IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BLUE CANYON WELL ASSOCIATION,

Plaintiff/Appellee,

v.

DENISE JEVNE,

Defendant/Appellant

Mag. Ct. Case No. M-49-CV-2012-00512
No. D-101-CV-2013-00870
COA No. 2015-34655

APPELLANT'S REPLY BRIEF

Appeal from the District Court of Santa Fe County
The Hon. Francis J. Mathew

Graeser & McQueen, LLC
Christopher L. Graeser
Post Office Box 220
Santa Fe, New Mexico
chris@tierralaw.com
counsel for Defendant/Appellant

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The typeface in this brief is Times New Roman and, according to the word-count feature in Microsoft Word 15.18 for Mac, the body contains 4348 words. Accordingly, it complies with the type-volume limitation in Rule 12-213(F)(3) NMRA.

ARGUMENT

I. AN UNINCORPORATED ASSOCIATION FORMED AFTER ADOPTION OF THE 1937 STATUTE IS REQUIRED TO FILE A STATEMENT WITH THE COUNTY CLERK TO BE RECOGNIZED AS A LEGAL ENTITY WITH THE ABILITY TO SUE AND BE SUED.

A. Standard of review

The Court reviews question of statutory construction and interpretation de novo. *First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, ¶ 9, 345 P.3d 310.

B. Preservation in the court below

This issue is preserved by Appellant's response to additional briefing filed July 23, 2013. **[RP 13, 50, 57]**

C. New Mexico's rules of statutory construction regarding the use of the terms "may" and "shall" postdate the 1937 statute.

Appellee argues "the statutory use of the terms 'may' and 'shall' have long-standing, well-established definitions presumed to be known by the legislators who use them." **[AB 2]** However, the use of "may" and "shall" as terms of art postdate the 1937 statute, and the Uniform Statute and Rule Construction Act, NMSA 1978, Sections 12-2A-1 to -20 (1997) does not apply. *See* § 12-2A-1B ("The Uniform Statute and Rule Construction Act applies to a statute enacted or rule adopted on or after the effective date of that act unless the statute or rule expressly provides otherwise, the context of its language requires otherwise or the application of that

act to the statute or rule would be infeasible.") *Gandy v. Wal-Mart Stores*, 1994-NMSC-040, ¶ 6, 117 N.M. 441, 442, 872 P.2d 859, cited by Appellee, also postdates the 1937 statute and the Uniform Statute and Rule Construction Act.

Appellee argues that the Legislature's choice of the word "may" is a clear indication of its intent to make filing optional. **[AB 12]** But the odd and seemingly superfluous use of the otherwise-mandatory term "shall" in the first line of Section 53-10-1 belies the notion that the use of either "shall" or "may" was necessarily a conscious drafting choice. A more logical wording of Section 53-10-1 would omit "shall" entirely, as the use of "shall" implies that members of a group *must* form an association, something clearly not intended by the 1937 drafters. The sometimes interchangeable use of the terms "may" and "shall" in the statute, along with the statutory requirement to file, suggest that the Legislature intended to make the decision to form an association permissive, but filing mandatory once that decision has been made.

There are numerous other instances in statute where the term "may file" is used, but where filing is mandatory to achieve the desired result. For example, Section 73-12-41 (1929), a 1929 statute which also predates the Uniform Statute and Rule Construction Act, uses "may file" in a manner similar to its usage in Section 53-10-1 in addressing how a property owner may petition for exclusion from an irrigation control district:

73-12-41. Owner shall file petition for exclusion.
The owner or owners in fee of any lands constituting a portion of any irrigation district **may file** with the board of directors of the district, a petition praying that such lands may be excluded and taken from said district. (emphasis added)

The only logical reading of the text is that while a property owner is not obligated to file a petition, that property owner cannot expect to obtain the benefits of the exclusion from the district without filing it (this was, perhaps, recognized by the compiler when stating that the owner "shall file" a petition in the title while the actual text states that the owner "may file.")

Statute contains numerous other examples of the term "may" being used in relation to a filing that is in fact required to effect the desired result. *See* § 77-14-7(D) (1999) (a livestock owner is not obligated to file a claim to recover damages, but has no right or ability to recover those damages absent filing a claim); § 57-3B-5 (1997) (a person is not required to register a trademark, but must do so in order to receive rights and protections of the Trademark Act). In § 76-6B-5 (2001) the same "may file" language is used to establish a pink bollworm control district, with the same result that five or more cotton producers are not required to file a petition, but that a district will not be created unless they do so:

76-6B-5. Establishment of pink bollworm control district.
Any five or more persons producing cotton for which it is proposed to establish a pink bollworm control district **may file** a petition with the department asking that a pink bollworm control district be established... (emphasis added)

Appellee also argues that "If the legislature had intended filing to be mandatory, it could easily have used the phrase 'shall file' or 'must file' to create such a requirement." **[AB 3]** In fact, the legislature did confirm the filing requirement in Section 53-10-7, which reads: "Any association or club formed under the provisions of this act may exist for such period of time not exceeding twenty years as may be fixed in the statement **required to be filed** by Section 1 of this act." (emphasis added).

Appellee argues that the plain meaning of "may file" in Section 53-10-1 indicates that the Legislature intended filing to be permissive or optional rather than mandatory, **[AB 4]** but courts acknowledge that "the plain meaning of particular statutory language will sometimes be modified when considered in the context of other statutes from the same act." *Cummings v. X-Ray Assoc.*, 1996-NMSC-035, ¶ 45, 121 N.M. 821, 834, 918 P.2d 1321, 1334 (1996). Section 53-10-1 must be read in concert with Section 53-10-7, which clearly specifies that filing is mandatory, is "required." Interpreting the filing provisions in Section 53-10-1 as discretionary makes the clause requiring filing in Section 53-10-7, as well as its attendant 20-year maximum life, meaningless, and "a statute must be construed so that no part of the statute is surplusage or superfluous." *State v. Javier M.,* 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1.

D. By Enacting NMSA 1978, Sections 53-10-1 to -8 the Legislature Intended to Provide Unincorporated Associations with New Privileges, Rights and Responsibilities

Appellee makes a contextual argument that a review of the common law, the overall statutory scheme and equitable concerns support the conclusion that the filing requirement is optional. **[RB 4]**

1. Unincorporated Associations could not sue and be sued at common law. New Mexico's 1937 statute created the right to sue and be sued, along with an obligation to file.

Under common law an unincorporated association had no existence independent of its members, did not exist as a legal entity, and did not have the capacity to sue and be sued. "The cases are remarkably in accord that, in the absence of an enabling statute, unincorporated associations could not sue or be sued in the common or association name." Wesley A. Sturges, *Unincorporated Assocations as Parties to Actions,* 33 Yale Law Journal 383, 383 (1924). "A voluntary association, being only a collection of individuals, could not, at common law, sue or be sued by its associated name…". *Lewelling v. Manufacturing Wood Workers* Underwriters, 140 Ark. 124, 128, 215 S.W. 258, 259, 215 SW.2d 258 (1919). "There is no principle better settled than that an unincorporated association cannot, in the absence of a statute authorizing it, be sued in its society or company name, but all the members must be made parties, since such bodies have, in the absence of statute, no legal entity distinct from that of their members." *Baskins v*

United Mine Workers, 234 S.W. 464, 150 Ark. 398, 401, 150 Ar&. 393 (1921).

Similarly, in New Mexico "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless some statute of this state provides to the contrary." Rule 1-017(C) NMRA 2016. While BCWA would have been "recognized" under common law, prior to the 1937 statute, it would not have been recognized as a legal entity with the capacity to sue and be sued. This was noted by the district court, which quoted *Flanagan v Benvie*, 1954-NMSC-074,] 58 N.M. 525, 529, 273 P.2d 381 (1954), stating "We recognize that unincorporated associations, clubs and societies, unless recognized by statute, have no legal existence." **[RP 57]** New Mexico's statute gave unincorporated associations status as legal entities, along with privileges, rights and responsibilities that they did not have prior to enactment of the statute.

Appellee cites *Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 622, 930 P.2d 153 for the proposition that "The plain meaning rule of statutory construction states that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (internal quotation marks and citation omitted). **[AB 3]** The *Sims* court held that the Appellant misread the "plain meaning rule" and that her interpretation of the plain meaning of the statute in question conflicted with the common law. *Id.* ¶ 22. Here, Appellant's interpretation of New Mexico's statute neither conflicts with nor

supplants the common law regarding unincorporated associations. Appellant agrees that the Legislature intended to give unincorporated associations more privileges and rights than they had at common law, along with greater responsibilities, and that interpreting the statute in this manner does not abrogate the common law, but supplements it. **[AB 6]**

Appellee cites a number of cases from other jurisdictions to define the elements of an unincorporated association at common law, including a federal district court case, *Johnson v. Chilcott*, 599 F. Supp. 224 (D. Colo. (1984). "In Colorado, 'a partnership or other unincorporated association' has the capacity to sue or be sued in its own name and right," but "the elements of an unincorporated association are not defined by statute." *Chilcott* at 227. The court engaged in extensive fact finding about the organization and determined that the factors laid out in *Hidden Lake Development Co. v. District Court*, 515 P.2d 632 (Colo. 1973) had been met. *Id.* BCWA is not only distinguished by the fact that New Mexico's statute articulates requirements for unincorporated associations, while Colorado's does not, but that in this case, no fact-finding was conducted by the district court judge. At the August 19, 2013 trial, the district court reiterated that "there is an association," and that "there has been an association since 1991," pursuant to the 1991 Well Agreement, but gave no factual basis for having reached that conclusion. **[Hearing Tr. TR-3, August 19, 2013]**

Appellee relies on the *Chilcott* court's statement that "the trend in other jurisdictions has been the rejection of legal niceties to assure full recognition of the unincorporated association as a separate legal entity." *Chilcott* at 230. Here, there are practical difficulties with Appellee's interpretation that go well beyond legal niceties. Those difficulties start with the most obvious: if a party has the right to sue an unincorporated association, who does that party serve with the lawsuit in the absence of a filed statement identifying the names and addresses of the members? Section 53-10-6 directs that "In any action against an unincorporated association process may be served by delivering a copy of the summons and of the complaint or other pleading to an officer of the association or other head officer or agent in charge of its principal office in this state or by serving process in the manner now provided for service of process against corporations." How could this be done in the absence of the essential information contained in the statement. Similarly, for unincorporated associations that do own property, to whom does the county treasurer send the tax bill?

Each of the California cases cited by Appellee also predate California's statute which provides general rules for unincorporated associations. At the time *Barr v. United Methodist Church*, 90 Cal.App.3d 259, 266 (1979) *cert. denied* 444 U.S. 973, *rehearing denied* 444 U.S. 1049 (1980) was heard, California did not yet have a general statute governing unincorporated associations until implementing

legislation was introduced in 2004 and 2005, enacted as 2004 Cal. Stat. ch. 178 and 3005 Cal. Stat. ch. 116, which became Title 3. Unincorporated Associations, [18000 – 24001.5] a part of the California Corporations Code, which contains provisions similar to those found in New Mexico's 1937 statute. This was only after several studies recommended that unincorporated associations should be able to sue in their own names. California Law Review Commission, *Recommendation and Study Relating to Suit By or Against An Unincorporated Association* (1966) at 908; 33 Cal. L. Revision Comm'n Reports 729 (2003).

Another case cited by Appellant, *State of Alaska v. Aleut Corporation*, 541 P.2d 730 (Alaska 1975), addressed the interpretation of an Alaska statute which applied only to "an incorporated municipality or other organized community." Several unincorporated native Alaskan native villages argued that "other organized community" applied to them, and the court agreed and held that they had the capacity to sue. *Id.* at 736. Alaska's Title 10, Corporations and Associations, does not appear to have a statute governing unincorporated associations, per se, and it is unlikely that it would have applied in this case, as the distinction made by the court was between "unincorporated native villages" and "incorporated native villages." *Id.*

In *Health Care Equalization Committee v. Iowa Medical* Society, 501 F. Supp. 970 (S.D. Iowa 980), the federal court first looked to Rule 17(b) of the

Federal Rules of Civil procedure and then examined Iowa Code § 504 A.21, governing non-profit corporations. The court determined that HCEC met both the Federal and Iowa definitions of an unincorporated association, and "as an unincorporated association with capacity to sue under Iowa law, has capacity to sue pursuant to Federal Rule of Civil Procedure 17(b)." *Id.*

Finally, in *Heifetz v. Rockaway Point Volunteer Fire Department*, 282 App. Div. 1062, 1063 (N.Y. App. Div. 1953) "The complaint alleges and the answer admits that defendant fire department is an unincorporated association, **duly organized under the laws of this State.**" (emphasis added) New York has an unincorporated associations statute, and both the plaintiff and the defendant admitted that the fire department was duly organized under state law. Here, both Appellee and Appellant argued that BCWA is not duly organized under state law.

Because New Mexico has had a statute since 1937, if BCWA was formed in 1991, post 1937 statute, it is not a pre-existing common law unincorporated association, and it must meet the statutory requirements.

Appellee argues that "The very nature of an unincorporated association is legal informality," **[AB 10]**, but Sections 53-10-1 to -8 do not lay out onerous requirements. Unincorporated associations confront very few requirements as compared, for example, to those under the Nonprofit Corporation Act, Chapter 53, Article 8. Among other things, non-profits must: keep a registered office and

registered agent, per § 53-8-8; hold annual meetings, per § 53-8-13; appoint a board, per § 53-8-17; have a least three directors, per § 53-8-18; have a quorum of at least one-third of the board of directors in order to transact business, per § 53-8-20; appoint officers, per § 53-8-23; comply with duties of directors, per § 53-8-25.1 and keep correct and complete books and records, per § 53-8-27.

The provisions laid out in Sections 53-10-1 to -8 are minimal, but were not followed by BCWA. Thus, BCWA cannot be a legally recognized unincorporated association.

2. The overall statutory scheme may be permissive as to the activities an unincorporated association may choose to engage in, but mandatory as to the filing requirement.

Appellee argues that a review of the statutory scheme demonstrates that NMSA 1978, Sections 53-10-1 to -8 are intended to be generally permissive. **[AB 11]** Appellee acknowledges that in discerning the meaning of a particular statute or section of a statute, including this 1937 statute drafted prior to adoption of the Uniform Statute and Rule Construction Act, our courts read "legislation in its entirety and construe each part in connection with every other part to produce a harmonious whole[.]" *State v. Javier M.*, 2001-NMSC-030, ¶ 27, 131 N.M. 1, 33 P.3d 1 (internal quotation marks and citation omitted). The drafters' potentially confusing uses of the terms "shall" and "may" in Section 53-10-1 are clarified through the use of the term "required" in Section 53-10-7. Appellee admits that it

may not be possible to for the court to reconcile Sections 53-10-1 and 53-10-7 using Appellee's interpretation, and that somehow interpreting "required" to actually mean "required" would result in "up-ending an entire statutory scheme," in conflict with Section 53-10-1 as well as the common law. **[AB 13]** None of these dire consequences or internal conflicts would result from simply letting "required" mean "required." Interpreting the statute as Appellee argues uses a contextual argument, including out of state authority, to arrive at an interpretation that violates the canons of construction.

Appellee also cites § 12-2A-10(A) of the Uniform Statute and Rule Construction Act, which states, "If statutes appear to conflict, they must be construed, if possible, to give effect to each." **[AB 11]** Although Section 12-2A-10(A) does not apply to the 1937 statute, the fact is that Section 53-10-7 supports the conclusion that, under Section 53-10-1, it was necessary for BCWA to file a statement, articles, and any existing rules/regulations in the office of the county clerk in order to form a legally recognized unincorporated association. In contrast to Appellee's analysis, this interpretation gives effect to both Section -1 and Section 7.

Finally, "if two provisions of the same statute are irreconcilable, the provision last placed will be deemed to repeal the other." *Great W. Constr. Co. v. N.C. Ribble, Co.*, 1967-NMSC-085, 77 N.M. 725, 427 P.2d 246 (S. Ct. 1967), ¶ 7.

Section 53-10-7 is not only unambiguous in its filing requirement, it is last placed and thus, is controlling.

3. Equity requires interpreting Section 53-10-1 to -8 as making filing mandatory

Appellee argues that "if a group desires to form an unincorporated association, it would look to Section 53-10-1 for guidance, not Section 53-10-7." **[AB 15].** Is it not equitable to ask those desiring to form an unincorporated association to read all of Article 10, "Unincorporated Associations", to obtain guidance on how to proceed? Appellee has no desire to "strip currently operating associations ... of their legal status without notice," **[AB 15]**, and the statute cannot logically be read to do so, but associations formed after enaction of the statute subject themselves the obligation to file, found in Section 53-10-7.

II. EVEN IF BCWA ONCE EXISTED, PURSUANT TO SECTION 53-10-1, IT CEASED TO EXIST TWENTY YEARS AFTER THE 1991 WELL AGREEMENT WHICH FORMED IT, PURSUANT TO SECTION 53-10-7.

A. Standard of review

The Court reviews question of statutory construction and interpretation de novo. *First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, ¶ 9, 345 P.3d 310.

B. The issue was properly preserved in the court below

Plaintiff/Appellee's "members" themselves first raised the real party in interest issue when they argued on three separate occasions that because Blue Canyon Well Association was not a legal entity properly formed under Section 53-10-1 NMSA, it was not the true owner of the right to be enforced (the magistrate court judgment), not the real party in interest, and therefore, not in a position to discharge the defendant from liability. **[RP 13, 36, 46]**

Appellee first filed its "Motion to Amend Caption to Properly Identify the Individual Plaintiffs/Appellees," on April 12, 2013, which argued that BCWA was not a properly formed unincorporated association because BCWA had not filed the requisite documents with the county clerk under NMSA 1978, Section 53-10-1 (1937). **[RP 13]** In Plaintiffs/Appellee's Reply to Defendant/Appellant's Response to Additional Brief Requested by Court Regarding Motion to Amend Caption, filed June 3, 2013, it again argued that BCWA was "an unincorporated association which did not meet statutory requirements." **[RP 36]**

On July 12, 2013, Appellee filed additional briefing on the motion at the court's direction, in which it raised the issue of real party in interest and argued that "In this matter, the 'Blue Canyon Well Association' is not a legal entity properly formed under Section 53-10-1 NMSA, is not the true owner of the right to be enforced (the magistrate court judgment), and is not in a position to discharge

the defendant from liability." **[RP 46]** Appellant's July 23, 2013 response also addressed the issue of real party in interest, agreeing with Appellee that BCWA was not a legal entity properly formed under Section 53-10-1, but nevertheless opposed the motion because, properly construed, it was not a motion to amend the caption, but, instead, an untimely motion to substitute the real parties in interest, in violation of Rule 1-025 NMRA. **[RP 50]**

The district court's August 2, 2013 Memorandum Opinion and Order denying Appellee's motion found that, as a matter of law, Section 53-10-1 established that filing with the county clerk is permitted but not required for unincorporated associations. The district court impliedly found that BCWA exists, although the court did not recite any facts in support of the putative members' intent to form an association. The district court found that Plaintiff was a statutory unincorporated association pursuant to NMSA 1978, Section 53-10-1 (1937) and, as such, it could bring suit. **[RP 57]** At the August 19, 2013 trial, too late for Appellant to address the formation date issue through evidence or argument at trial, the district court reiterated that "there is an association," and held that "there has been an association since 1991," pursuant to the 1991 Well Agreement. **[Hearing Tr. TR-3, August 19, 2013]**

At the February 27, 2015, hearing on the Motion to Amend Judgment and Motion for a New Trial, Defendant/Appellant argued that even assuming BCWA

existed pursuant to Section 53-10-1, it would cease to exist twenty years after it came into existence pursuant to NMSA 1978, Section 53-10-7 (1937). **[CD, 2-27-15, 02:44-03:22]** Defendant further argued that if BCWA was formed pursuant to an Agreement to Share Well made in 1991, BCWA ceased to exist prior to the filing of this suit and, therefore, lacked standing. **[id. 03:22-03:44]** Appellant gave the court the opportunity to rule on the issue at that time, but it expressly declined to do so, instead stating that it preferred to wait for appellate review of that issue. **[id. 28:08-27] 271]**

Both Appellee and Appellant have argued that BCWA did not exist as an unincorporated association with the right to sue and be sued, because it was not a legal entity properly formed under statute. Appellant would not and could not have raised the issue of the twenty-year sunset provision in Section 53-10-7 prior to the district court judge's ruling that BCWA had been in existence since 1991. The first opportunity Appellant had to raise the issue of the twenty-year sunset on unincorporated associations was at the hearing on the motion to amend judgment and for a new trial, held on February 27, 2015, and she did so at that time. **[CD, 2-27-15]**

This issue also goes to standing, and, under *Bank of New York v. Romero,* 2014-NMSC-007, ¶ 15, 320 P.3d1, standing cannot be waived and may be raised at

any time. The Court has jurisdiction over this issue pursuant to Rule 1-072(P) NMRA.

C. Because BCWA, if it existed at all, ceased to exist in 2011, twenty years after it was formed by the 1991 Well Agreement, it did not have standing to bring suit in 2012.

If Blue Canyon Well Association was, in fact, formed pursuant to the 1991 Well Agreement, under Section 53-10-7 it ceased to exist twenty years later, in 2011.

Under Section 53-10-7, "Any association or club formed under the provisions of this act **may exist for such period of time not exceeding twenty years** as may be fixed in the statement required to be filed by Section 1 of this act." (emphasis added)

In the absence of legislative history it is reasonable to postulate that after twenty years of existence, the Legislature might have expected an unincorporated association to become a corporation, its durability indicating that it is now appropriate for it to follow the corporate formalities. It is worth noting that Sections 53-10-1 through 53-10-8 NMSA 1978 are compiled in Chapter 53, Article 10, NMSA 1978, "Corporations"

Appellee also cites *Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC*, 2014-NMCA-017, ¶ 23, 317 P.3d 842, in which the Court of Appeals specifically

declined to determine whether Los Vigiles was a properly formed unincorporated association:

> Whether Los Vigiles's formal entity status has been perfected, whether Los Vigiles's authority to act as successor in fact in a position of trust with respect to the property, and whether Los Vigiles's legal action here was properly authorized by individuals with authority to act on behalf of the entity, **are matters we have no need to pursue in this appeal.**

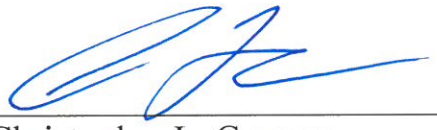
Appellees' characterization that "the plaintiffs asserted that Los Vigiles had standing to sue as an unincorporated association" is incorrect. **[AB 19]** Plaintiffs argued that the property was taken in trust, and that Los Vigiles' trust status was based on the Las Vegas Trustees' 1951 deed. *Id.* ¶ 16. Defendants admitted that there was a trust, but the court rejected their argument that "even though it may be injured in fact, the trust had no standing because its claims were not brought by a trustee." *Id.* ¶ 20. The court clearly does not make a determination about Los Vigiles's "entity status in form or legal existence," and does not address Defendants' argument about the twenty-year maximum term of existence for unincorporated associations found in Section 53-10-7. This is further indication that the court allowed standing on some other basis than finding that Los Vigiles was a properly formed unincorporated association under NMSA 1978 §53-10-1 to -8.

CONCLUSION

Blue Canyon Well Association does not exist as an independent entity capable of suing Jevne. Even if Blue Canyon Well Association did exist, it ceased to exist twenty years after it was created by the 1991 agreement and therefore no longer possesses the ability to sue Jevne. Appellant respectfully requests that the district court be reversed and that costs and fees be assessed against Appellee and its members.

Respectfully Submitted,

Graeser & McQueen, LLC
ATTORNEYS AT LAW



Christopher L. Graeser
Post Office Box 220
Santa Fe, New Mexico 87504-0220
(505) 982-9074
chris@tierralaw.com