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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CECILIA TAFOYA AND
CHARLES TAFOYA,

PLAINTIFFS-APPELLANTS,

v.

PAMELA MORRISON AND
LEON MORRISON,

DEFENDANTS-APPELLEES.

CT. APP. NO. 34,465
SANTA FE COUNTY
(D-101-CV-2011-01707)

BRIEF IN CHIEF

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

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TABLE OF CONTENTS

CITATIONS TO TRANSCRIPT OF PROCEEDING

Citations are to the record proper and CD's of argument on motions. They follow the format endorsed by our Supreme Court: The date of the hearing, followed by the abbreviation "**CD**" followed by the time. The record proper is cited to the volume number, followed by the abbreviation "**RP**", followed by the page number.

STATEMENT OF COMPLIANCE

The body of this Brief in Chief exceeds 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 8,944 words, which is less than the 11,000 word maximum permitted by Rule 12-312(F)(3). This Brief was prepared using WordPerfect, Version X3, and the word count was obtained from that program.

Jane B. Yohalem

TABLE OF AUTHORITIES

MISCELLANEOUS AUTHORITY

NATURE OF THE CASE

This action was brought by Cecilia and Charles Tafoya seeking to establish an express, implied by necessity, or prescriptive easement of access to their backyard over the driveway located on land owned by Pamela and Leon Morrison. The Tafoyas' home is located at 446 Camino De Las Animas, Santa Fe, New Mexico ("Lot 2"]. The Morrison residence is located at 444 Camino De Las Animas ["Lot 1") The Morrisons' house is situated behind the Tafoyas' lot on a tract of land which, like the Tafoyas' lot, had once been a single tract owned by Mrs. Tafoya's father, Alex J. Armijo. The 15-foot wide driveway which is the focus of the Tafoya's easement claim runs from Camino De Las Animas, along the west side of the Tafoyas' residence, and then along the west border of their backyard, to the Morrison's residence and beyond to other buildings on the Morrisons' lot.

The Tafoyas seek an easement to use the driveway owned by the Morrisons for ingress and egress to allow them to access their backyard and to the only entrance to their home which is on ground level and accessible to a wheelchair.

Plaintiffs Cecilia and Charles Tafoya appeal from a grant of summary judgment by the district court dismissing all of their claims based on the doctrines of res judicata and collateral estoppel. The district court below decided that the existence of an easement over the Morrisons' driveway had previously been litigated or could

have been litigated by the Tafoyas during a probate court proceeding filed by the Estate of Cecilia Tafoya's father, seeking to revoke Cecilia's inheritance. That claim was ultimately resolved in the Tafoyas' favor by this Court in *Redman-Tafoya v. Armijo,* 2006-NMCA-011, 126 P.3d 1200 (hereinafter ***"Opinion"***).

The Tafoyas' contend in this appeal that the district court erred in its application of the law of both res judicata and collateral estoppel. First, the Morrisons were no longer in privity with the Estate of Alex J. Armijo at the time the Estate filed its Motion to Revoke Inheritance ["the Prior Action"]. Lot 1 had been sold to the Morrisons the year before. Indeed, at the time the proceeding to revoke Cecilia's inheritance was commenced, the Estate's interests in the resolution of the easement issue conflicted with the Morrisons' interests.

Second, the cause of action in the Prior Action and in this action are not the same. The relationship between the easement claims and the issues controlling the revocation of an inheritance is tenuous at best. Moreover, because the owner of the property was not a party to the action, the district court avoided a decision on the easement claims, limiting its findings to the issues relevant to the Motion to Revoke Inheritance. Because there was no privity and the causes of action were different, res judicata does not bar this action.

To the extent the district court relied on collateral estoppel to bar this action, this holding too was in error. Collateral estoppel does not apply where the finding of fact claimed to preclude additional litigation was not both actually and necessary to the judgment in the prior action. Here the findings of fact related to the easement issues are plainly secondary to the issues tried in the Prior Action. Moreover, to the extent those findings were necessary at all to the trial court's reasoning, this Court reversed the trial court's decision, vacated the judgment, and imposed a very different legal standard. The district court's findings were no longer necessary or even relevant to the judgment. Finally, the case was subsequently settled and a stipulated judgment of dismissal with prejudice was entered. It is settled law that a consent judgment cannot support a claim of collateral estoppel in a subsequent action.

For these reasons and additional reasons explored below, this action is not barred by either res judicata or collateral estoppel. The district court's summary judgment decisions barring this action and then quieting title in the Morrisons should be reversed and this case remanded for trial on all of the Tafoyas' claims for an easement.

SUMMARY OF FACTS AND PROCEEDINGS

Background and facts relevant to the merits of the current action to establish an easement.

The driveway at issue in this case was created in 1960 by Cecilia Tafoya's father, Alex J. Armijo, the original owner of both 444 Camino De Las Alamos (Lot 1) and 446 Camino De Las Alamos (Lot 2), the lots now owned by the Morrisons and the Tafoyas respectively. **2 RP 298-99.** Alex Armijo created the driveway as a way to get access to all of his land and, in particular, and to provide access to and from his residence to Camino De Las Animas. ***Id.***

In 1993, Alex Armijo decided to split off a lot from his property (Lot 2) and give that lot to his daughter Cecilia Tafoya. Lot 2 is now known as 446 Camino De Las Animas. **2 RP 330, 446.** At the time, Mr. Armijo was elderly and was becoming increasingly frail. His wife had died a few years earlier and he wanted his daughter, Cecilia, who had been taking care of him, to live nearby. **1 RP 78; 2 RP 446 FOF 2.** In order to subdivide the land to create a lot for Cecilia, he initiated a Family Transfer Lot Split. **2 RP 446 FOF 3; 1 RP 19, 24, 28.** Family Transfer Lot Splits are permitted by City of Santa Fe ordinance. Santa Fe City Code 14-3.7(F). Residents of the City are permitted to subdivide their land using a simplified procedure so long

as each lot created is transferred to a close family member who agrees to live on the land. ***Id.***

In order to create Lot 2 at 446 Camino De Las Animas for Cecilia's home, Alex Armijo hired a surveying firm to prepare a Family Transfer Lot Split Plat. **1 RP 24.** Alex Armijo signed and recorded a Family Transfer Affidavit on August 5, 1993. **1 RP 28.** The plat, showing the new lot, was signed by Alex J. Armijo, and recorded in the County land records on August 13, 1993. **1 RP 24.** The Family Transfer Lot Split Plat shows the driveway at issue in this case running along the west edge of the Tafoyas' lot. It identifies the driveway as "an easement" for access for Lot 1, 444 Camino De Las Animas, although all but five feet of the driveway was located on Lot 1. **1 RP 24.** The plat is silent about whether it intends for Lot 2, the Tafoyas' property, to have an easement for ingress and egress to the rear of their property along that driveway. ***Id.*** Although the plat and affidavit were recorded, Alex Armijo did not record a deed to the new lot. **2 RP 498.** A written easement for Lot 2 over the driveway also was never recorded and the original was lost. **2 RP 447, 478-80.**

Cecilia, with Alex Armijo overseeing the work, built her house on Lot 2, completing the house in 1994. From 1993 on, during the construction and continuing after the completion of the house, both Cecilia Tafoya and Alex Armijo and later Cecilia's husband Charles used the driveway on foot and by vehicle to access the

backyard of the Tafoyas' home. The Tafoya home is located on a steep slope. **2 RP 446 ¶ 5**. The doorway into the backyard is the only way to gain entrance to the home without having to climb a 12-step staircase. **2 RP 446, 451-52, 455-56, 475-76**. The Tafoyas have used their backyard to park their second car and for guest and visitor parking since 1993. **2 RP 447, 475-76**.

Alex Armijo died in May, 1997. **1 RP 25**. Cecilia's brother Anthony Armijo was appointed as the Personal Representative of his father's Estate. **2 RP 447, 384; Opinion,[1] ¶ 6**. The Estate formally deeded Lot 2 to Cecilia and her husband, Charles Tafoya, by a Personal Representative's deed recorded on November 29, 1998. That deed describes the driveway as an "easement" for ingress and egress and utilities for the benefit of Lot 1. **2 RP 330, 343, 498**. The Tafoyas allege that their continued use of the driveway to access their backyard and the back entrance of their home after that date was adverse to the Estate. **1 RP79 ¶ 8**.

The lot retained by Alex Armijo (Lot 1 on the Lot Consolidation Plat, which shows a 15-foot wide driveway to the west of the Tafoyas' property, **(2 RP 345)** was

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[1]As noted above, the term ***Opinion*** is used to refer to the opinion of this Court in *Redman-Tafoya v. Armijo,* 2006-NMCA-011, 126 P.3d 1200, this Courts decision on appeal reversing the district court's decision revoking Cecilia Tafoya's inheritance.

transferred to the Morrisons on December 21, 2001, by warranty deed from the Estate. **2 RP 344.**

The events leading to the "Prior Action".

Following Alex Armijo's death on May 16, 1997, a probate proceeding was filed in Santa Fe County, New Mexico, on June 2, 1997: *In the Matter of the Estate of Alex J. Armijo*, D-101-PB-97-152. **2 RP 331 ¶ 5.**

On November 21, 2002, the Estate filed a motion to disinherit Cecilia Tafoya. ***Opinion* ¶ 23.** On July 15, 2003, Cecilia responded asking the court to summarily deny the Estates' motion to revoke her inheritance. **2 RP 351.** It is this proceeding to revoke her inheritance that the Morrisons identify as the "Prior Action " they claim bars this litigation to establish an easement of access along the Morrisons' driveway for the benefit of Lot 2. **2 RP 331-32.** The Morrisons' motion for summary judgment in this case relies on both the doctrines of res judicata and collateral estoppel. **2 RP 332, 338.**

The undisputed facts about the "Prior Lawsuit" for purposes of summary judgment are reviewed here.

Alex J. Armijo's Last Will and Testament ("the Will") provided that the Personal Representative "immediately take the action necessary to sell his personal

residence and the land" and "that the proceeds received after payment of all expenses of sale be divided equally amongst my [six] children." **2 RP 359, 384.**

In an attempt to forestall conflict among his children, the Will expressly provided that: "the land on which Cecilia has built her home is her sole and separate property and shall not be considered for purposes of determining her equal share of the proceeds of my estate." ***Id.*; 2 RP 448, ¶ 14.** The Will included a general no-contest clause which provided for disinheritance of any beneficiary who contested the Will. The no-contest clause reads as follows:

> [i]f any beneficiary under this Will shall in any manner contest or attack this will or any of its provisions, then in such event, any share or interest in my estate given to such contesting beneficiary under this Will is hereby revoked and shall be disposed of in the same manner provided herein as if such contesting beneficiary had predeceased me.

2 RP 385.

Despite Alex Armijo's desire to avoid conflict among his children and heirs, such conflict arose soon after his death. The primary cause of the conflict was the discovery after Alex Armijo's death, and shortly after Lot 1 was put on the market, that Cecilia's home (placed by the contractor pursuant to Alex Armijo's instructions, **2 RP 384**) encroached eight inches into the 20-foot driveway shown on the Family Transfer Lot Split Plat. **2 RP 385 FOF 19; *Opinion* ¶ 4.** The driveway was also obstructed by a chain link fence constructed years earlier by Alex Armijo. The fence

was located just on the Tafoyas' side of the lot line, approximately five feet within the 20-feet platted for the driveway. **2 RP 385 FOF 19.** In other words, fifteen feet of the platted driveway was on the strip owned by Lot 1 and the remaining 5 feet, where the obstructions were located, was on Lot 2, the Tafoyas' lot. ***Id.***

It was undisputed that the City originally required a 20-foot access driveway to access Lot 1. **2 RP 386, FOF 27.** As a practical matter, this meant that Lot 1 could not be sold, or in any event, could not be sold for its fair market value, without either clearing the obstructions on the five-feet strip located on the Tafoyas' land, or, in the alternative, obtaining a variancef from the City approving the existing 15-foot driveway. **2 RP 389 FOF 46.**

The Estate attempted first one approach and then the other. It was undisputed that Cecilia resisted clearing the encroachments. **2 RP 386 FOF 28.** She refused a number of offered compromises which would have preserved her home, requiring the removal of only the chain link fence. **2 RP 389 FOF 37, 42.**

On November 23, 1999, the Estate filed a quiet title action in Santa Fe County district court, seeking to quiet title in the Estate to a five-foot easement on the Tafoyas land and to require the removal of the chain link fence and the encroaching portion of the Tafoyas' house. **2 RP 387, ¶ 31.** Tafoya responded with counterclaims and a third-party complaint seeking to disinherit her brother and one of her sisters based on

a claim of slander (having to do with an unfounded allegation that Cecilia had burglarized the Estate). **2 RP 387 FOF 32-33; 2 RP 369 ¶ 17.**

In the fall of 2001, the City of Santa Fe modified its position on the encroachment issue. For the first time, it was open to the idea of allowing a variance so that the width of the driveway could remain 15 feet. **2 RP 389 FOF 44.** While originally cooperating in the attempt to get the City to grant a variance, Cecilia ultimately refused to sign the plat granting the variance. **2 RP 389 FOF 47; 2 RP 390 FOF 52.** She wanted the plat to show the easement for ingress and egress she claimed was implied from her father's Family Transfer Lot Split documents and the City's imposition of a requirement for a second off-street parking space at the rear of the Tafoya lot. This was the first mention in the record of any claim by the Tafoyas for a driveway easement. **2 RP 357, ¶ 20.** The primary controversy had been about the five foot encroachment of the Tafoyas' home and fence into the 20-foot driveway.

Despite Cecilia's refusal to sign the Plat, the variance was approved by the City's Planning Commission and the plat recorded without Cecilia's signature. **2 RP 390 FOF 52.** Cecilia sought reconsideration by the City, which was promptly denied. **2 RP 390 FOF 54.**

The sale of Lot 1 to the Morrisons.

Lot 1 was sold to the Morrisons on December 31, 2001. Lot 1 included ownership of the now 15-foot wide driveway. **2 RP 390 FOF 53.**

The dismissal of the quiet title suit and the commencement of the "Prior Action."

On November 25, 2002, the Estate executed a quitclaim deed to the Tafoyas removing the reservations and restrictions aimed at forcing the Tafoyas to clear the encroachments which had previously been included in the 1998 Personal Representative's Deed (**391 FOF 56**). **2 RP 343**. The quiet title suit was dismissed as moot shortly thereafter based on the recording of the Consolidation Plat, which granted the variance and abandoned the easement, and the execution of the quitclaim deed and the sale of Lot1 to the Morrisons. **2 RP 391 FOF 56-57*; Opinion* ¶ 22.**

On November 21, 2002, nearly a year after the transfer of Lot 1 to the Morrisons, the Estate filed a motion in the probate court to revoke Cecilia's inheritance. ***Opinion* ¶ 23**. The Estate argued that Cecilia should be disinherited pursuant to the Will's no-contest clause based on her persistence in resisting clearing the encroachments on the easement; her lack of cooperation in obtaining the variance; her refusal to sign the Consolidation Plat; her attempt to remove her brother as the Personal Representative; and her failure to cooperate with the Estate to facilitate the sale of Lot 1. The Estate pointed to this conduct, claiming that it amounted to a

contest of the Will. It complained that Cecilia's conduct had caused the Estate to lose lucrative contracts for the sale of Lot 1. The Estate complained that it was not able to sell Lot 1 until December, 2001 (when the variance was granted and the Morrisons purchased Lot 1). The Estate argued that Cecilia had obstructed the immediate sale of Lot 1, a requirement of the Will, and had done so in bad faith and without adequate justification. ***Opinion* ¶¶ 4-19.**

Cecilia defended by presenting evidence to show that she was justified in opposing the Estate's efforts to clear the encroachments and sell the property. She claimed she had a right to defend herself from having to knock down either a portion of her house or her fence. She also argued that she was legitimately pursuing a permissible construction of an ambiguous provision of the Will when she claimed that Alex Armijo had approved the encroachments and that the Will did not contemplate their removal. She also pointed out that she had never filed a lawsuit against the Estate – she merely defended the quiet title suit brought against her by the Estate. ***Opinion* ¶¶ 31-44.**

The district court agreed with the Estate. The court found that Cecilia's objections to compromises proposed by the City, by potential purchasers, and by the Estate had interfered with the sale of Lot 1 and that, therefore, she had violated the Will's no-contest clause. **2 RP 387 FOF 30; 2RP 386 FOF 25; 388 FOF 37, 39, 40;**

2 RP 389 FOF 42; 2 RP 390 FOF 52, 54; 2 RP 391 FOF 58. The court also found that Cecilia had unnecessarily prolonged the Quiet Title Lawsuit. ***Id.*** **FOF 58; 2 RP 389 FOF 45.**

The district court concluded, as a matter of law, that the following actions engaged in by Cecilia each independently constituted a contest of or an attack on the Will without probable cause: (1) her failure to remove the portion of her home and fence encroaching on the five-foot easement, thereby delaying the sale of Lot 1 and reducing the purchase price and marketability of that lot; (2) her failure to cooperate with the Estate in the sale of Lot 1 as evinced by her rejection of reasonable accommodations, including her refusal to sign the variance finally granted by the City; (3) her other efforts to discourage the sale of Lot 1; and (4) her efforts by Petition and letter in the probate proceeding seeking the removal of the Personal Representative. **2 RP 394-95;** ***Opinion*** **¶ 28.**

In support of its conclusion that Cecilia did not have reasonable cause to withdraw here consent to the variance offered by the City or to otherwise delay compromising on the five-foot easement, the court found: (1) that neither the Family Transfer Lot Split Plat nor the Family Transfer Affidavit (which Alex Armijo used to create Lot 2) "reference any off-street parking space or easement for the benefit of [Lot 2]" and that therefore the driveway was solely to benefit Lot 1 (**2 RP 383 FOF**

2-3; 2 RP 392 COL 4); (2) that the Personal Representative's quitclaim deed for Lot 2 does not, by its terms, grant Tafoya an easement over Lot 1 or an easement to access to any off street parking on her own lot (**2 RP 391 FOF 56; 2 RP 394 COL 16-19**).

The court went on to revoke Cecilia's inheritance on these bases. **2 RP 395 COL 26.**

The Estate's request to address the Tafoyas' easement claims in the Prior Action.

Cecilia never filed a lawsuit against the Estate or against the Morrisons claiming an interest in a driveway easement before this suit was filed. **2 RP 561-62.** It was the Estate which asked the probate court at the start of the evidentiary hearing on its motion to revoke her inheritance to resolve the issue of Cecilia's right to an easement over the driveway that had been owned by the Morrisons for nearly two years. The Estate's attorney stated at the outset of the hearing that there was a "separate issue" he wanted to raise. He reported to the court that Cecilia "is saying she has an easement along this driveway to enter into her property." **2 RP 561.** Counsel for the Estate stated that he was concerned that Cecilia would sue the Morrisons and the Morrisons would bring in the Estate. **2 RP 562** ("I would like to just deal with it right now.... Let's just bite this off and decide it today, because what's going to happen is she's going to sue the Morrisons"). **3 RP 562.**

Initially, Cecilia's counsel agreed, although he "reserv[ed] the right to sue the Morrisons in quiet title...." **3 RP 566, 567**. Before significant evidence was taken on easement issue, Cecilia's counsel withdrew his agreement to considering the easement issues. Counsel pointed out that Lot 1 was no longer owned by the Estate. He told the court that it, therefore, no longer had jurisdiction to grant an easement. **3 RP 638-39** (I don't believe this Court can decide that issue without the Morrisons here. They're necessary parties now because it affects their property now. Anything the Court decides is not going to be binding on [the Morrisons])." The court agreed with Cecilia's counsel that it could not grant an easement without bringing the Morrisons in and allowing them to be heard. **3 RP 640**. Indeed, the court found In its final Decision that:

> The Estate no longer owns [Lot 1] and has no power to grant Tafoya's demand for an easement over the fifteen (15) foot [driveway] to access any off-street parking on Tafoya's lot.

2 RP 391, FOF 59.

Nonetheless, because the express and implied by the City's parking requirement easement issues were relevant to Cecilia's claim that she was justified in refusing to sign the City Consolidation Plat, the court entered the following findings of fact: (1) that neither the Family Transfer Lot Split Plat nor the Family Transfer Affidavit which Alex Armijo used to create Lot 2 "reference any off-street

parking space or easement for the benefit of [Lot 2]" and that, therefore, the driveway was solely to benefit Lot 1 (**2 RP 383 FOF 2-3; 2 RP 392 COL 4**); (2) that the Personal Representative's quitclaim deed for Lot 2 does not by its terms grant Tafoya an easement over Lot 1 or access to any off street parking on her lot and that therefore "the Quitclaim Deed does not grant any easements to Tafoya" (**2 RP 391 FOF 56; 2 RP 394 COL 16-19**). The court also found that Cecilia did not have an interest in a parking space implied from any City requirement to have a second off-street parking space. **2 RP 399.**

The appeal to this Court in the Prior Action.

Cecilia appealed from the decision revoking her inheritance to this Court. This Court reversed the decision of the probate court, holding that the probate court applied an incorrect legal standard. This Court held that broad no-contest or no-attack provisions like the one in Alex Armijo's Will "should be read as penalizing only beneficiaries who, in the absence of good faith and probable cause, seek through a legal proceeding to invalidate a will or a provision of a will on grounds such as lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or subsequent revocation by later document, or on grounds that effectively nullify a material provision in the will." ***Opinion*** **¶ 58.** On this basis, this Court reversed and remanded to the probate court. ***Opinion*** **¶ 70.**

Entry on remand of a stipulated judgment of dismissal with prejudice.

Following this Court's reversal and remand, the Estate and Cecilia Tafoya entered into a Settlement Agreement which provided for the dismissal of the action to revoke her inheritance. The settlement includes the agreement of both sides that the same issues or the issues which could have been raised in the proceeding on the motion to revoke would not be raised again between the parties. The Morrisons were not a party to the Settlement Agreement. **2 RP 400.**

The grant of summary judgment by the district court in this action.

The district court in this action granted summary judgment to the Morrisons. The court ruled that the Tafoyas' claims to both an express and implied easement over the Morrision's driveway and their claim to an interest implied by the alleged City requirement for a second parking space were adjudicated to a final decision on the merits in the Prior Action and that they are therefore barred under the doctrine of res judicata. **3 RP 535**. The court concluded that, although the easement by necessity was not litigated and could not have been litigated in the prior action, an essential material fact in any action for an easement by necessity had been resolved against the Tafoyas in the Prior Action: that the Tafoyas do not have an interest in a parking space in their backyard based on implication from a City requirement for a second off-street parking space. The court therefore found that this claim is barred by

collateral estoppel. **3 RP 704-05.** Finally, the court dismissed the Tafoyas' claim to a prescriptive easement, concluding that the Prior Action effectively quieted title in the Morrisons and that it therefore barred the Tafoyas' from asserting any adverse use of the driveway which began before the entry of judgment in the Prior Action. **3 RP 536, 704-05.** The district court then went on to quiet title in the Morrisons, holding that "[t]he Tafoyas have no easement of any kind or nature including, but not limited to, an easement by express grant, an easement by necessity, an implied easement or a prescriptive easement, over or across the real property owned by the Morrisons ... known as Lot 1. **2 Supp. RP 1133.**

This appeal followed.

ARGUMENT

Standard of Review: Where the facts are not in dispute, this Court reviews a district court's grant of summary judgment de novo. Reasonable inferences from the summary judgment record are drawn in favor of the party opposing summary judgment, in this case, the Plaintiffs. *Rummel v. St. Paul Surplus Lines Ins. Co.,* 1997–NMSC–042, ¶ 9, 945 P.2d 985. Similarly, the district court's determination that the Prior Action was res judicata and bars the Plaintiffs' claim to an easement in this case is a legal question that is reviewed de novo by this Court. *Computer One, Inc. v. Grisham & Lawless, P.A.,* 2008-NMSC-038, ¶ 11, 188 P.3d 1175. Judgment on collateral estoppel can not be granted unless it can be said with a high degree of certainty the same issues were both actually and necessarily decided in the prior action. *Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor,* 1993-NMCA-008, ¶ 15, 848 P.2d 1086; Restatement (Second) of Judgments § 2(f) (1982).

Preservation: The argument made in this Brief, that the Prior Action does not bar the easement claims across the Morrisons' driveway pursuant either to res judicata or to collateral estoppel were raised in the Plaintiffs' opposition to the Morrisons' motion for summary judgment **(2RP 426, 437-41)**; at oral argument on that motion on July 17, 2012 **(7-17-12 CD 10:30:39, 10:36:40, 10:38:26-10:41:16)**; in the Plaintiffs' motion for reconsideration **(3 RP 538, 539-545)** and reply **(3 RP**

671, 672, 675-77); at hearing on the motion to reconsider on January 30, 2013 (**1-30-13 CD 1:40:24; 1:52:26; 2:05:12; 2:07:47**); and in their opposition to the Morrisons' claim for quieting title (**2 Supp. RP 1047**).

I. Res Judicata Does Not Bar the Tafoyas from Claiming a Driveway Easement Over the Morrisons' Land in This Action.

The Morrisons claim that the legal proceedings initiated by the Estate of Alex J. Armijo on November 21, 2002, by the motion to revoke Cecelia Tafoya's inheritance ("the Prior Action") bars this action for easement over the Morrisons' land and quiet title. **2 RP 332.**

Res judicata is a doctrine which bars relitigation of claims that were raised in a prior proceeding and finally resolved, and also bars claims that were required to be raised in the prior proceeding. The party asserting res judicata must satisfy the following four requirements:

1) the parties must be the same or in privity;

2) the cause of action must be the same;

3) there must have been a final decision in the first suit;

4) the first decision must have been on the merits.

Kirby v. Guardian Life Ins. Co. of America, 2010-NMSC-014, ¶ 61, 231 P3d 87.

A. Res Judicata Does Not Bar This Action Because the Morrisons Were No Longer in Privity with the Armijo Estate at the Time the Prior Action was Commenced.

The very first principle of res judicata is that a subsequent action is barred only if both parties to the current action are the same or in privity with the parties to the prior action. *Silva v. State,* 1987-NMSC-107, ¶ 5, 745 P.2d 380 (*res judicata* or "claim preclusion," depends upon the identity of parties or privies). *Silva* adds to privity the requirement that the capacity or character of the persons for whom or against the claim is made must also be the same. *Id., citing Three Rivers Land Co. v. Maddoux*, 1982-NMSC-11, ¶¶ 21, 24, 652 P.2d 240, *overruled on other grounds by, Universal Life Church v. Coxon*, 1986-NMSC-086, 728 P.2d 467.

It is undisputed in this case that the Morrisons were <u>not</u> parties to the Prior Action. The only parties were Cecilia Tafoya (then Cecilia Redman-Tafoya) and the Estate of Alex J. Armijo.

The remaining question, then, is whether the Morrisons, even though they were not parties, were "in privity" with the Estate at the time the Prior Action was commenced. Our Supreme Court has recognized that there is no simple definition of "privity" which can be automatically applied in all cases involving res judicata. *Deflon v. Sawyer,* 2006-NMSC-025, ¶ 4, 137 P.3d 735. Determination of whether parties are in privity requires careful examination of the circumstances. "Privity

requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same." *Id; see also, Johnson v. Aztec Well Servicing Co.,* 1994-NMCA-065, ¶ 7, 875 P.2d 1128 ("[a] person in privity with another is a person so identified in interest with another that he represents the same legal right").

Although generally parties are in privity when they have a successive relationship to the same rights of property, this legal principle only applies when a claim is resolved, or at least commenced, while the predecessor-in-interest owns the property. A judgment entered in such an action is then binding on a subsequent purchaser of the property, who is deemed to be in privity with the previous owner. Restatement (Second) of Judgments § 43 (a judgment in an action that determines interest in real property has preclusive effects upon a person who succeeds to the interest of a party). This is because at the time the litigation took place the predecessor held the very same interest the subsequent owner now holds and was able to represent that interest without a conflict.

The same identity of interests, however, does not exist when the property is transferred to a new owner prior to the commencement of the litigation of a claim for or against the property. Once the transfer of the land has occurred, the predecessor in title no longer holds an interest in the land. He, therefore, is not in privity with the

land owner and is not the proper party to litigate issues affecting that land. *Bloom v. Hendricks*, 1991-NMSC-005, ¶ 9 n 2, 804 P.2d 1069 (a predecessor in title is not in privity with the current landowner in his defense of a prescriptive easement claim); Rule 1-017(A) NMRA.

The Morrisons argued in support of their summary judgment motion in the district court that the Estate was in privity with the Morrisons as to the easement claims because the Estate had transferred the land by Warranty Deed. **2 RP 333, 334.** The Morrisons are not correct. The warranty covenant made the Estate an indemnitor of the Morrisons for claims involving encroachments on title and imposed a duty to defend if asked to do so.

An indemnitor is not permitted to substitute themselves for the property owner, the proper party to the action. Just as an insurance company is not the proper party to an action against its insured, an indemnitor by warranty deed is not the proper party to a case seeking to determine rights in real property. *Lopez v. Townsend*, 1933-NMSC-045, ¶¶ 31-32, 25 P.2d 809 (Watson, C.J.) (on rehearing) (distinguishing a carrier's liability to pay after judgment and its "liability to be sued"). The proper party is the current landowner.

Although the indemnitor is permitted to defend the lawsuit, it can do so only as the designated representative of the landowner, and it can attain that status only

with notice to the landowner of the lawsuit and the landowner's express consent. Without the consent of the grantee, the grantor has no authority to assume the conduct of the defense. *Bloom v. Hendricks,* 1991-NMSC-005, ¶ 18.

There is no evidence in the summary judgment record establishing that the Estate resolution of the Tafoyas' easement claims on the Morrisons' behalf and with their consent. Indeed, the statements of counsel for the Estate create a strong inference that the Estate was pursuing the claims solely on its own behalf in order to avoid a subsequent indemnity claim. **3 RP 562.** It is apparent, therefore, from the summary judgment record that no consent was obtained from the Morrisons.

Nor could such consent properly have been obtained. That is because the interests of the Estate as the indemnitor and the interests of the Morrisons were in conflict. (It was in the Estate's interest that any easement be prescriptive and therefore outside the warranty covenants. *See* § III, below). This conflict itself precludes the application of res judicata. *Deflon v. Sawyer*, 2006-NMSC-025, ¶ 4 ("[p]rivity requires, at a minimum ... a showing that the parties in the two actions are really and substantially in interest the same").

The parties Morrisons and the Estate have sued or been sued in two different legal capacities: that of owner of the property and that of indemnitor of the owner on some of the easement issues and not on others. These capacities and the interests they

each represent conflict in significant ways. Application of res judicata is therefore not appropriate. *Three Rivers Land Co. v. Maddoux,* 1982-NMSC-11, ¶¶ 21, 24.

Finally, res judicata assumes mutual application of the doctrine. It should apply to both parties, no matter who wins. *See Silva,* 1987-NMSC-107, ¶ 7. Unlike collateral estoppel, the application of res judicata still requires that both parties be the same or in privity, guaranteeing mutuality. It is clear in this case that a judgment imposing an easement on the Morrisons in the Prior Action, to which they were not a party, would not have precluded the Morrisons from relitigating any easement found.

Because the Estate and the Morrisons were not in privity at the time the Prior Action was commenced, then, the Prior Action is not res judicata as to the claims to an easement raised by the Tafoyas in this action.

B. Res Judicata Also Does Not Does Not Bar This Action Because the Cause of Action is Not the Same.

Under New Mexico law, res judicata precludes the bringing of a subsequent lawsuit only if the causes of action in the two proceedings are the same:

> [W]here the causes of action in the cases are identical in all respects, the first judgment is a conclusive bar upon the parties and their privies as to every issue which either was or properly could have been litigated in the previous case

Silva v. State, 1987-NMSC-107, ¶ 5, *quoting, City of Santa Fe, v. Velarde*, 1977-NMSC-040, ¶ 5, 564 P.2d 1326.

To determine whether the causes of action in two lawsuits are the same, the New Mexico courts apply the single transaction rule adopted by the Restatement (Second) of Judgments, §§ 24-25. Our courts look to whether the facts are closely entwined and whether the claims would reasonably be brought in a single action. *Id; Anaya v. City of Albuquerque,* 1996-NMCA-092, 924 P.2d 735.

This test is not met here. The district court recognized that without the Morrisons, the owners of the land, in front of the court, it could not resolve the Tafoyas claims to an easement. The sole cause of action in front of the court was the issue of whether Cecilia Tafoya's inheritance should be revoked. Her claim that an express easement or an implied easement from the City justified her refusal to sign the Consolidated Plat was a minor sub-issue at trial. The bulk of the evidence concerned the five-foot encroachment of the Tafoyas' house and fence onto the Morrisons' driveway easement over the Tafoya's land. The easement by necessity claim was not relevant in any way and no prescriptive easement claim was even raised.

It cannot be said that the motion to revoke an inheritance and the claims to an easement over land owned by someone not a party to the action is part of a single cause of action.

II. Collateral Estoppel Does Not Bar the Tafoyas' Claim for a Driveway Easement Over the Morrisons' Land.

"Collateral estoppel bars relitigation of ultimate facts or issues actually and necessarily decided in a prior suit." *Silva v. State*, 1987-NMSC-107, ¶ 6. For collateral estoppel to apply, the issue must be both actually litigated and actually determined, as reflected in a valid and final judgment on the merits. Restatement (Second) Judgments § 27. The issue must be an ultimate, material fact or issue in the first case, necessary to the judgment. *Paulos v. Janetakos*, 1942-NMSC-057, ¶ 14, 129 P.2d 636. Finally, the party to be bound by collateral estoppel must have had a full and fair opportunity to litigate the issue in the prior suit. *Hyden,* 1993-NMCA-008, ¶ 14.[2]

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[2]Unlike where res judicata is alleged as a bar, there is no requirement that the party asserting collateral estoppel be in privity with one of the parties in the first action A plaintiff may be precluded from relitigating an issue the plaintiff has previously litigated and lost, regardless of whether the defendant was privy to the prior suit. *Hyden,* 1993-NMCA-009, ¶ 15. Nor does collateral estoppel require that the causes of action or subject matter of the two actions be the same. *Silva v. State,* 1987-NMSC-107, ¶ 6.

In this case, the Morrisons cannot establish that the easement issues raised by the Tafoyas in this case were either actually or necessarily determined in the Prior Action. Nor can they show that a valid, final judgment on the merits incorporating these issues was entered by the district court. Finally, it is apparent that the Tafoyas did not have a full and fair opportunity to litigate the easement claims particularly the easement by necessity and prescriptive easement claims.

A. The Easement Issues Were Neither Actually Nor Necessarily Determined in the Prior Action.

The party seeking a determination that collateral estoppel bars a subsequent action must establish that the questions at issue were both actually decided in the prior action, that their determination was essential to the resolution of the prior action, and that the prior action was resolved on its merits by a final judgment. *Paulos v. Janetakos*, 1942-NMSC-057, ¶ 14; Restatement (Second) of Judgments § 27.

1. *The Final Judgment Here was Entered by Consent; Therefore None of the Issues was "Actually Litigated" for Purposes of Collateral Estoppel.*

"Actually litigating" an issue for purposes of collateral estoppel requires the entry of a final judgment incorporating the court's determination of the issue. In the case of a judgment entered by consent or stipulation, no issue has been "actually litigated" for purposes of collateral estoppel because all issues were resolved by agreement. *Pope v. Gap Inc.*, 1998-NMCA-103, ¶¶ 25-27, 961 P.2d 1283 (a consent

judgment or settlement is not a judicial determination of the issues raised in the action and, therefore, does not satisfy the requirement of collateral estoppel that the issues in the prior action be "actually decided" by the court and that the judgment by on the merits).

The final judgment in the Prior Action was a stipulated judgment of dismissal with prejudice entered by consent of the parties after reversal and remand on appeal by this Court.

2. *In the Alternative, None of the Findings Relied on by the Morrisons in Their Motion for Summary Judgment Were Necessary to Support the Judgment of the Court.*

The Morrisons claim that collateral estoppel precludes all of the Tafoyas' easement claims relies on the following findings entered by the district court (and later vacated by this Court): (1) that neither the Family Transfer Lot Split Plat nor the Family Transfer Affidavit which Alex Armijo used to create Lot 2 "reference any off-street parking space or easement for the benefit of [Lot 2]" and that therefore the driveway was solely to benefit Lot 1 (**2 RP 383 FOF 2-3; 2 RP 392 COL 4**); and (2) that the Personal Representative's quitclaim deed for Lot 2 does not by its terms grant Tafoya an easement over Lot 1 or access to any off street parking on her lot and that therefore "the Quitclaim Deed does not grant any easements to Tafoya" (**2 RP 391 FOF 56; 2 RP 394 COL 16-19**). The court also found that Cecilia did not have "an

interest" in a parking space (presumably a legal interest awarded by the City). **2 RP 399.**

As noted in Section I (B) above, the district court reconsidered its authority to resolve the easement issues in the Prior Action in the Morrisons' absence as a party to that action . It explicitly recognized its lack of authority to consider these issues in Finding of Fact 59 where it stated:

> The Estate no longer owns [Lot 1] and has no power to grant Tafoya's demand for an easement over the fifteen (15) foot [driveway] to access any off-street parking on Tafoya's lot.

2 RP 391, FOF 59.

The sole claim resolved by the district court and appealed to this Court was the motion to revoke Cecilia Tafoya's inheritance. The findings relied on by the Morrisons which are relevant to an express easement are simply not essential to the decision of the district court on the motion to revoke. Cecilia's refusal to sign the Consolidation Plat so the sale to the Morrisons could go forward and whether that refusal was justified by a reasonable belief that she was entitled to an easement of access over the Morrisons' driveway were both secondary disputes of fact, not facts essential to the court's decision. *Paulos v. Janetakos*, 1942-NMSC-057, ¶ 14 (it must be an "ultimate fact, the fact without which the judgment would lack support in an essential particular"). These factual issues did not even make their way into court's

ultimate findings listing the four or five actions that, in the court's view supported disinheritance. **2 RP 394-395 FOF 21-25.**

To the extent this Court believes that determining whether Cecilia had an driveway easement over the Morrisons' land was necessary to the district court's judgment before appeal, it plainly is not necessary or even relevant to the decision of the disinheritance following this court's reversal of the district court's decision and judgment. This Court found that the district court erred in weighing each of the disputes between Cecilia and the Estate and each instance of lack of cooperation by Cecilia. This Court held that the only relevant and necessary findings are: whether Cecilia sought "through a legal proceeding to invalidate a will or a provision of a will on grounds such as lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or subsequent revocation by later document, or on grounds that effectively nullify a material provision in the will." ***Opinion* ¶ 58.** . Plainly the dispute around Cecilia's refusal to sign the City's Consolidated Plat, the only dispute that raised the claim that Lot 2 had a driveway easement over the Estate's Lot 1 does not rise to this level.

In any findings or judgment entered on remand, the district court would have been required to amend the court's findings to address what this Court held were the relevant legal issues. The findings made by the court, although not challenged and

reversed on substantial evidence grounds, were nonetheless reversed by this Court because they were based on a mistaken view of the law. *Hughes v. Hughes*, 1978-NMSC-002, ¶ 52, 573 P.2d 1194 (where the trial court operates under an erroneous belief as to the governing legal principles, findings based on that misapprehension of the law are not binding on the appellate court). The district court's findings simply are no longer relevant or necessary to the decision when the correct view of the law is applied.

B. Collateral Estoppel Does Not Preclude Litigation of the Tafoyas' Easement-by-Necessity Claim Against the Morrisons.

Even if this Court concludes that collateral estoppel applies to the district court's findings rejecting an express easement arising from either the Family Transfer Lot Split, the quitclaim deed, or an implied easement arising from the City's requirements, there is no basis for precluding the Tafoyas' easement by necessity claim.

The Morrisons claim in their summary judgment motion that collateral estoppel precludes litigation of the Tafoyas' easement by necessity claim based solely on the district court's finding that Cecilia has "no interest in a parking space." As indicated above, this finding appears to be a finding rejecting Cecilia's claim that the City of Santa Fe had required her to have a second off-street parking space as a condition of the family lot split and the construction of her home. It makes no sense to read this

finding preluding the Tafoyas from parking a vehicle in their backyard if they choose to do so given that the parking area the Tafoyas wish to use is on land owned by them in fee simple.

The law of collateral estoppel places a heavy burden on the party claiming estoppel. If the record is insufficient to determine with certainty whether an issue was actually and necessarily determined in the prior litigation, collateral estoppel is not applied. *Hyden*, 1993-NMCA-008, ¶ 15. Here, the meaning of the court's finding simply cannot be determined with the requisite certainty.

Even if this finding is interpreted broadly to preclude a claim of necessity based on the use of the Tafoyas' backyard to park a vehicle, collateral estoppel does not preclude litigation of other aspects of the Tafoyas' implied easement by necessity claim. The summary judgment record here shows that in the current action, the Tafoyas are seeking an easement of necessity for additional reasons unrelated to parking a vehicle in their backyard. They seek access both on foot and by vehicle to the only ground-level entrance to their home. They claim that this access is reasonably necessary to allow for delivery of heavy goods, to allow access for persons who are infirm, and to allow them to clean and maintain their backyard and their adobe wall. These purposes are separate and distinct from their interest in accessing a parking space and were plainly not resolved by the court's finding.

III. There is No Basis in the Law of Either Res Judicata or Collateral Estoppel to Bar the Tafoyas' Prescriptive Easement and Easement by Necessity Claims Against the Morrisons.

Even if this Court concludes that res judicata or collateral estoppel apply to some of the claims raised in the current action, there is no basis in either doctrine for precluding the Tafoyas from litigating their prescriptive easement claim against the Morrisons in this action.

Res judicata does not apply because, in addition to the reasons stated in Section I above, it is settled law in New Mexico that warranty covenants do not run as to an open and obvious prescriptive easement. Therefor any claim by the Estate to have a continuing interest in Lot 2 so as to create privity between the Estate and the Morrisons based on the Warranty Deed does not apply to a prescriptive easement. *Bloom v. Hendricks*, 1991-NMSC-005, ¶ 9, 13. An open and obvious prescriptive easement such as that at issue here is simply not a breach of the warranty covenant against encumbrances. *Tabet Lumber Co. v. Golightly*, 1969-NMSC-091, 457 P.2d 374. The grantor, therefore, is not called upon either to defend a prescriptive easement claim or to indemnify the grantee if an easement is found.

Although there is not yet a New Mexico case on point, the reasons given by our Supreme Court for excluding prescriptive easements from warranty covenants apply

equally to an implied easement by necessity which, like a prescriptive easement is obvious to the purchaser. *See Tabet Lumber Co. v. Golightly*, 1969-NMSC-091.

Collateral estoppel also does not apply because no prescriptive easement claim was raised or decided in the Prior Action. Any such claim would have been premature. Alex J. Armijo had died only six years prior to the November 21, 2002, filing date of the Motion to Revoke [Cecilia's] Inheritance, starting the adverse use. Because only six years had passed, this claim was not raised and was not actually or necessarily decided. Nor were the factual questions relevant to this claim actually and necessarily litigated in the Prior Action.

The district court below granted summary judgment on the Tafoyas' prescriptive easement claim in the current action on the basis that the prescriptive time period against the Morrisons began to run when the judgment was entered in the Prior Action. The basis for this ruling apparently is the district court's erroneous conclusion that the Morrisons were in privity with the Estate in the Prior Action and that, therefore, the Prior Action served as a quiet title action against the Morrisons, restarting the 10-year statute of limitations. However, because the Morrisons were neither a party to the Prior Action, were not in privity with a party, and were not a party to the settlement of the Prior Action, the Prior Action could not quiet their title. *Bloom v. Hendricks*, 1991-NMSC-005, ¶¶ 9 and n 2 (no privity between predecessor

no longer holding title and current landowner for purposes of a prescriptive easement). The date of judgment in the Prior Action is, therefore, irrelevant to the running of the prescriptive period against the Morrisons.

The prescriptive easement claim is properly brought in this action and the proper date for the start of the prescriptive period is a question of fact which should be left for determination by the district court at trial on remand based on the evidence as to when the use became adverse. (The Tafoyas have alleged that the use became adverse when Alex Armijo died and the Estate took over control of Lot 1.)

The district court erred in its ruling that the Prior Action stopped the running of the prescriptive period.

IV. The Tafoyas Did Not Have a Full and Fair Opportunity to Litigate Their Claim to an Easement in the Prior Action.

Finally, the summary judgment record here shows that the Tafoyas did not have a full and fair opportunity to litigate their easement claims in the Prior Action. The Morrisons were not parties to the action. The district court recognized that it, therefore, lacked authority to grant the Tafoyas an easement. **2 RP FOF 59.** The court claimed that as long as it decided against the easement sought by Mrs. Tafoya, there was no problem. This is hardly a fair stance or a fair and full opportunity to litigate a claim raised by the Estate at the commencement of the evidentiary hearing, without prior notice that it intended to litigate those issues.

One further point merits mention. The Estate has claimed that Mrs. Tafoya's failure to challenge the sufficiency of the evidence to support the court's findings concerning easement on appeal from the Prior Action means that at least those issues were actually decided for purposes of collateral estoppel. This position is not consistent with the law of collateral estoppel. As noted above, these findings, although marginally relevant to the district court's view of the law on a Will's no-contest clause, were not material, ultimate facts necessary to the decision. Such findings are not generally the subject of an appeal by the party against whom they were made. The Restatement (Second) of Judgments concludes that "[i]n these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation." Restatement (Second) of Judgments, § 27, cmt. h.

CONCLUSION.

For the reasons stated here, neither res judicata nor collateral estoppel can properly be applied to bar the Tafoyas' claims to an express, implied by necessity, or prescriptive easement of access for ingress and egress to their backyard over the Morrisons' driveway. The Tafoyas ask this Court to reverse the district court's grant of summary judgment based on res judicata and collateral estoppel, vacate the court's

grant of summary judgment quieting title in the Morrisons and remand for trial on the merits of the Tafoyas' claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of this Motion to the following counsel of record by first class U.S. Mail on this, the 20th day of November, 2015:

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