cannot as a matter of law show uninterrupted use for a ten year period, and thus claim a prescriptive easement. *Jaramillo v. Romero,* No. 32,298, mem. op. at 11 (N.M. Ct. App. Sept. 23, 2013) (non-precedential) (where gate was erected that prevented use of land during the prescriptive period, there was no easement by prescription). In granting the Morrisons' second summary judgment to quiet title, the district court properly ruled that the Tafoyas had no prescriptive easement over the driveway. **(2 Supp. RP 1119 ¶¶ 2 and 3).**

CONCLUSION

The Morrisons ask this Court to affirm the district court's grants of summary judgment and dismiss the Tafoyas' appeal.

Respectfully submitted,

MOSES, DUNN, FARMER & TUTHILL, P.C

By: 
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CERTIFICATE OF SERVICE

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