THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ERIC WALLACE,

Defendant/Appellant/Cross-Appellee,

vs.

DAVID J. FOGELSON, and CORINNE FOGELSON, Husband and wife,

Plaintiffs/Appellees/Cross-Appellants,

And Consolidated cases

Court of Appeals Case No.:
35086

District Court Case No.:
D-1329-CV-2010-02239

ERIC WALLACE'S BRIEF IN CHIEF

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Appellant Eric Wallace submits his Brief in Chief Pursuant to Rule 12-213 of the Rules of Appellate Procedure by and through attorney Robert Koeblitz as follows:

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A. **SUMMARY OF PROCEEDINGS**:

i. **Nature of Case/Overview**:

This is a contract dispute between David and Corinne Fogelson (the "Fogelsons") and real estate developers Wallen Development, Inc., and Developments by Wallen, LLP., (collectively "Developers"), which were hired to build a single family home for the Fogelsons.

The Developers substantially completed the home that the Fogelsons' were purchasing. Both companies became insolvent approximately two weeks before the home was scheduled to be finished and title conveyed.

The Fogelsons filed suit against the Developers to recover their payments, which totaled $165,111.00. They ultimately received a $363,539.60 Judgment jointly and severally against the Developers, Wallen Development, Inc., and Developments by Wallen, LLP., under theories of breach of contract, violation of the Unfair Trade Practices Act, and fraud. The Judgment includes $165,111.00 in compensatory damages, and $165,111.00 in punitive damages. The judgment has been partially satisfied.

The Fogelsons filed a second subsequent lawsuit which is the subject of this appeal. The second lawsuit, as amended, included both Developers, but added claims against two of the companies' management staff/investors, Eric Wallace and Mark Bozzone, for conversion (count I), fraud (count II), civil conspiracy (count III) and prima facie tort (count IV)[1]. See Second Amended Complaint, Record Proper page 869)

Eric Wallace filed two motions to dismiss based on the findings and award encompased in the first Fogelsons' First Judgment. Notwithstanding, the case was allowed to proceed. The Fogelsons were ultimately, albeit impermissibly, awarded a second duplicate Judgment. The

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[1] A fifth count was alleged against Mark Bozzone for intentional interference with contractual relationships.

second Judgment included another award of $165,111.00 in compensatory damages, and a second award for $165,111.00 in punitive damages.

The Fogelsons now have judgments exceeding $693,761.60 ($363,539.60 plus $330,222), exclusive of fees and costs on the second judgment, and pre/post-judgement interest now accruing on both judgments.

B. SUMMARY OF FACTS:

i. Fogelsons' Purchase Agreement with Developers

The Fogelsons entered into a May 25, 2008 Purchase Agreement with Developers Wallen Development, Inc., "or" Developments by Wallen, LLP., for construction of a single-family home at 1012 Cristanos Drive, Bernalillo. The total purchase price was $210,000.00 (lot and house). The Fogelsons paid Developers $165,111.00 in installment payments as the construction proceeded.

The Developers became insolvent, went out of business and ceased operations as construction neared completion, but before home was finished. At the time Developers became insolvent, the house was "substantially finished" (two weeks from completion), needing only electrical and plumbing fixtures, carpeting, landscaping and stucco finishing. (TR-35, lines 10-15, April 29, 2014)

ii. Eric Wallace had no personal ownership in the Developer entities.

Appellant Eric Wallace had no personal ownership in Wallen Development, Inc., and/or Developments by Wallen, LLP. Eric Wallace's wife and children invested in the Wallen Development, Inc., through 8 Fish LP. Eric Wallace was neither a general or limited partner of Developments by Wallen, LLP. He had some ownership in the company through Wall2 Builders, LLP. The Wallaces collectively lost their entire investment when the companies ceased operations. Eric Wallace's only direct connection with the Developers was his designation as an officer and director of Wallen Development, Inc., and the management duties her undertook.

No evidence was offered in any way suggesting that Appellant Eric Wallace personally benefited in any way from the funds paid to Developers by the Fogelsons; Appellant offered evidence he did not benefit and, if fact, lost all the monies his family invested.

iii. Fogelsons' First Lawsuit (D-1329-CV-2009-01472)

Plaintiff's initial lawsuit[2] ("Fogelsons' First Lawsuit") was filed in Sandoval County on June 22, 2009 as case number D-1329-CV-2009-01472. The Complaint was captioned "Complaint to Compel Arbitration"; the allegations asserted were:

> "On or about May 25, 2008, Fogelsons and Wallen [Wallen Development, Inc. and Developments by Wallen, LLP] entered into a Purchase Agreement wherein Fogelsons agreed to purchase the lot and new home to be constructed thereon located at 1012 Cristanos Drive ... Fogelsons have paid $165,111.00 to date to Wallen for the Property and new construction. Wallen has breached the Purchase Agreement. Demand has been made upon Wallen to cure said breach. Wallen has failed and refused to cure said breach." (Id. Paragraphs 7-11)

The case was assigned to the Honorable George P. Eichwald. The only named Defendants were Wallen Development, Inc. and Developments by Wallen, LLP. Service was made on the Developers' registered agent on July 7, 2009. The Developers did not appear.

Fogelsons moved for a Default Judgment on September 18, 2009. (RJN, Exhibit 2) A Default Judgment was entered on September 22, 2009, awarding Fogelsons costs, attorneys' fees, and appointing Joseph Werntz as arbitrator. (RJN, Exhibit 3) The Order compels the defaulted Defendants to "attend arbitration at a date and time to be set by Mr. Werntz." (Id.)

Arbitration went forward on December 1, 2009. Developers did not appear. Fogelsons testified on their behalf. Fogelsons' exhibits were admitted into evidence. The allegations of the Complaint were deemed accepted findings of the Arbitrator. Plaintiffs were awarded $363,539.60 in monetary damages jointly and severally against the Developers, including findings that:

5. Defendants are in breach of the purchase agreement attached to the Complaint ...

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[2] Complaint to Compel Arbitration, Exhibit 1 to Request for Judicial Notice ("RJN")

6. Defendants have ***committed fraud against Plaintiffs by intentionally receiving payments from Plaintiffs, refusing to complete construction and sale of the property described in the purchase agreement, refusing to return the monies paid by Plaintiffs, demanding payment of additional funds from Plaintiffs two weeks before going out of business, and converting the monies tendered by Plaintiffs for their benefit instead of returning the funds to Plaintiffs***.
7. Defendants have ***engaged in unconscionable violations of the Unfair Practices Act by failing to provide the services contracted for and failing to provide quality of goods purchased***.
8. Plaintiffs are entitled to recover costs and attorney's fees under both Count I and Count II of the Complaint in Arbitration.
9. Plaintiffs have compensatory damages in the amount of $165,111.00 ...
10. Plaintiffs have incurred costs of $231.78, attorney's fees of $6,187.50 plus New Mexico gross receipts tax of $425.39 thereon, and arbitration fees of $500.00 ...
11. Plaintiffs are entitled to pre-judgment interest at the rate of 15% ... The total amount of pre-judgment interest is $25,938.56.
12. Plaintiffs are entitled to past-judgment interest ...
14. ... Defendants' conduct was willful and intentional thereby entitled Plaintiffs to an award of punitive damages.

(Id. Arbitration Judgment, Exhibit A to Judgment Confirming Arbitration Award, RJN Exhibit 4).

The $363,539.60 Judgment was broken down to include compensatory damages against Defendants jointly and severally ($165,111.00), pre-judgment interest against defendants jointly and severally ($25,938.56), costs ($231.78), attorneys' fees ($6,187.50), arbitration fees ($534.37), punitive damages ($165,111.00), plus post judgment interest. (Id.)

Fogelsons filed a Motion to Confirm Arbitration Award on January 13, 2010. (RJN, Exhibit 4) On March 11, 2010, the court entered a Judgment Confirming Arbitration Award. (RJN, Exhibit 5) Transcripts of Judgment were issued on March 12, 2010, affirming the Judgment Debtors as Wallen Development, Inc. and Developments by Wallen, LLP. (RJN, Exhibit 6)

iv. Fogelsons' Second Lawsuit (D1329-CV-2010-02239)

On September 16, 2010, six months after being awarded the $363,539.60 Judgment, Fogelsons filed a second lawsuit (the underlying case) against "officers and/or directors of Wallen Development" including Eric Wallace. The case number assigned was D1329-CV-2010-02239 ("Fogelsons' Second Lawsuit"). The Complaint alleged six counts against Eric Wallace for

conversion, fraud, unfair trade practices, civil conspiracy, prima facie tort and foreclosure. The allegations mirrored the award rendered in Fogelsons' First Lawsuit, albeit this time against the officers and directors of Wallen Development.

The Fogelsons' Second Lawsuit was amended twice. As amended, it included foreclosure claims against the Developers (Wallen Development, Inc., Developments by Wallen, LLP), and four counts for conversion, fraud, civil conspiracy and prima facie tort against Eric Wallace individually and as officer/director of Wallen Development, Inc.

The August 25, 2015 Judgment found against Eric Wallace under counts for prima facie tort and civil conspiracy only. The Judgement, as amended most recently on September 3, 2015 (Second Amended Judgment), determined Eric Wallace and Mark Bozzone took improper payments from the Fogelsons without making adequate disclosures, refused to complete construction of the Fogelsons' home, refused to return the monies paid by the Fogelsons, and diverted funds. (See Second Amended Judgment, Conclusions of Law, para. 8, 15 and 17).

The Judgment, as amended, awards Fogelsons the identical $165,111.00 compensatory damage award (para. 4), this time against Mark Bozzone and Eric Wallace jointly and severally, and the identical $165,111 punitive damage award (para. 5), also against Mark Bozzone and Eric Wallace jointly and severally. It also included prejudgment/post judgment interest (para. 6, 9, 10 and 11) on the same compensatory/punitive damage awards.

v. The District Court Denied Various Motions to Dismiss and Entered a Duplicate Judgment on August 25, 2015

Eric Wallace filed two separate motions dismiss the Fogelsons' Second Lawsuit, or alternatively, to set aside the first Judgement. Relief was denied.

Fogelsons were ultimately, albeit impermissibly, awarded a second duplicative Judgment on August 25, 2015. The Court entered two subsequent Judgments in Fogelsons' Second Lawsuit. An Amended Judgment was entered September 1, 2015. A Second Amended Judgment was entered on

September 3, 2015. All three Judgment include a duplicate award of $165,111.00 in compensatory damages, and another duplicate award for $165,111.00 in punitive damages. Fogelsons now have judgments exceeding $693,761.60 ($363,539.60 plus $330,222), exclusive of fees and costs on the second judgment, and pre/post-judgement interest now accruing on both judgments.

vi. Utilization of Fogelsons' First Judgment in Fogelsons' Second Lawsuit

Fogelsons' Second Lawsuit resulted in an order permitting the Fogelsons to foreclose on the subject property. Foreclosure was accomplished through a Special Master. Fogelsons purchased the property for $40,000.00. (Order Approving Special Mater's Report, Record Proper, pages 1123 and 1124). Pursuant to the September 23, 2014 Order Approving Special Master's Report rendered in the Fogelsons' Second Lawsuit, the Fogelsons used the proceeds of their First Lawsuit to fund the purchase. (Id.)

vii. Fogelsons' Collective Judgments Dwarf Their Actual Damages

As outlined above, Fogelsons entered into a Purchase Agreement for a lot and home at 1012 Cristanos Drive. The agreed purchase price was $210,000.00. Fogelsons have now purchased the home through a foreclosure in the Fogelsons' Second Lawsuit (see above). They expended $165,111.00 of their own money, and $40,000.00 of the award from the first Judgment, thus procuring the lot, and a substantially complete home, for roughly $5,000.00 less than the agreed purchase price. Notwithstanding, they have two valid Judgments, awarded under the same operative facts, collectively granting them $330,222.00 in compensatory damages, and an additional $330,222.00 in punitive damages.

C. **SUMMARY OF ARGUMENT**:

This is an appeal from the September 3, 2015 Judgment entered against Eric Wallace and Mark Bozzone, jointly and severally, on the following grounds:

i. The claims in this case, the Fogelsons Second Lawsuit, arose from the same facts underlying Fogelsons' First Lawsuit. The Complaint was barred by the Doctrine of Claim Preclusion.

ii. The findings underlying the Fogelsons' Second Judgment were further barred by the Doctrine of Issue Preclusion. The September 3, 2015 Judgment is irreconcilably inconsistent with the facts underlying Fogelsons' March 11, 2010 Judgment. In other words, the Judgment rendered in the Fogelsons' First Lawsuit necessarily determined that the Developers, through authorized agents Eric Wallace and/or Mark Bozzone, acting within the course and scope of their positions, breached the May 25, 2008 Purchase Agreement and otherwise intentionally and willfully committed fraud and unconscionable violations of the Unfair Practices Act. Absent a finding that at least one agent was acting within the course and scope of his agency, the Developer entities would not have been liable for their agents' fraud and unconscionable conduct. In stark contrast, the Fogelsons' Second Judgment was predicated on a finding that Eric Wallace and Mark Bozzone intentionally acted individually[3] outside the scope of their respective duties. Eric Wallace maintains the Fogelsons were barred from taking inconsistent Judgments predicated on contrary and conflicting facts. The findings in the Fogelsons' First Lawsuit precluded the Court from making the award contained within the Fogelsons' Second Judgment.

iii. The September 3, 2015 Judgment impermissibly constitutes a duplicate award in favor of David and Corinne Fogelson.

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[3] The Findings of Fact underlying the September 3, 2015 Judgment asserts "tortious acts committed by Mark Bozzone were committed in his individual capacity." Para. 105. Appellant notes there is no finding of fact asserting Eric Wallace acted in his individual capacity. Notwithstanding, Paragraph 37 of the Second Amended Judgment, Conclusions of Law, asserts "Fogelsons have named the proper parties as Defendants in that the tortious acts committed by Mark Bozzone and Eric Wallace were committed by them individually." (also restated in Order, para. 14) There is no corresponding finding of fact to support that Conclusion.

iv. The March 11, 2010 Judgment rendered in the Fogelsons' First Judgement has been partially satisfied thus precluding any claim of uncollectability.

v. The Fogelsons were estopped from asserting their Second Lawsuit and failed to establish the elements of prima facie tort and/or conspiracy.

vi. Eric Wallace and Mark Bozzone were indispensable parties to the Fogelsons' First Lawsuit such that the Fogelsons' Second Lawsuit was barred.

vii. The $363,539.60 Judgment rendered in the Fogelsons' First Lawsuit rendered the Fogelsons' Second Lawsuit fatally/procedurally defective because it allowed the Fogelsons to circumvent the rules prohibiting a default judgment from being entered against one of several joint tortfeasors.

D. **MEMORANDUM OF AUTHORITIES AND ARGUMENT**

Introduction/Incorporation: Eric Wallace incorporates the authorities and arguments offered by Mark Bozzone as though fully set forth herein, and briefly adds the following points:

- To constitute an actionable civil conspiracy, there must be a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Las Luminarias of the New Mexico Council of the Blind v. Isengard*, 92 N.M. 297, 587 P.2d 444. The gist of a conspiracy action is the damage arising from the acts done pursuant to the conspiracy, rather than the conspiracy itself. (Id. Para. 5; Also see *Armijo v. National Surety Corp*, 58 N.M. 166, 268 P.2d 339 (N.M. 1954) In the instant case, the Fogelsons offered no witness testimony, let alone expert testimony, in any way suggesting any act or omission undertaken by Eric Wallace fell below the standard of care required of a corporate director/officer[4] There was no evidence offered that suggested Eric Wallace or

[4] Appellant maintains the simple act of delaying vendor payments due to restricted cash flow and using a single operating account is a standard operating procedure in the construction industry and in no way violates any standard of care. According to Mark Bozzone, the practice "was not only not unusual, I think it was incredibly common in the building industries to be doing that at that time." (April 30, 2014 at TR-201 and 202) According to Jenice Montoya

Mark Bozzone conspired to accomplish an unlawful purpose or attempted to accomplish a lawful purpose by unlawful means. A corporate officer or employee owes s duty of undivided and unselfish loyalty to the corporation. (Id., para. 8) Plaintiffs failed to establish any duty owed to them by Eric Wallace or Mark Bozzone, breach of that duty or other wrongful conduct/act.

- For a conspiracy to exist, there must be a common design or mutually implied understanding between the conspirators. *Morris v. Doge Country, Inc.*, 85 N.M. 491, 513 P.2d 1273 (N.M. Ct.App. 1973). In other words, an "agreement" to unite to accomplish a fraudulent scheme. (Id., para. 5) The undisputed testimony was that Eric Wallace and Mark Bozzone sought to perpetuate the business they had invested in, which was a benefit to the Fogelsons. Eric Wallace did not make the decision to close the Developer entities. His family lost their entire investment in Wallace Development, Inc., when the business closed. Eric Wallace did not profit by the conduct which Plaintiffs alleged as tortious. Plaintiffs failed to show a relationship or agreement to defraud them.
- At least one New Mexico Court, in an unpublished opinion, has adopted the holding of *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, which states:

> "Even when a firm is insolvent, its directors may, in the appropriate exercise of their business judgment, take action that might, if it does not pan out, result in the firm being pained in a deeper hue of red. The fact that the residual claimants of the firm at that time are creditors does not mean that the directors cannot choose to continue the firm's operations in the hope that they can expend the adequate pie such that the firm's creditors get a greater recovery." (Id. 174)

Eades, having one operating account instead of segregated trust accounts was "typical" for a builder like Wallen Developments, Inc. (April 29, 2014, TR-184)

i. **The Appropriate Standard of Review is De Novo**

Claim preclusion is a legal question which the appellate court reviews de novo. *Moffat v. Branch*, 2005-NMCA-103, para. 10, 138 N.M. 224, 118 P.3d 732; *Anaya v. City of Albuquerque*, 1996-NMCA-092, para. 5, 122 N.M. 326, 924 P.2d 735.

ii. **The Fogelsons' Second Lawsuit is barred under the Doctrine of Claim Preclusion/Res Judicata and the Doctrine of Issue Preclusion/Collateral Estoppel.**

i. **<u>Claim Preclusion/Res Judicata</u>: The Court's adoption of the Arbitration Judgment in the Fogelson's First Lawsuit was a bar to all claims arising out of the same transaction/occurrence. This Claim Preclusion barred the Fogensons' Second Lawsuit in its entirety because it was based on the same conduct, the same operative facts and the same claimed damages.**

The subject of claim preclusion was addressed recently in the case of *State v. Scott*, 2016-NMCA-12 (NM Ct.App. 2015), which affirmed existing law the court summarized as follows:

> "***Claim preclusion "applies equally to bar all claims arising out of the same transaction, regardless of whether they were raised at the earlier opportunity, as long as they could have been raised.***" Pielhau v. State Farm Mut. Auto. Ins. Co., 2013-NMCA-112, ¶ 8, 314 P.3d 698 (alteration, internal quotation marks, and citation omitted), cert. granted, 2013-NMCERT-011, 314 P.3d 963. ***The doctrine "applies if three elements are met: (1) a final judgment on the merits in an earlier action, (2) identity of parties or privies in the two suits, and (3) identity of the cause of action in both suits.***" Id. (internal quotation marks and citation omitted). ***In determining whether a cause of action in the two suits is the same, "we consider the relatedness of the facts, trial convenience, and the parties' expectations.***" Id. ¶ 14 (internal quotation marks and citation omitted)." (Id. Para. 10)

Scott reiterates long-stand principals of law and procedure enunciated in *Chaara v. Lander*, 2002-NMCA-053, 132 N.M. 175, 45 P.3d 895 ("Claim preclusion, or res judicata, bars subsequent actions involving the same claim, demand or cause of action, para. 10, quoting *Wolford v. Lasater*, 1999-NMCA-024, para. 5, 126 N.M. 614, 973 P.2d 866); *Bank of Santa Fe v. Marcy Plaza Assoc.'s*, 2002-NMCA-053, para. 20, 132 N.M. 175, 45 P.3d 895; *Cruz v. FTS Construction, Inc.* 2006-NMCA-109, 140 N.M. 284, 142 P.3d 365 (Under the doctrine of "priority jurisdiction" it is

impermissible to litigate the same lawsuit twice); *Valdez v. Ballenger*, 91 N.M. 785, 786, 581 P.2d 1280 (1978) and *Pielhau* (supra).

A simple application of this well-reasoned doctrine establishes that the Fogelsons' Second Lawsuit and the September 3, 2015 Second Amended Judgement were barred by the Arbitration Judgment rendered in the Fogelsons' First Lawsuit since both suits are premised on the same parties or privies, the same claimed conduct, the same operative facts and the same claimed damages.

Element One: There seems little room to argue the Fogelsons' First Lawsuit and Judgment did not constitute a final judgment of the claims set forth in the June 22, 2009 Complaint to Compel Arbitration, the December 8, 2009 "Arbitration Judgment", and the January 13, 2010 Motion to Confirm Arbitration Award in case D-1329-CV-091472. In that instance, the Arbitration Judgment was confirmed as a Judgment of the Court. See March 11, 2010 Judgment Confirming Arbitration Award. Even if the Arbitration Judgment hadn't been confirmed, our Supreme Court has determined that both administrative and arbitral decisions can foreclose judicial proceedings as a result of either claim preclusion or issue preclusion. (See *Rex, Inc. v. Manufactured Housing Committee of State of N.M., Manufactured Housing Div.*, 119 N.M. 500, 892 P.2d 947 (N.M. 1995); Also see *Bank of Santa Fe v. Marcy Plaza Associates*, 2002-NMCA-014, 131 N.M. 537, 40 P.3d 442; *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, C.A. 9th, 1992, 971 F.2d 244, 248; *U.S. West Fin. Servs., Inc., v. Buhler, Inc.*, C.A.8th, 1998, 150 F.3d 929, 932-934)

The Court's March 11, 2010 Judgment is binding and based on the December 1, 2009 Arbitration which went forward before the "Court Appointed Arbitrator" Joseph Werntz with Plaintiffs' sworn testimony and exhibits such that a complete findings of fact was rendered. (See December 8, 2009 Arbitration Judgment). The fact that the arbitration was uncontested does not foreclose claims preclusion. Appellant points out the Arbitration Judgment was affirmed by the Court on March 11, 2010. Although New Mexico courts have not addressed this issue, the United

States Supreme Court has ruled that valid default judgments establish claim and defense preclusion in the same way as litigated judgments, and are equally entitled to enforcement. *Morris v. Jones*, 1947, 67 S.Ct. 451, 455-456, 329 U.S. 545, 550-551, 91 L.Ed. 488, quoting *Riehle v. Margolies*, 1929, 49 S.Ct. 310, 279 U.S. 218, 73 L.Ed. 669: "A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default."

Element Three: Turning to element three, it is important to recognize that the conduct underlying Fogelsons' First Lawsuit and Fogelsons' Second Lawsuit is the identical conduct. This fact is self-evident from a review of the Judgments. The theory of liability underlying the Arbitration Judgment rendered in the Fogelsons' First Lawsuit[5], expressly states that "Defendants [Developers] are in breach of the purchase agreement" (Id. Para. 5) and:

> "Defendants [Developers] have **committed fraud against Plaintiffs by intentionally receiving payments from Plaintiffs, refusing to complete construction and sale of the property described in the purchase agreement, refusing to return the monies paid by Plaintiffs, demanding payment of additional funds from Plaintiffs two weeks before going out of business, and converting the monies tendered by Plaintiffs for their benefit instead of return funds to Plaintiffs**." (Id. Para. 6)

Paragraph 7 of the Arbitration Judgment goes on:

> Defendants have engaged in unconscionable violations of the Unfair Practices Act by failing to provide the services contracted for and failing to provide the quality of goods purchased. " (Id.)

This is the identical conduct underlying the Fogelsons' Second Lawsuit and the September 3, 2015 Second Amended Judgment, which determined Eric Wallace and Mark Bozzone took improper payments from the Fogelsons without making adequate disclosures, refused to complete construction of the Fogelsons' home, refused to return the monies paid by the Fogelsons, and diverted funds. (See Second Amended Judgment, Conclusions of Law, para. 8, 15 and 17).

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[5] The Complaint to Compel Arbitration is framed in a single count for breach of contract. That count, of course, was limited to the defunct company's refusal to participate in arbitration. The Arbitration Judgment is profoundly more informative about the theories alleged and those underlying the award.

As outlined, the conduct which forms the basis of the Fogelsons' First Lawsuit and the Arbitration Judgment is the same conduct alleged in the Fogelsons' Second Lawsuit. In other words, both suits involved the same cause, satisfying the third prong of claim preclusion. Considering the relatedness of the facts and the Fogelsons' damage claims, there seems little room to argue that the causes were the same in both suits. See *Rosette, Inc. v. U.S. Dept. of the Interior*, 2007-NMCA-136, para. 33, 142 N.M. 717, 169 P.3d 704; *Pielhau* (supra), para. 14.

Second Element: The Fogelsons appear poised to argue against claim preclusion based on element two: "*Identity of parties or privies in the two suits*". Essentially, by claiming the officers and directors of the Developers were not subject to the arbitration clause such that Fogelsons were permitted to take duplicate judgments against the companies (Fogelsons' First Lawsuit) and officers/directors (Fogelsons' Second Lawsuit). Any such argument would be spurious.

"Privity" is that relationship between two parties which is sufficiently close so as to bind them both to an initial determination, at which only one of them was present. (See *Rex*, supra). It has been described as substantially the same interest. *Boyd Estate ex rel. Boyd v. U.S.* 2015-NMCA-018, 344 P.3d 1013, certiorari denied 345 P.3d 341. Privity may exist where the parties have a concurrent relationship to the same right or a successive relationship to the same right. (Id.) Privity has been found in many circumstances: Stock holders are privies of a corporation, *Williams v. Pacific Royalty Co.*, 247 F.2d 672 (10th Cir. 1957); an insurer/insured are privies, *Mid-Century Ins. Co. v. Varos*, 96 N.M. 572, 632 P.2d 1210 (N.M. Ct. App. 1981), grantor/grantees are privies, *Myers v. Olson*, 100 N.M. 745, 676 P.2d 822 (N.M. 1984), principals/agents are privies, *State v. Mills*, 23 N.M. 549, 169 P. 1171 (N.M. 1917), etc.

It is axiomatic that both Wallace and Bozzone had a common interest with the companies they organized, funded, managed and oversaw, just like a corporation and its shareholders. The conduct which forms the basis of the Fogelsons' First Lawsuit (and the Arbitration Judgment) is the

same conduct alleged in the Fogelsons' Second Lawsuit. It is alleged against both the companies (Fogelsons' First Lawsuit) and the Developers' officers, directors and management staff: Eric Wallace and Mark Bozzone (Fogelsons' Second Lawsuit). As the organizers, owners and managers of these two companies[6], Eric Wallace and Mark Bozzone had the same interests as the companies, and were thus privies of the Developer entities. Accordingly, under the Doctrine of Claim Preclusion, the Fogelsons' Second Lawsuit should have been dismissed. This claim preclusion nullifies the Second Amended Judgement, which is property abrogated.

ii. **Issue Preclusion/Collateral Estoppel: The Court's adoption of the Arbitration Judgment in the Fogelsons' First Lawsuit, specifically that Eric Wallace was acting within the course and scope of his agency, was binding and dispositive in Fogelsons' Second Lawsuit, thus precluding a finding he acted individually.**

There is one significant difference between the factual basis of the Fogelsons' Arbitration Judgment and the September 3, 2015 Second Amended Judgment: The conduct alleged in the Fogelsons' Second Lawsuit alleges that the conduct undertaken by Eric Wallace "individually". Or, in other words, outside the course and scope of his duties as an officer and/or director, thus creating individual liability. See, for example, the Second Amended Judgment, Conclusions of Law, para. 37, which asserts "Fogelsons have named the proper parties as Defendants in that the tortious acts committed by Mark Bozzone and Eric Wallace were committed by them individually."

In stark contrast, the findings in the Arbitration Judgment determined that Eric Wallace and Mark Bozzone's conduct was within the course and scope of their agency. That is necessary and evident because the findings and damage award set forth in the Arbitration Judgment are contingent on a determination that the "fraud" and "unconscionable violations" was committed by the Developers' employees while acting within the course and scope of their agency. Otherwise, the entities would have no liability. It is well established that a corporation acts through its employees.

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[6] And in the case of Eric Wallace, an officer and director of Wallen Development, Inc.

(See UJI 13-409; *Chavarria v. Fleetwood Retain Corp.*, 2006-NMSC-046, 140 N.M. 478, 143 P.3d 717, holding a corporation may be liable for punitive damages for the wrongful acts of employees who are acting within the scope of employment and who are employed in a managerial capacity; *Bourgeous v. Horizon Healthcare Corp.*, 117 N.M. 434, 872 P.2d 852 (N.M. 1994); *De La O v. Bimbo's Restaurant, Inc.*, 89 N.M. 800, 558 P.2d 69, cert. denied, 90 N.M. 7, 558 P.2d 619 (1976). Also see *Two Old Hippies, LLC v. Catch the Bus, LLC.*, 784 F.Supp.2d 1200 (D.N.M. 2011), holding that under New Mexico law a corporation can act only through its officers and employees, and any act or omission of an officer or an employee of a corporation, within the scope or course of his or her employment, is an act or omission of the corporation. Absent such agency, no corporate liability could exist. (Id.) To establish liability of the Developers for punitive damages, there must necessarily be an implied finding Eric Wallace and Mark Bozzone were acting within the course and scope of their agency.

The findings of the Arbitration Judgment are, of course, completely contrary to the findings in the September 3, 2015 Second Amended Judgment. Both Judgments are based on the same conduct. In the Arbitration Judgment, the agents acted within the course and scope of their agency. In the September 3, 2015 Judgment, the agents acted outside the course and scope of their agency. These two conflicting findings cannot be reconciled.

Since the Court, by virtue of the Arbitration Judgment, determined that Eric Wallace and Mark Bozzone's conduct was within the course and scope of their agency, that finding precluded further adjudication to a different result. In other words, the Court was bound by its earlier finding. If the Court had properly applied the finding that Eric Wallace and Mark Bozzone were acting within the scope of their agency, the Court could not have found personal liability. Thus, the Second Amended Judgment is fatally defective and properly overturned.

iii. **The August 25, 2015 Judgment entered against Eric Wallace and Mark Bozonne in the underlying case, the Fogelsons' Second Lawsuit, was an impermissible double-recovery. The August 25, 2015 Judgment included $165,111 in compensatory damages (representing the Fogelsons' down payment and construction payments) and $165,111 in punitive damages. The August 25, 2015 Judgment duplicated the damages awarded in the Fogelsons' First Lawsuit, which included the same $165,111 in compensatory damages and $165,111 in punitive damages. (See March 11, 2010 Judgment for $363,539.60).**

Fogelsons' Second Lawsuit acknowledges the $363,539.60 judgment previously entered jointly and severally against Wallen Development and Developments by Wallen. Any recovery in excess of that amount represents an impermissible double-recovery. The general rule in New Mexico is that "the law seeks to award compensation, and no more for personal injuries negligently inflicted." (*Trujillo v. Chavez*, 76 N.M. 703, 417 P.2d 893 (N.M. 1966). The state of the law has not changed for almost a century. By way of example, in *Hughey v. Ware*, 34 N.M. 29, 276 P. 27 (N.M. 1929), appellant A. T. Hugley was injured while working for H.T. Ware. Hugley and Ware were residents of Texas. Hugley's injury occurred in Albuquerque, New Mexico. Hugley filed a petition in Bernalillo County to invoke New Mexico's Workman's' Compensation Act. Ware filed a motion to dismiss. The Court granted Ware's motion to dismiss, in part, because Hugley's received an award from the Industrial Accident Board of Texas which barred further recovery in New Mexico, and because his claim was an impermissible attempt to recover twice for the same injury. The ruling was affirmed by the New Mexico Supreme Court.

Additional authorities include: *Maese v. Garrett*, 2014-NMCA-53, 329 P.3d 713, cert. denied 328 P.3d 1187, holding it is never the purpose of compensatory damages to allow a plaintiff to profit from his or her loss; *Sunnyland Farms, Inc. v. Central New Mexico Elec. Co-op, Inc.*, 2013-NMSC-17, 301 P.3d 387, holding Plaintiffs may not collect compensation twice for the same injury; *Guidance Endodontics, LLC. v. Dentsply Intern., Inc.*, 728 F.Supp.2d 1170 (D.N.M. 2010), holding "One-satisfaction rules" provides that, aside from punitive damages, a plaintiff cannot recover more in damages than the plaintiff sustained from his or her injury, not matter how many

claims or theories of recovery the plaintiff brings; *Pedroza v. Lomas Auto Mall, Inc.*, 663 F.Supp.2d 1123, holding New Mexico law prohibits double recovery of damages; *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006, holding New Mexico law does not allow duplication of damages or double recovery for injuries received; *Hood v. Fulkerson*, 699 P.2d 608, 102 N.M. 677, 1985-NMSC-048, holding duplication of damages or double recovery for injuries is not permissible; *Summit Properties, Inc. v. Public Service Co. of New Mexico*, 118 P.3d 716, 138 N.M. 208, 2005-NMCA-090, cert. denied 117 P.3d 951, 138 N.M. 145, holding New Mexico does not allow duplication of damages or double recovery for injuries received.

Applying this well-reasoned rule of law, the Arbitration Judgment and $363,539.60 award previously entered jointly and severally against Wallen Development and Developments by Wallen serve a complete bar to the Fogelsons' Second Lawsuit. Fogelsons have impermissibly received a double recovery. It is undisputed that the total amount of compensatory damages claimed was $165,111.00. Notwithstanding, the Fogelsons now have judgments exceeding $693,761.60 ($363,539.60 plus $330,222), exclusive of fees and costs on the second judgment, and pre/post-judgement interest now accruing on both judgments, representing twice their compensatory damage claim (collectively $330,222.00) and two times the punitive damage award.

iv. **The March 11, 2010 Judgment rendered in the Fogelsons First Judgment has been partially satisfied thus precluding any claim on uncollectability. The Court allowed the Fogelsons to use $40,000 in proceeds from Judgment rendered in the Fogelsons' First Lawsuit to purchase the subject property (1012 Cristanos Drive), which included the substantially complete house that the Fogelsons foreclosed upon in Fogelsons' Second Lawsuit without credit/offset to Eric Wallace.**

During the May 24, 2012 hearing on Eric Wallace's Motion to Dismiss, the Court expressed concerns related to the duplicative awards:

> "The Court: … But for the arbitration clause, I would have probably granted your motion. I'm going to deny the motion. I'm going to have this matter proceed. What I am uncomfortable about is, there's a judgment there. I was asking Ms. Davis these questions. I'm uncomfortable in having the judgment that would exceed – another judgment that would

exceed the amount of this judgment. I'm just – we are starting with the case, but I just have a gut feeling of being uncomfortable with a second judgment in excess of what's already being awarded. I'm just letting you know how I feel about that." (TR-27 to 28)

Plaintiff's counsel provided the Court with assurances of an "offset" to Eric Wallace and/or Mark Bozzone (TR-28, lines 14-23) to alleviate the Court's concerns. The assurances amounted to empty promises. And, the Court's worst concerns about prohibited duplicative awards have come to fruition. The Fogelsons now have clear title to the home they had constructed. They expended $205,111.00 to purchase the home ($165,000 payments and $40,000 foreclosure sale), substantially less than the agreed purchase price of $210,000. Notwithstanding, they have two valid Judgments, awarded under the same operative facts, collectively for $330,222.00 in compensatory damages, and an additional $330,222.00 in punitive damages.

v. **Fogelsons were estopped from asserting their Second Lawsuit and failed to establish elements of prima facie tort and conspiracy.**

When a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to prejudice of party who has acquiesced in position formerly taken by him. See *Santa Fe Pacific Trust, Inc. v. City of Albuquerque*, 285 P.3d 595, 2012-NMSC-028, rehearing denied; *Keith v. ManorCare, Inc.*, 218 P.3d 1257, 147 N.M. 209, 2009-NMCA-119, cert. granted 224 P.3d 1257, 147 N.M. 452; *Meiboom v. Watson*, 994 P.2d 1154, 128 N.M. 536, 2000-NMSC-004; *Gallegos v. Pueblo of Tesuque*, 202-NMSC-012, 132 N.M. 207, 46 P.3d 668, cert. dismissed 123 S.Ct. 32, 536 U.S. 990, 153 L.Ed.2d 894; *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012; *U.S. v. McCall*, 219 F.Supp.2d 1208 (D.N.M. 2002); *Santa Fe Village Venture v. City of Albuquerque*, 914 F.Supp. 478 (D.N.M. 1995); *Eads Hide & Wool Company v. Merrill*, 252 F.2d 80 (10th Cir. 1958); *Laughlin v. Convenient Management Services, Inc.*, 308 P.3d 992, 2013-NMCA-088, cert. denied *Convenience Mgmt. Servs. v. Laughlin*, 308 P.3d 133.

vi. **Eric Wallace and Mark Bozzone were "indispensable parties" to Plaintiffs' June 22, 2009 lawsuit against Wallen Development, Inc. and Developments by Wallen, LLP, rendering this action unsustainable.**

The Fogelsons attempt to justify their procurement of duplicative Judgments maintaining they were forced to take the duplicative awards because the arbitration clause in the Purchase Agreement pertained to the Developers, and not Eric Wallace/Mark Bozzone. The proposition is counterintuitive as the practical implication of any such argument would be to proliferate litigation in besieged judicial system. Such practices are specifically forbidden. Pursuant to Rule 1-019 NMRA, a person who is subject to service of process shall be joined as a party in the action if in his absence complete relief cannot be accorded among those already parties; or he claims an interest related to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest; or leave any of the persons already parties subject to a substantial risk of incurring double, multiple or other inconsistent obligations by reason of his claimed interest. The implication, of course, is that the Fogelsons needed to join all potentially culpable parties into a single suit, whether subject to arbitration or not, and proceed in a single action. Their counsel made a strategic decision to proceed only against the Developers in the Fogelsons' First Lawsuit, and they are now bound by that decision.

Plaintiffs filed suit against Wallen Development, Inc. and Developments by Wallen, LLP, on June 22, 2009. That matter was scheduled for arbitration, which went forward on December 1, 2010. Plaintiffs took a judgment against the corporation and limited liability partnership (jointly and severally) for $363,539.60.

Within the confines of the Fogelsons' Second Lawsuit, the claims and Judgment against Eric Wallace confirm his perceived liability was that of a joint tortfeasor who acted in concert with Mark Bozzone to defraud the Fogelsons. The findings within the Fogelsons First and Second Lawsuits

conflict as to whether Eric Wallace was acting within his agency or individually outside his agency. Under the claims of the Fogelsons' Second Lawsuit and the September 3, 2015 Second Amended Judgment which found Eric Wallace acted individually and as a joint torfeasor conspiring with Mark Bozzone, both individuals were "necessary" and "indispensable" parties to the original action, wholly undermining the Fogelsons' second bite at the apple. (See Rule 1-019 NMRA). The controlling Judgment was entered on March 11, 2010. The Fogelsons cannot be permitted to take repetitive and duplicative judgments after having limited their initial claim with full knowledge of the conduct they claim was tortious.

vii. **The Judgment in Fogelsons' First Lawsuit renders the September 3, 2015 Judgment in violation of the Frow Doctrine and Rule 1-054, both of which restrict Plaintiffs ability to take a default judgment against one of several joint tortfeasors.**

In the confines of a single case, it is impermissible for the Court to enter final judgment as to any issue in the case, including liability or damages, by default, if that issue applies to one or more non-defaulting joint tortfeasor. (*Frow v. De La Vega*, 83 U.S. 552, 21 L.Ed. 60 (U.S. 1872), *City of Albuquerque v. Huddleston*, 55 N.M. 240, 230 P.2d 972 (N.M. 1951), *United Salt Corporation v. McKee*, 96 N.M. 65, 628 P.2d 310 (N.M. 1981), Rule 1-054 NMRA). Frow provides in relevant part:

> "The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike -- the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal." Frow, page 554.

This rule of law, dubbed the Frow doctrine, has been adopted in New Mexico, and codified by rules such as Rule 1-054 NMRA:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

Plaintiffs effectively violated Rule 1-054 NMRA, and the Frow doctrine, by taking a default judgment against Wallen Development and Developments by Wallen, then proceeding against Defendants Eric Wallace and Mark Bozone.

E. **CONCLUSION**:

Appellant Eric Wallace respectfully submits that this lawsuit, the Fogelsons' Second Lawsuit, was an impermissible claim premised solely on the damage claims previously awarded to the Fogelsons pursuant to the Court's March 11, 2010 Judgment of $363,539.60. The September 3, 2015 Second Amended Judgment is in impermissible double-recovery for Fogelsons. The lawsuit was barred under the doctrines of claim preclusion and issue preclusion and should properly have been summarily dismissed. Eric Wallace seeks an order remanding this case with instructions to dismiss.

F. **STATEMENT OF REASONS ORAL ARGUMENT WOULD NE HELPFUL TO A RESOLUTION OF THE ISSUES**:

Appellant Eric Wallace respectfully submits that oral argument would be helpful to the Court and the resolution of the issues. From Appellant's perspective, there were significant procedural errors which gave rise to a multiple Judgments seemingly disregarding fundamental corporate and agency laws. The complexity of the procedural history, the competing lawsuits and Judgments, and the various agencies is ripe for confusion. Oral argument will permit the Court to clarify any questions it has and ensure a proper resolution of this case.

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