COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DAVID J. FOGELSON AND CORINNE FOGELSON, husband and wife,

Plaintiffs-Appellees/Cross-Appellants,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
JUL 18 2016

v.

Court of Appeals No. 35086
Thirteenth Judicial District Court
No. D-1329-CV-2010-02239

ERIC WALLACE, MARK BOZZONE, WALLEN DEVELOPMENT, INC., DEVELOPMENTS BY WALLEN, LLP,

Defendants-Appellants/Cross-Appellees,

PLAINTIFFS-APPELLEES DAVID J. FOGELSON AND CORINNE FOGELSON'S ANSWER BRIEF TO WALLACE'S BRIEF-IN-CHIEF

Appeal from the Thirteenth Judicial District Court, County of Sandoval, The Honorable George P. Eichwald

Catherine F. Davis
Julie J. Vargas
HUNT & DAVIS, P.C.
2632 Mesilla NE
Albuquerque, NM 87110
(505) 881-3191

Counsel for Plaintiffs-Appellees David J. Fogelson and Corinne Fogelson

TABLE OF CONTENTS

I. **SUMMARY OF PROCEEDINGS**.....1

A. Nature of the Case.....1

1. The prior action.....1

2. The instant case.....2

II. **COURSE OF PROCEEDINGS AND DISPOSITION BELOW**.....3

A. The claims.....3

B. Pre-trial and trial disposition of the claims.....3

C. Summary of facts.....5

III. **ARGUMENT**.....11

A. Plaintiffs' claims against Wallace could not have been brought in the prior arbitration because Wallace, individually was not a party to the Agreement to arbitrate.....11

B. The instant case is not barred under the Doctrine of Claim Preclusion/Res Judicata.....12

C. The instant case is not barred under the Doctrine of Issue Preclusion/Collateral Estoppel.....21

D. The arbitration judgment against Wallen and the judgment against Wallace is not an impermissible double-recovery.....25

E. The partial satisfaction of the arbitration judgment in the amount of $40,000 does not preclude any claim on uncollectability and credit/offset was given to the judgment against Wallace.....29

F. Wallace and Bozzone were not indispensable parties to the arbitration.....30

G. The judgment is not in violation of the Frow Doctrine, nor Rule 1-054.....31

H. Fogelsons established elements of prima facie tort and conspiracy..... 33

IV. CONCLUSION AND REQUEST FOR RELIEF.....36

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Frow v. De La Vega,
82 U.S. 552, 21 L.Ed. 60 (1872).....31

NEW MEXICO CASES

Alexander v. Carlton & Associates
2005-NMCA-034, 137 N.M. 293, 100 P.3d 509 12

Bogel v. Summit Investment Company, LLC,
205-NMCA-024, 137 N.M. 80, 107 P.3d 520.....25

Deflon v. Sawyers,
2006-NMSC-025, 137 P.3d 577 .....12,13,14, 15, 22, 23, 24

Ettenson v. Burke,
2001-NMCA-003, 130 N.M. 67, 17 P.3d 440..... 22, 35

Hale v. Basin Motor Co.,
1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006.....27

Heye v. American Golf Corp. Inc.,
2003-NMCA-138, 134 N.M. 558, 90 P.3d 495.....12

Kaveny, et al., v. MDA Enterprises, et al.,
2005-NMCA-118, 138 N.M. 432, 120 P.3d 854 .....16, 17, 18

Kreischer v. Armijo,
1994-NMCA-118, 884 P.2d 827 .....16, 17, 18

Little v. Gill,
2003-NMCA-103, 134 N.M. 321, 76 P.3d 639.....30

Myers v. Olson,
1984-NMSC-015, 100 N.M. 745, 676 P.2d 822.....14

McConal Aviation, Inc. v. Commerical Aviation Ins. Co.,
1990-NMSC-093, 110 N.M. 697, 799 P.2d 133.....27, 28

Sanchez v. Clayton,
1994-NMSC-064, 117 N.M. 761, 877 P.2d 567.....28, 29

Schmitz v. Smentowski,
1990-NMSC-002, 109 N.M. 386, 785 P.2d 726.....25, 34

Shovelin v. Central N.M. Elec. Coop.,
1993-NMSC-015, 115 N.M. 293, 850 P.2d 996.....23

Silva v. Town of Springer,
1996-NMCA-022, 912 P.2d 304.....35

Stinson v. Berry,
1997-NMCA-076, 123 N.M. 482, 943 P.2d 120.....18, 19

Sunnyland Farms Inc., v. Cent. New Mexico Elec. Coop., Inc.
2013-NMSC-017, 301 P.3d 387.....27

United Salt Corp. v. KcKee,
1981-NMSC-052, 96 N.M. 65, 628 P.2d 310 32

CASES FROM OTHER JURISDICTIONS

Lobato v. Pay Less Drug Stores, Inc.,
261 F.2d 406, 408-409 (10th Cir. 1958) 19

Morgan v. City of Rawlins,
792 P.2d 975, 980 (10th Cir. 1986) 14

Salazar v. Furrs's,
629 F. Supp. 426 (E.D.Pa 1983) 15

Smith v. Updegraff,
744 F.2d 1354 (8th Cir. 1984) 14

STATUTES AND RULES

NMRA 1-019.....30

NMRA 1-054.....31

Uniform Arbitration Act N.M.S.A. 1978 §44, 7A-24(b) 33

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A)(1)(F)(3), Plaintiffs-Appellees, David J. Fogelson and Corinne Fogelson, state that this Answer Brief complies with the length limitations of Rule 12-213(F) NMRA. The brief uses a proportionately spaced font, has a typeface of 14 points, and contains 8,818 words. The word count is obtained using Microsoft Word 2007.

Catherine F. Davis

Catherine F. Davis

STATEMENT OF ABREVIATIONS

Trial transcripts are identified as follows:

April 29, 2014: Tr.I
April 30, 2014: Tr.II
May 1, 2014: Tr.III

Plaintiffs exhibits are identified by Exhibit number.

Eric Wallace's exhibits are identified by name and letter, e.g. "Wallace Exhibit A".

Mark Bozzone's exhibits are also identified by name and letter, e.g. "Bozzone Exhibit A".

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

1. The prior action

Prior to filing this suit, Plaintiffs/Appellees/Cross-Appellants David J. Fogelson and Corinne Fogelson (hereinafter "Fogelson") filed a complaint in arbitration against Wallen Development, Inc. and Developments by Wallen, LLP (hereinafter sometimes jointly "Wallen") for breach of contract, fraud and unfair practices. [RP 3-4]. On May 25, 2008, Fogelsons, as Purchasers, and Wallen, as Seller, entered into a Purchase Agreement with Wallen for New Home Construction (hereinafter "Purchase Agreement"). [RP 11-34; Plaintiffs' Exhibit 24]. Wallen owned the lot, upon which a house was to be constructed for the Fogelsons (hereinafter "property"). [RP 3-4] Pursuant to the terms of the Purchase Agreement, Fogelsons agreed to pay Wallen $220,605.00 to purchase the property, which included the new home to be constructed thereon by Wallen. [RP 11-34; Plaintiffs' Exhibit 24] The Purchase Agreement contained a Cash Addendum, which set forth the payment schedule. [Plaintiffs' Exhibit 24, RP 27] Fogelsons paid $165,111.00 to Wallen in accordance with the requirements of the payment schedule on the Cash Addendum. [RP 3] Prior to completion of the construction of the home, Wallen abandoned the job and Claims of Lien were filed against the

Property in the amount of approximately $57,052.20 for labor and materials which were unpaid. [RP 3]

Paragraph 6 of the Purchase Agreement required Purchasers (Fogelsons) and Seller (Wallen) to resolve, through binding arbitration, any disputes arising between them relating to the construction or to the terms and provisions of the Purchase Agreement. [RP 13] Fogelsons' attorney corresponded with an attorney representing Wallen and informed Wallen's attorney that an action in arbitration would be filed.

Fogelsons filed a complaint in arbitration against Wallen. [RP 3] Larry Filener, as registered agent of Wallen, was served with the Complaint in Arbitration. [RP 36-37, 63, 219] Wallace, as President of Wallen, knew that Fogelsons were proceeding in arbitration against Wallen. Fogelsons obtained a default judgment in arbitration against Wallen for breach of contract, fraud and unfair trade practices. [RP 64-68] The default judgment against Wallen was for $165,111.00 in compensatory damages and $165,111.00 in punitive damages [RP 64, 67-68].

2. The instant case

Fogelsons filed an initial Complaint on September 16, 2010, against various Defendants, including Larry Filener, Eric Wallace, Jenice Montoya, Garry and Mary Wallen, and GM Westside Investments, LLC. [RP 1] Fogelsons filed their

First Amended Complaint on March 26, 2012, and asserted tort claims against Defendants/Appellees Eric Wallace (hereinafter "Wallace") and Mark Bozzone (hereinafter "Bozzone), individually, and Wallen. [RP 162] On January 21, 2014, Fogelsons filed their Second Amended Complaint and asserted tort claims against Wallace and Bozzone, individually, and asserted claims only for foreclosure against Wallen and other defendants. [RP 869-882]. Contrary to Wallace's assertion in his section entitled "Nature of the Case", this was not a contract case, but a case asserting various tort claims against Wallace and Bozzone.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

A. The Claims

Fogelsons, in their Second Amended Complaint, asserted tort claims against Wallace, individually, for Conversion, Fraud, Unfair Trade Practices, Civil Conspiracy and Prima Facie Tort and asserted claims against Bozzone individually for Conversion, Fraud, Unfair Trade Practices, Civil Conspiracy, Intentional Interference with a Contractual Relation, and Prima Facie Tort. [RP 869-879] Fogelsons also asserted a claim for foreclosure of its judgment against Wallen and various subcontractors who had filed liens against the property. [RP 879-882]

B. Pre-trial and trial disposition of the claims

Wallace filed two motions to dismiss the claims against him on the grounds that the arbitration action and award entered therein precluded the instant action

against Wallace. [RP 0051, 199] The court denied both motions. [RP 0262] Prior to trial, the court granted Bozzone's motion to dismiss Fogelsons' Unfair Practices Act ("UPA") claims [RP 424-27, 861]. At trial and by Order dated May 21, 2014, the court granted Bozzone's Rule 1-041(b) motion as to the fraud and conversion claims, but denied the motion as to the claims of civil conspiracy, intentional interference with contractual relations and *prima facie* tort claims. [RP 1050] Wallace did not join in the motion to dismiss the UPA claims filed by Bozzone and the order entered by the court did not dismiss the UPA claims against Wallace. At trial, Wallace did not join in Bozzone's Rule 1-041(b) motion as to the fraud and conversion claims. The Order entered by the court on May 21, 2014, did not dismiss the UPA claims and the conversion claims against Wallace. However, the court denied any such claims in its findings and conclusions entered herein.

A trial on the merits was held on April 29-30 and May 1, 2014. The parties filed proposed findings of facts and conclusions of law after the trial. [RP 1058-1111]

The trial court entered its findings of fact and conclusions of law and order of the court, wherein the court concluded that Wallace, individually, actively participated in the commission of *prima facie* tort and civil conspiracy against Fogelsons. The trial court found Wallace individually liable for his own tortious

acts, and found Wallace and Bozzone jointly and severally liable for the damages of the Fogelsons. [RP 1150-1174]

C. Summary of Facts

On May 25, 2008, Fogelsons, as Purchasers, and Wallen, as Seller, entered into a Purchase Agreement with Wallen for New Home Construction (hereinafter "Purchase Agreement"). [RP 11-34; Plaintiffs' Exhibit 24]. Wallen owned the lot, upon which a house was to be constructed for the Fogelsons (hereinafter "property"). [RP 3-4] Pursuant to the terms of the Purchase Agreement, Fogelsons agreed to pay Wallen $220,605.00 to purchase the property, which included the new home to be constructed thereon by Wallen. [RP 11-34; Plaintiffs' Exhibit 24] The Purchase Agreement contained a Cash Addendum, which set forth the payment schedule. [Plaintiffs' Exhibit 24, RP 27] Fogelsons paid $165,111.00 to Wallen in accordance with the requirements of the payment schedule on the Cash Addendum. [RP 3; Tr I:30] Prior to completion of the construction of the home, Wallen abandoned the job and Claims of Lien were filed against the Property in the amount of approximately $57,052.20 for labor and materials which were unpaid. [RP 3]

Eric Wallace was president of Wallen. Wallace is a CPA providing accounting services to clients in the construction and real estate industry. [RP 1150, Finding ¶2; Tr II: 38-40] Larry Filener was a shareholder in Wallen, and an

officer and director of Wallen. [Tr III: 80] Bozzone was an agent of Mooresville, which was an investor in Wallen. [Tr II: 177-178]

The trial court found, based upon the testimony of Jenice Montoya ("Montoya") that Wallace, Bozzone and Filener were aware that there was just one general operating account into which all monies paid to Wallen were deposited. [RP 1154, ¶30, Tr I: 104]

Wallace knew Fogelsons were purchasing the property for cash. Montoya, as General Manager, would provide a weekly update to Wallace, Bozzone, and Filener concerning Wallen's sales, cancellations and home starts. [RP 1151, ¶7 supported by Tr I: 80] Sales were identified by communities and addresses. [RP 1151, ¶8, supported by Tr I:81] As part of her weekly reporting requirements, Montoya told Wallace, Bozzone and Filener about sales that occurred . [RP 1151 ¶9, supported by Tr I:82] Montoya provided Wallace with Production Summaries, which stated what sales had happened during the week, as well as what homes had started construction and gone vertical, and what cancellations had occurred. [RP 1151-1152 ¶13, supported by Tr I: 84] Forecasts of closings were sent to Wallace, which projected closings and when funds would be available. [RP 1152, ¶14; supported by Tr I: 84-85] Wallace received start reports on a regular basis, which listed any home that had broken ground to vertical construction. [RP 1152, ¶15, supported by Tr I: 89] Cash flow by jobs reports showed cash flows coming in

typically by address. [RP 1153, ¶20; supported by Tr I: 95] There were two different reports that discussed the address or name of the contracts that were pending. [Tr II:32] In fact, Wallace confirmed at trial that he produced Plaintiffs' Exhibit 65 in discovery. [Tr II: 61-62] Wallace received Exhibit 65, which stated that Fogelsons were a cash buyer. [Exhibit 65, RP 1155 ¶39; supported by Tr I: 84-85; Tr II: 31-32]

Plaintiffs' Exhibit 65 specifically lists under Projected Closings for February 2009 that Fogelsons were purchasing 1012 Cristanos for cash. The trial court, in its Finding ¶59 , cited Montoya's testimony that Exhibit 65 was part of the production summary regularly sent to Wallace, Bozzone and Filener. [RP 1157, supported by Tr I: 83, 84, 133, Tr II: 62] The trial court cited in its Finding ¶59, the testimony of Wallace that he produced Exhibit 65, which shows a projected closing for February of 2009 for a cash sale to the Fogelsons. [Tr II: 62] The trial court found in its Finding ¶38 that once the Fogelson house began to go vertical, the Fogelson property would show up on production summaries and reports. [RP 1155, supported by Tr I: 106]

The evidence presented at trial supports the trial court's findings that Wallace knew about the cash sale to Fogelsons, and that Wallace and Bozzone were aware, when the February 24, 2009 decision to close Wallen was made, that the Fogelson's house had not been completed. Wallace and Bozzone had received

Exhibit 65, which showed a projected cash closing of the Fogelson house in February of 2009. [Tr I: 83, 84, 133, Tr II: 62] Bozzone told Montoya to not keep a skeleton crew to finish up the few homes that were within 30 days of completion, one of which was the Fogelsons' home. [RP 1160 ¶79, supported by Tr I: 154-155] There was no evidence presented at trial by Wallace that he did anything further to try and complete the Fogelson house.

Wallace and Bozzone collaborated to initiate what became the policy of Wallen to push payables and not pay vendors. This finding is supported by the evidence presented at trial as follows: 1) by April of 2008, payments were being delayed to vendors, which was a collaborative idea among Wallace, Bozzone and Filener [RP 1152, ¶18; supported by Tr I:93; Tr III: 119-120]; 2) Wallace was the author of Plaintiffs' Exhibit 47, copied to Filener, Montoya and Bozzone, which stated that they needed to continue to push payables and accumulate cash [Plaintiffs' Exhibit 47; Tr II: 42] ; 3) Wallace testified that he and Bozzone initially started talking about delaying payments to vendors for sixty days [Tr II: 43]; 4) Exhibit 59 was an email from Wallace to Montoya dated October 30, 2008, stating that payables would continue to be pushed 60 to 90 days; 5) Wallace and Bozzone knew that payments to vendors were being delayed [RP 1154, 1156 Findings ¶46, 51, 52, 53; supported by Tr I: 93; Tr III: 119-120; Tr I: 128-129, 132-133; Tr II: 43; Tr II 43-45; Plaintiffs' Exhibit 46, 59, 64]; 6) Wallace knew

that New Mexico had mechanic lien statutes [Tr II:41]; 7) Wallace knew that a contractor could lien a home if the contractor was not paid [Tr: 42]; and 8) the decision to push payables and not pay vendors timely and the ratification thereof was reckless and done without regard to the rights of the Fogelsons [RP 1157, court's finding ¶54].

Wallace and Filener created Southwest Builder's Trust after Wallen was shut down. [Tr III: 105] Southwest Builders Trust was created on March 24, 2009, between Wallen Builders, Ltd, Wall2Builders LP, Wallen Development Inc., Wall2 Development Inc., Wall2 Development, Wallen Homes South LLC, and/or Wall2Holdings, LLC, as Grantor, and Larry Filener, as Trustee. [Wallace's Exhibit T] Wall2 Holdings LLC is an entity in which Bozzone, Wallace, and Filener were listed as the Managers. (Wallace's Exhibit N] After Wallen closed its business in February of 2009, Southwest Builders Trust was created to liquidate properties into cash. [Tr II: 68] Prior to the closing of Wallen in February of 2009, Wallen had previously worked out a deal with the New Mexico State Department of Taxation and Revenue to put a mortgage on lots owned by Wallen to avoid the filing of a tax lien. [Tr III: 105] For unknown reasons, that mortgage was never filed against the properties. [Tr III: 105] Once Wallace and Filener realized that the mortgage was not filed, the entities described in Exhibit T transferred the lots to Southwest

Builders Trust. [Tr III: 106] Southwest Builders Trust sold the lots to pay back deposits to people that had bought a home. [Tr II: 67-70; Tr III: 106].

Thomas Gulley, an attorney, represented Filener, Wallace and Wallen after Wallen closed. [Tr II: 72-73; Tr III: 136] Mr. Gulley sent a letter dated April 6, 2009, to the attorney for Fogelsons saying Wallen was working towards a solution. [Plaintiffs' Exhibit 110; Tr III: 136] Fogelsons' attorney informed Mr. Gulley that there were mechanics' liens filed against the property and that the house was only two weeks away from completion. [Plaintiffs' Exhibit 115] On April 24, 2009, Fogelsons' attorney advised Mr. Gulley that, if by May 4, 2009, Mr. Gulley did not respond, Fogelsons would file a motion to compel arbitration. [Plaintiffs' Exhibit 115]

Fogelsons never received any of the money obtained by Southwest Builders Trust from the sale of the lots by Southwest Builders Trust. [Tr III: 132] The Attorney General's office was investigating Wallen. [Tr III: 108-109] Wallace and Filener knew the Fogelsons were demanding return of their money when the deposits were being repaid to other purchasers. [Tr II: 72, Tr III: 134] The Fogelsons didn't get any money because construction deposits were paid back to prevent a further investigation by the Attorney General's office. [Tr III: 133]The trial court found that the major reason Fogelsons did not receive any of the monies from the sale of the lots after Wallen was closed, was because Filener and Wallace

undertook to return deposits to other purchasers because they had been notified that the attorney general was investigating them. [RP 1163 ¶110]

III. ARGUMENT

Wallace argues that the claims in the instant case arose from the same facts underlying the arbitration action and are therefore barred by the Doctrine of Claim Preclusion/Res Judicata. Wallace further argues that the Arbitration Judgment necessarily determined that Wallace and Bozzone were authorized agents of Wallen, acting within the course and scope of their positions. Wallace argues that the Judgment entered in the instant case was predicated on a finding that Wallace and Bozzone acted individually and therefore the Fogelsons are barred from taking inconsistent judgments based on contrary and conflicting facts. Wallace contends that the Judgment entered in the instant case was barred by the Doctrine of Issue Preclusion/Collateral Estoppel.

A. Plaintiffs' claims against Wallace could not have been brought in the prior arbitration because Wallace, individually, was not a party to the Agreement to arbitrate.

The Purchase Agreement is between Wallen Development Inc., or Developments by Wallen LLP, as Seller, and Dave Fogelson and Corinne Fogelson, as Purchaser. (Exhibit 24) Paragraph 6 of the Purchase Agreement states that the Seller and the Purchasers agree to resolve exclusively through binding arbitration any dispute regarding the construction and the terms of the

Purchase Agreement. [Plaintiffs' Exhibit 24]. There is nothing in Exhibit 24, which states that customers who have claims against officers and directors of Wallen (including Wallace), or other individuals, officers or directors employed by Wallen, but acting on their own behalf, must agree to resolve exclusively, through binding arbitration, any dispute between them. A legally enforceable contract to arbitrate is a prerequisite to arbitration. Parties will not be forced to arbitrate without such a contract. §44-7A-8(c) 1978 N.M.S.A. *Heye v. American Golf Corp., Inc.* 2003-NMCA-138, 134 N.M. 558, 80 P.3d 495; *Alexander v. Carlton & Associates,* 2005-NMCA-034, 137 N.M. 293, 100 P.3d 509. In this case, there was no contract on which Fogelsons could rely to compel Wallace to arbitrate. Therefore, the Fogelsons had no choice but to file this action to raise its individual tort claims against Wallace and Bozzone.

Paragraph 6 of the Purchase Agreement is specific that binding arbitration is required for any dispute regarding the construction and the terms of the Purchase Agreement. [Plaintiffs' Exhibit 24] In the instant action, Fogelsons brought suit against Wallace and Bozzone for tortious acts they committed in their individual capacities.

B. The instant case is not barred under the Doctrine of Claim Preclusion/Res Judicata.

DeFlon v. Sawyers, 2006-NMSC-025, 137 P.3d 577 explored the res judicata and collateral estoppel effects of the dismissal of a federal lawsuit on

subsequent state court proceedings. *Id* at ¶1. *DeFlon* did not involve a mandatory arbitration contract with only one of many parties, as does the instant case. In *DeFlon*, the Plaintiff previously sued her former employer, a corporation, in a federal court case for sex discrimination. In the federal action, Plaintiff also brought state law claims for negligent retention and supervision and intentional infliction of emotional distress. The state court claims were based primarily on the actions of the corporate employees. *Id* at ¶1. The federal district court granted the Employer Corporation's motion for summary judgment and the Tenth Circuit Court of Appeals affirmed. *DeFlon v. Danka Corp.,* 1 Fed. Appx. 807 (10th Cir. 2001)

The plaintiff in *DeFlon* subsequently filed another suit in state court against three employees of the corporation, individually, for intentional infliction of emotional distress, intentional interference with a contract, defamation, prima facie tort, and civil conspiracy. *Id* at ¶1. The trial court dismissed the plaintiff's state court action against the three employees, in their individual capacities, finding that the doctrines of res judicata and collateral estoppel barred the plaintiff's claims. *Id* at ¶1. The decision of the trial court was upheld by the New Mexico Court of Appeals in *DeFlon v. Sawyers,* No. 23,013, slip op. at 2 (Ct. Appl. July 28, 2004). The New Mexico Supreme Court reversed the Court of Appeals and held that res judicata and collateral estoppel did not bar the state court claims. *Id* at ¶1.

Res judicata bars a subsequent lawsuit only if four elements are met: "1) the parties must be the same or in privity; 2) the subject matter must be identical; 3) the capacity or character of persons for or against whom the claim is made must be the same; and 4) the same cause of action must be involved in both suits," *DeFlon* citing *Myers v. Olson,* 1984-NMSC- 015, 100 N.M. 745, 676 P.2d 822. Res judicata will ordinarily preclude a claim provided there has been a full and fair opportunity to litigate all issues arising out of that claim. *Myers* at ¶8.

The *DeFlon* court stated that determining whether parties are in privity for purposes of res judicata requires a case-by-case analysis. *DeFlon* at ¶4. *DeFlon* cited *Morgan v. City of Rawlins,* 792 F.2d 975, 980 (10th Cir. 1986), wherein the Tenth Circuit indicated that privity does not exist where an initial lawsuit is brought against an employer and a second lawsuit is then brought against an employee acting in his or her individual capacity ("We fail to see how Mr. DeHerrera's employee/employer relationship bars his presence in this suit when he is named for actions for which he allegedly was personally responsible." (citing *Smith v. Updegraff,* 744 F.2d 1354 (8th Cir. 1984)).

The *Deflon* court held that res judicata did not bar the Plaintiff's claims in the state court action, because privity did not exist where an initial lawsuit was brought against an employer and a second lawsuit is then brought against an employee acting in his or her individual capacity. In the instant case, privity does

not exist because: 1) the action in arbitration was against Wallen only, as required by the arbitration clause in the Purchase Agreement; and 2) the claims in the instant case were bought against Wallace and Bozzone in their individual capacities.

There is not identical subject matter between the arbitration action and the instant case. Fogelsons, in their Second Amended Complaint, asserted tort claims against Wallace, individually, for Conversion, Fraud, Unfair Trade Practices, Civil Conspiracy and Prima Facie Tort and also asserted claims against Bozzone individually for Conversion, Fraud, Unfair Trade Practices, Civil Conspiracy, Intentional Interference with a Contractual Relation, and Prima Facie Tort. [RP 869-879] Fogelsons further asserted a claim for foreclosure of their transcript of judgment against Wallen and various subcontractors who had filed liens against the property. [RP 879-882] by comparison, the complaint in arbitration was against Wallen for breach of contract, fraud and unfair trade practices. [Plaintiffs' Exhibit 40]. The arbitrator found that Wallen breached the contract, committed fraud, and engaged in unconscionable violations of the Unfair Practices Act. [Plaintiffs' Exhibit 41] As the court found in *DeFlon*, parties to a contract cannot bring an action for tortious interference with an existing contract against each other. *Id* at ¶6, citing *Salazar v. Furr's,* 629 F. Supp. 426 (E.D.Pa. 1983). As the court

correctly noted, a plaintiff can only bring an intentional interference with a contract claim against the present defendants in their individual capacities. *Id* at ¶7.

New Mexico courts recognize that officers or agents of corporations can be held liable if they engage in tortious conduct. *Kreischer v. Armijo*, 1994-NMCA-118, ¶5, 118 N.M. 671, 884 P.2d 827. *Kaveny, et al., v. MDA Enterprises, et al.,* 2005-NMCA- 118, ¶20-22, 138 N.M. 432, 120 P.3d 854. Both *Kreischer* and *Kaveny* involved tort claims against agents, officers and directors of corporation who had entered into contracts for construction of additions to homes.

In *Kreischer,* the court upheld the trial court's dismissal of Plaintiff's claims of misrepresentation against the agent, individually, because it found that although it recognizes that an agent may be held liable for his own tortious acts, whether or not he was acting for a disclosed principal, based on the allegations raised in the complaint, the initial inquiry is whether the causes of action sounded in contract or in tort. *Id* at ¶5. The court recognized that the distinction between tort and contract liability is often a difficult distinction. *Id* at ¶5. The *Kreischer* court held that the real party in interest was not the defendant named individually, but rather was Armijo Construction, Inc., a New Mexico corporation. *Id* at ¶7.

Although in the instant case, Fogelsons' UPA claims were dismissed by the trial court [RP 1050}, which is the subject of a cross-appeal, *Kreischer* contains an interesting discussion regarding the plaintiff's claims asserted in its first amended

complaint. The *Kreischer* court noted that the plaintiff came close to alleging a valid non-contractual cause of action against the individual defendant , as an agent of the corporation, based on the UPA. The *Kreischer* court recognized that those allegations might support a claim that is separately actionable against the defendant. *Id* at ¶9. In that particular instance, the court did not address the propriety of the dismissal of the UPA claim because the plaintiff did not raise that issue on appeal and the quoted language posed the cause of action as one sounding in contract rather than tort. *Id* at ¶10.

In *Kaveny* the court found individual liability against the corporate officer. *Kaveny* involved a construction contract for a detached cottage, which was to serve as Kaveny's new home. The Plaintiffs hired Defendant MDA Enterprises, Inc. d/b/a Arnett Home Remodelling ("MDA") to construct a detached cottage. Defendant Duebler, as a disclosed agent for MDA, made a contract with the Plaintiffs for the construction. *Id* at ¶2. Defendant Arnett argued that he acted at all times with corporate authority and did not have any individual liability. Arnett further argued that in order to impose such liability, plaintiffs must pierce the corporate veil. *Id* at ¶19. The trial court disagreed and found that Arnett's actions created individual liability. *Id* at ¶4. The appellate court agreed that it was not necessary to pierce the corporate veil to hold Arnett individually liable under the facts of the case. *Id* at ¶19. The appellate court held that once the trial court found

that Arnett committed an intentional tort, it was unnecessary to pierce the corporate veil. *Id* at ¶21.

The defendant in *Kaveny* argued that under *Kreischer,* the court must look to whether the gravamen of the complaint lies in contract or tort. This is the same issue that Wallace and Bozzone raise. Wallace states that the conduct underlying the arbitration action and the instant case is the identical conduct arising from the breach of the purchase agreement (Wallace's brief, p. 12) In *Kaveny*, the defendant argued that the plaintiffs' cause of action arose out of contract and such contractual obligations do not impose liability on him individually. The court in *Kaveny* distinguished that case from *Kreischer* by noting that in *Kreischer*, the court had reviewed a summary judgment decision, whereas in *Kaveney*, the appellate court was reviewing a trial court decision that had found the defendant committed an intentional tort. *Id* at ¶23. In *Kaveny*, the trial court had found the tort allegations were meritorious. The court in *Kaveny* noted that *Kreischer* had held that, under some circumstances, allegations of a noncontractual nature could support a claim that was separately actionable against an individual. The *Kaveny* court found that there was sufficient evidence in the record to support the judgment of fraud against the defendant. *Kaveny* at ¶23.

The Court in *Stinson v. Berry*, 1997-NMCA-076, 123 N.M. 482, 943 P.2d 120 also found that officers or agents of corporations can be held individually

liable if they engage in tortious conduct. The *Stinson* court held that if an officer or director directs or actively participates in the commission of the tortious act of the corporation, he will be liable, along with the corporation. *Id* at ¶17. If the officer or director directed, controlled, approved or ratified the activity that led to the injury, he or she can be held personally liable. *Id* at ¶17, citing *Lobato v. Pay Less Drug Stores, Inc.,* 261 F.2d 406, 408-409 (10th Cir. 1958). The *Stinson* court found that this rule has its roots in the law of agency as directors are the agents of their corporate principal, and the rule is that agents are liable for their own tortious acts, regardless of whether the principal is liable. *Id* at ¶18.

Likewise, in the instant case the trial court made numerous findings to support its finding that Wallace directed and actively participated in the activities evidencing Plaintiffs' claims of prima facie tort and civil conspiracy against Wallace. Those findings have been challenged by both Bozzone and Wallace as a matter of law and not based upon any lack of substantial evidence. As set forth above in the Summary of Facts, there is evidence that supports the trial court's factual findings. Some of the findings of the court, which supported its findings that intentional torts were committed include: 1) payments were being delayed to vendors, which was a collaborative idea with Wallace, Bozzone and Filener [RP 1152, ¶18; RP 1156 ¶47; RP 1156, ¶¶51-53]; 2) Bozzone and Wallace questioned Jenice Montoya (Montoya) concerning why she was paying trades when they had

agreed to push accounts payables [RP 1156, ¶46]; 3) the decision to push payables and not pay vendors timely and the ratification thereof was reckless and done without regard to the rights of Fogelsons [RP 1157, ¶54]; 4) Wallace and Bozzone knew about the lien laws and that contractors could lien after 30 days [RP 1158, ¶¶66-67]; 5)Wallace and Bozzone were directly responsible for the failure to pay vendors on the Fogelsons' home based on their decision to not pay vendors timely and which vendors to pay [RP 1159, ¶72]; 6) Bozzone instructed Montoya that the company would close [RP 1159, ¶78]; 7) Bozzone told Montoya not to keep a skeleton staff to finish up the few homes which were within 30 days of completion [RP 1160, ¶79]; 8) Wallace and Bozzone actively participated in the commission of the tortious acts against Fogelson by directing, approving and ratifying the late payments to vendors [RP 1163, ¶¶106, 107]; 9) proceeds from the sale of lots owed by Wallen were used to refund deposits and not to repay Fogelsons because it was believed that paying off construction deposits would prevent any further investigation by the Attorney General's office [RP 1163, ¶¶109-112]. None of these allegations for prima facie tort, conspiracy, or intentional interference with contractual relations, were part of the Plaintiffs' complaint for arbitration against Wallen. [Plaintiffs' Exhibit 140] Since the trial court found intentional torts were committed by Wallace and Bozzone, it is clear that the subject matter of the arbitration and the instant case is not identical. The

capacity or character of persons against whom the claims are made in this action are not the same as in the arbitration action which was against the corporation. The same causes of action are not involved in the arbitration action and the instant action. Further, Wallace and Bozzone could not individually be compelled to arbitration, so the parties were not the same nor in privity. As set forth in Fogelsons' Answer Brief to Bozzone's Brief-in-Chief, Bozzone maintained throughout the instant case that he was not an agent, officer or director of Wallen.

C. The instant case is not barred under the Doctrine of Issue Preclusion/Collateral Estoppel.

Wallace asserts in his argument regarding issue preclusion/collateral estoppel, that the one significant difference between the factual basis of the arbitration judgment and the trial court's judgment is that in the instant case, Fogelsons alleged that the conduct undertaken by Wallace and Bozzone was committed individually and outside the course and scope of Wallace's duties as an officer and/or director. (p. 14, Wallace's Brief). In contrast, Wallace argues, the findings of the arbitration judgment determined that Wallace and Bozzone's conduct was within the course and scope of their agency. (p. 14 of Wallace's brief.) First, the arbitrator made no findings about Wallace and Bozzone's conduct. Second, as set forth above in the discussion under Doctrine of Claim Preclusion, the court in the instant case made findings about the conduct of Wallace and Bozzone, which conduct was not alleged in the arbitration complaint.

Although the following discussion occurs in *DeFlon* under the section on res judicata, it addresses Wallace's claims about whether the conduct of Wallace and bozzone was within the course and scope of their agency. The *DeFlon* court cited *Ettenson v. Burke,* 2001-NMCA-003, 130 N.M. 67, 17 P.3d 440 for its holding in adopting a qualified privilege. The court in *Ettenson* found that the absolute immunity theory is a minority view. The majority view is that a corporate officer is privileged to interfere with his corporation's contracts only when he acts in good faith and in the best interests of the corporation, as opposed to his own private interests. *Id* at ¶17. *Ettenson* adopted a qualified privilege and held that corporate officers may be liable for interfering with corporate contracts if such interference is in bad faith and against the best interests of the corporation. *Id* at ¶¶18, 20.

The *DeFlon* court stated that determining whether a corporate officer's actions fall outside the scope of authority "requires a court to delve into the motivating forces behind the officer inducing his corporation to breach its contractual obligations." *DeFlon* at ¶10, quoting *Ettenson* at ¶18. The trial courts must examine whether the corporate officer acted to serve his own private interest. *DeFlon* at ¶10. In the instant case, the trial court found that Wallace determined not to return any monies to Fogelson from the sale of other lots in the hopes of halting an investigation by the Attorney General's office. [RP 1163, ¶¶109-112]. Bozzone instructed Montoya close Wallen and to not finish homes within 30 days

of completion. Bozzone was more concerned about the three homes for which a company he owned provided construction financing. [RP 1159, ¶78; RP1160, ¶¶79-80] There were several findings by the court set forth above that Wallace and Bozzone collaboratively decided to delay payments to vendors, notwithstanding they knew that properties could be subject to liens after 30 days. These are all actions that were in their own personal interests, in bad faith, and not in the best interest of the corporation. Furthermore, the court found that these actions were made recklessly by Wallace and Bozzone. [RP 1157, ¶54]

Collateral estoppel has four elements: 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. *Shovelin v. Central N.M. Elec. Coop.,* 1993-NMSC-015, ¶10, 115 N.M. 293, 850 P.2d 996. Wallace and Bozzone cannot establish that the issues of individual liability had actually been litigated and necessarily determined in the arbitration action, which is an element of collateral estoppel. *DeFlon* at ¶14.

The Court of Appeals in the *DeFlon* case held that because the state suit was grounded on the same set of facts as the federal suit, and because the federal court did not think those facts were sufficient to establish the causes of action that

plaintiff brought in federal court, collateral estoppel barred plaintiffs' state court claims for intentional interference with a contract and civil conspiracy. The Court of Appeals held that the plaintiff's claims were actually and necessarily decided by the federal court. *DeFlon*, No. 23,013, slip op. at 11. The Supreme Court in *DeFlon* disagreed and reversed the Court of Appeals. *DeFlon* at ¶15.

DeFlon held that collateral estoppel did not apply because the state court claims for intentional interference with a contract and civil conspiracy had not been actually and necessarily decided in the federal court action. *Id* at ¶27. The *DeFlon* court examined each of the claims made in the federal court action and determined that, because the elements of each claim therein were different than the elements required to establish an intentional interference with contractual relations and do not require the same findings in order to succeed, the tort of intentional interference with contractual relations was not necessarily decided in the federal action. *Id* at ¶16.

Wallace and Bozzone were not even parties to the arbitration action. There was no contract compelling them to arbitrate. Wallace and Bozzone were sued in the instant case in their individual capacity. The issues relating to the individual torts of Wallace and Bozzone alleged in the instant case were not actually litigated in the prior adjudication , nor were those issues necessarily decided in the arbitration action. The elements to establish a breach of contract claim, as asserted

against Wallen in the arbitration action, differ from the elements of the tort claims of intentional interference with a contract, prima facie tort, and civil conspiracy asserted against Wallace and Bozzone. An element in both intentional interference with a contract claim and prima facie tort claim is that the individual acted without justification or privilege to do so. *Bogel v. Summit Investment Company, LLC,* 205-NMCA-024, ¶20, 137 N.M. 80, 107 P.3d 520. *Schmitz v. Smentowski,* 1990-NMSC-002, ¶37, 109 N.M. 386, 785 P.2d 726. That element is not required to establish a breach of contract, fraud or UPA violation, which were the causes of action asserted in the prior arbitration action. Therefore, collateral estoppel does not apply in the instant case as the claims and causes of action were different, were not actually litigated, and were not necessarily determined in the arbitration action.

D. The arbitration judgment against Wallen and the judgment against Wallace is not an impermissible double-recovery.

Wallace argues that the arbitration judgment against Wallen and the judgment against Wallace is an impermissible double-recovery. The Fogelsons obtained a judgment against Wallen in arbitration. [Plaintiffs' Exhibit 141] The property which Fogelsons were purchasing was titled in the name of Wallen and Wallen did not offer to convey the property to Fogelsons at any time. [RP 1162, courts' findings ¶¶97-98] There were numerous claims of liens against the property totaling approximately $60,000. [RP 1161, court's finding ¶95] In the instant case, along with the tort claims asserted against Wallace and Bozzone,

Fogelsons foreclosed its transcript of judgment against Wallen and the holders of the claims of lien. [RP 0865-889] The court entered a partial judgment and default judgment allowing Fogelsons to foreclose their transcript of judgment against the property and against any and all right, title, and interest of Wallen and the lien holder defendants. [RP 993-995] The court entered an order approving the special master's report and reducing the judgment against Wallen by $40,000, the amount bid by the Fogelsons. [RP 1123-1124] The court awarded a deficiency judgment against Wallen of $463,891.73. [RP 1124] There are no further assets of Wallen against which to collect as the court found that Wallen transferred lots to Southwest Builders Trust, which proceeds were used to pay other purchasers' deposits. [RP 1163, ¶¶109-111] The court also found that the remaining lots were deeded to GM Investments and sold by GM Investments for a profit. [RP 1164, ¶¶1164]

The court entered a judgment against Wallace and Bozzone, jointly and severally, as a result of their tortious conduct, as follows: 1) compensatory damages in the amount of $165,111.00; 2) punitive damages of $165,111.00; 3) prejudgment interest $49,124.04 through August 18, 2015 and thereafter accruing at the rate of $45.23 per day; 4) post-judgment interest at the rate of 15% per annum; and, 5) costs in the amount of $10,458.71. [RP 1266-1268]. These are damages that are distinct from the damages awarded against Wallen.

When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. The prevailing party must then elect between awards that have duplicative elements of damages. *Hale v. Basin Motor Co,* 1990-NMSC-068, ¶ 21, 110 N.M. 314, 795 P.2d 1006. In the *Hale* case, the court considered both treble damages under the UPA and punitive damages awarded for fraud. The court ruled that the Hales had to elect between the punitive damage award based upon fraud and any award of damages under the UPA. *Id* at ¶28.

Although *Sunnyland Farms, Inc. v. Cent. New Mexico Elec. Coop., Inc.,* 2013-NMSC-017, ¶48, 301 P.3d 387, involved the collateral source rule, which is not applicable in the instant case, the court noted that a plaintiff's double recovery is likely to be more egregious in theory than in practice. *Id* at ¶50. The *Sunnydale* court cited the dissent in *McConal Aviation, Inc. v. Commercial Aviation Ins. Co.,* 1990-NMSC-093, ¶33,110 N.M. 697, 799 P.2d 133, in that if there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer be relieved of his fully responsibility for his wrongdoing. *Sunnydale* involved payment under a settlement agreement, but to allow Wallace and Bozzone to escape liability for their individual tortious actions,

because a judgment was entered against a defunct Wallen, would provide the wrongdoer with a windfall.

McConal was later limited by *Sanchez v. Clayton*, 1994-NMSC-064, 117 N.M. 761, 877 P.2d 567 to situations involving the collateral source rule where there are no facts showing that the parties were jointly liable for the damages caused to the plaintiff. *Sanchez* at ¶6. In *Sanchez,* the plaintiffs had asserted claims against New Mexico Highlands University and through settlement of the judgment had received full satisfaction of their damages against Highland. Plaintiffs then asserted claims in tort and breach of contract against Clayton and Servicemaster. The federal court had found that Highlands had violated plaintiffs' First Amendment right of free speech and Fifth Amendment right to due process. *Id* at ¶4. Once the Highland case settled, Clayton and Servicemaster moved for and were granted summary judgment in the state claim case against them on the basis that dismissal would be appropriate under the principle against double recovery. *Id* at ¶5. Plaintiff appealed the summary judgment dismissal and the court found that the plaintiffs asserted a cause of action for compensatory and punitive damages that would not constitute a double recovery. *Id* at ¶1.

The court in *Sanchez* reversed the motion for summary judgment and remanded for further proceedings. The court agreed that a claim for the same damages is extinguished regardless of the theories upon which the respective

claims for relief are based. With respect to tortfeasors who are jointly and severally liable, a settlement with one tortfeasor reduces the claim against the other tortfeasor. *Id* at ¶6. However, the damages against Wallen and Bozzone were based on distinct theories and distinct damages were awarded for each of those claims. Even though the punitive damages claim appears to be the same, as the court noted in *Sanchez,* punitive damages against two or more defendants must be separately determined. *Id* at ¶11. An award for punitive damages must be supported by an award of compensatory damages. *Id* at ¶12. As the court held, the key is whether plaintiffs can state a cause of action under which they would be entitled to compensatory or nominal damages against the Defendants. *Id* at ¶17. As the *Sanchez* court held, if plaintiffs are successful in establishing a cause of action, they may recover unpaid compensatory damages and punitive damages. *Id* at ¶20. In this instance, Fogelsons could assert the claims in one action because of the arbitration clause. Fogelsons did state a cause of action under which they would be entitled to compensatory damages and were awarded a judgment thereon against Wallace and Bozzone, which is not precluded by the doctrines of res judicata or collateral estoppel. Furthermore, it is clear that there will be no double recovery as Fogelsons will only collect $40,000 against Wallen.

E. The partial satisfaction of the arbitration judgment in the amount of $40,000 does not preclude any claim on uncollectability and credit/ offset was given to the judgment against Wallace.

Fogelsons address this issue above. There is no double recovery as Fogelsons will only collect $40,000 against Wallen and Fogelsons asserted causes of action against Wallace and Bozzone, upon which they were awarded a judgment.

F. Wallace and Bozzone were not indispensable parties to the arbitration.

Wallace and Bozzone were not indispensable and necessary parties to the arbitration because NMRA 1-019 requires a three part analysis of: 1) whether a party is necessary to the litigation; 2) whether a necessary party can be joined; and 3) whether the litigation can proceed if a necessary party can not be joined. *Little v. Gill*, 2003-NMCA-103, 134 N.M. 321, 76 P.3d 639. Wallace and Bozzone could not be joined because they could not be compelled to arbitrate without the existence of an agreement to arbitrate. The claims asserted against Wallen involved claims of breach of contract, fraud, and violations of the UPA. As set forth above, Wallace was represented by Mr. Gulley and fully aware that a claim against Wallen was made in arbitration. Wallace chose to ignore the arbitration action and a judgment in arbitration was entered against Wallen on the above claims.

In the instant case, Fogelsons asserted claims based in tort against Wallace and Bozzone individually. Those claims were based on the individual actions

taken by Wallace and Bozzone and, as such, the inclusion of Wallen in such a suit was not necessary so the litigation could proceed.

G. The judgment is not in violation of the Frow Doctrine, nor Rule 1-054.

The judgment entered in the instant case is not in violation of the Frow Doctrine nor NMRA 1-054. The Supreme Court held that a final decree on the merits could not be made separately against one defendant where a joint charge was still pending against the others. *Frow v. De La Vega*, 82 U.S. 552, 21 L.Ed. 60 (1872). De La Vega had filed a complaint against Frow and thirteen other defendants charging them with a joint conspiracy. The court entered a decree *pro confesso* against Frow and, against the protestation of Frow, entered a final decree. *Id* at 552. The court proceeded to try the issues against the remaining defendants and decided the merits against the complainant and dismissed his bill. The question was whether the court could make a final decree against one defendant separately on the merits while the case was proceeding undetermined against the others. The Supreme Court held that, in that particular instance, an absurdity could result in that fraud could be held against one joint defendant, but not against the other joint defendants. *Id* at 552. The Supreme Court went on to hold that the defaulting defendant has merely lost his standing in court, but if the suit is decided against the complainant on the merits, the suit has to be dismissed against all other defendants. *Id* at 553.

The *Frow* doctrine is not applicable in the instant case. The court in *United Salt Corp. v. McKee, 1981-NMSC-052, 96 N.M. 65, 628 P.2d 310* stated that, at most, Frow controls in situations where the liability of one defendant necessarily depends upon the liability of the others. *Id* at ¶4. The first question is whether a default judgment against one defendant would prejudice the other defendants. *Id* at 5. Wallen, Wallace and Bozzone were not charged with a joint conspiracy. There was no arbitration clause that could compel Wallace and Bozzone into arbitration, whereas there was an arbitration clause compelling Wallen and Fogelsons to litigate in arbitration. Fogelsons did seek joint and several liability against Wallace and Bozzone and the tort claims against them were tried together. The default judgment against Wallen did not prejudice Wallace and Bozzone. There is no evidence that the court found that Wallace and Bozzone were individually liable in tort because there was a default judgment against Wallen. In fact, notwithstanding the default judgment against Wallen, the court could have found Wallace and Bozzone were not individually liable in tort. There were no inconsistent judgments entered as *Frow* feared and no double recovery as argued above. The liability of Wallace and Bozzone, in tort, did not depend on the liability of Wallen.

United Salt Corp. stated that another question to be resolved is whether the effect of the default judgment on United Salt was harmless error. Setting aside a judgment is in the discretion of the court and appellate courts will not interfere

with the action of the trial court except upon a showing of abuse of discretion. *Id* at ¶6. In the instant case, Wallace moved the court to set aside the default judgment against Wallen. [RP 199] The court declined to do so. [RP 262] Although the court did not set out its reasoning for the denial in the order, Fogelsons argued in their response that the Wallen entities were clearly aware of the claim for arbitration as evidenced by Plaintiffs Exhibits 115-116. Fogelsons also argued that a motion to vacate an arbitration award must be filed in ninety days pursuant to the Uniform Arbitration Act. N.M.S.A. 1978, §44,7A-24(b) and such request was not timely made. [RP 225]

H. Fogelsons established elements of prima facie tort and conspiracy.

Wallace argues that Fogelsons were estopped from asserting their Second Lawsuit and failed to establish elements of prima facie tort and conspiracy. (P. 18 of Wallace's Brief). However, there is no argument set forth therein, other than to state that when a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position. There is nothing specific set forth therein or challenge to any of the court's findings and conclusions to alert Fogelsons as to what Wallace is arguing.

In an attempt to guess at what Wallace asserts, Fogelsons addressed in the collateral estoppel argument the claim Wallace made that the one significant difference between the factual basis of the arbitration judgment and the trial court's

judgment is that in the instant case, Fogelsons alleged that the conduct undertaken by Wallace and Bozzone was committed individually and outside the course and scope of Wallace's duties as an officer and/or director versus the findings of the arbitration judgment that determined that Wallace and Bozzone's conduct was within the course and scope of their agency. (p. 14 of Wallace's Brief.) As discussed previously in this answer brief, there were no findings in the arbitration judgment about Wallace and Bozzone. Furthermore, the elements of a breach of contract claim, UPA claim and fraud claim differ from a prima facie tort claim and intentional interference with contract claim in that the individual must be found to act without justification or privilege to do so. Finally, an officer, agent or director can be held personally liable for their intentional tortious conduct.

Wallace does not state how he claims Fogelsons failed to establish elements of prima facie tort and conspiracy. (p. 18 of Wallace's Brief). Therefore, such claim should be stricken.

The elements of prima facie tort are: 1) an intentional, lawful act by defendant; 2) an intent to injure the plaintiff; 3) injury to plaintiff, and 4) the absence of justification or insufficient justification for the defendants' acts. *Schmitz v. Smentowski,* 1990-NMSC-002, ¶37. The *Schmitz* court rejected the argument that to allow a defendant to escape liability solely because he can demonstrate some economic benefit to himself or, in this case, the corporation also,

would defeat the policy behind the recognition of prima facie tort. The *Schmitz* court held that the act must be committed with the intent to injure the plaintiff, or, in other words, without justification, but it need not be shown that the act was solely intended to injure the plaintiff. *Id* at ¶47.

In the instant case, the court made many findings, none of which Wallace challenges on the basis of lack of substantial evidence. The actions by Wallace and Bozzone in depositing all funds in one operating account, including the payments made by Fogelsons, delaying payments to vendors, paying vendors and liens on other houses with funds from the general operating account, including the cash paid by Fogelsons, allowing the filing of liens against the property being paid for in cash by Fogelson, ordering that Wallen be closed without completing the few houses within 30 days of construction and, notwithstanding their knowledge of the claims of Fogelsons, using monies from sales of lots owned by Wallen to pay back deposits to avoid an investigation by the Attorney General's office, all support a finding that Wallace and Bozzone engaged in a prima facie tort.

The elements of a conspiracy claim are: 1) a conspiracy between two or more individuals; 2) specific wrongful acts carried out by Bozzone and Wallace pursuant to the conspiracy; and 3) damage to Fogelsons as a result of such acts. *Ettenson,* 2001-NMCA-003, ¶¶ 12, 14 (*quoting Silva v. Town of Springer,* 1996-NMCA-022, ¶25, 912 P.2d 304).

The trial court found: 1) both Wallace and Bozzone knowingly delayed payments to vendors and collaborated on such policy; 2) knowingly allowed liens to be filed against the property to be purchased by Fogelsons; 3) did not finish the construction of the property even though Fogelsons had already paid $165,111.00; and, 4) ordered Wallen to be closed without consideration for the houses within 30 days of completion, including the Fogelsons. In addition, lots were transferred by Wallen and Wall2Holdings to Southwest Builders Trust for the purpose of liquidating property. Those funds were paid to other purchasers for their deposits in order to avoid an investigation by the Attorney General's office, notwithstanding that Wallace knew about the claims of Fogelsons.

This court found that both Wallace and Bozzone committed a *prima facie* tort against Fogelsons. If that claim is allowed to stand against Bozzone, then the civil conspiracy claim stands. Fogelsons have also filed a cross-appeal against Bozzone and Wallace on the dismissal of the conversion claim and unfair practices act claim. If Fogelsons prevail on their cross-appeal, then there is an underlying claim which would support a civil conspiracy claim.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth herein the Judgment against Wallace should be affirmed.

Respectfully submitted,

HUNT & DAVIS, P.C.

Catherine F. Davis

Catherine F. Davis
2632 Mesilla NE
Albuquerque, NM 87110
(505) 881-3191

Attorneys for Plaintiff-Appellee Cross-Appellants, David J. Fogelson And Corinne Fogelson

I hereby certify that a copy of the foregoing Answer Brief to the Brief-in-Chief filed by Defendant-Appellant Mark Bozzone was served by first class mail on July 18, 2016 on the following counsel of record:

Alice T. Lorenz, Esq.
Lorenz Law
2501 Rio Grande Blvd. NW
Suite A
Albuquerque, NM 87104
(505) 247-2456

LeeAnn Werbelow, Esq.
Lastrapes, Spangler &
Pacheco, P.A.
P.O. Box 15698
Rio Rancho, NM 87174
(505) 892-3607

Attorneys for Defendant-Appellant Mark Bozzone

Robert M. Koeblitz
New Mexico Litigation Group, LLC
1100 Second Street NW
Albuquerque, NM 87102

Attorneys for Appellant Eric P. Wallace

Catherine F. Davis

Catherine F. Davis