


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
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Mark Reynolds

4 **NOS. A-1-CA-37459, A-1-CA-37483, A-1-CA-37969**
5 (consolidated for purpose of opinion)

6 **AUTOVEST, L.L.C.,**

7 Plaintiff-Appellant,

8 **v.**

9 **DEBRA M. AGOSTO and DEBBIE M.**
10 **AGOSTO,**

11 Defendants-Appellees.

12 **and**

13 **AUTOVEST, L.L.C.,**

14 Plaintiff-Appellee,

15 **v.**

16 **MARIA ESTRADA,**

17 Defendant-Appellant,

18 **and**

19 **FRANK RIVERA, JR.,**

20 Defendant.

21 **and**

1 **AUTOVEST, L.L.C.,**

2 Plaintiff-Appellant,

3 **v.**

4 **DEBRA M. AGOSTO and DEBBIE M.**
5 **AGOSTO,**

6 Defendants-Appellees.

7 **APPEALS FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**
8 **Mary W. Rosner, District Judge**

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1 **OPINION**

2 **DUFFY, Judge.**

3 {1} In this opinion we address related appeals arising from two district court cases
4 involving the same Plaintiff, Autovest LLC, and its pursuit of deficiency actions
5 against borrowers who defaulted on automobile purchase contracts.¹ A common
6 issue arose in both cases: whether a partial payment revived the limitations period
7 for a cause of action under Article 2 of New Mexico’s Uniform Commercial Code
8 (UCC)—NMSA 1978, Section 55-2-725(1) (1961). The district courts reached
9 conflicting decisions on the question. In *Autovest I*, the court concluded that
10 Autovest’s complaint was time-barred and dismissed the complaint with prejudice,
11 whereas in *Autovest II*, the court concluded that a partial payment revived the
12 limitations period and entered judgment in favor of Autovest. We hold that the
13 partial payment revival statute, NMSA 1978, § 37-1-16 (1957), does not operate to
14 toll the limitations period in Section 55-2-725. Therefore, we affirm the dismissal of
15 Autovest’s complaint in *Autovest I* and reverse the judgment in favor of Autovest in
16 *Autovest II*.

¹This opinion resolves three appeals: two appeals arose from Dist. Ct. No. D-307-CV-2014-01148—No. A-1-CA-37459 and No. A-1-CA-37969—and are hereinafter referred to collectively as *Autovest I*. A third appeal, No. A-1-CA-37483, arose from Dist. Ct. No. D-307-CV-2013-00164 and is hereinafter referred to as *Autovest II*. Because the district court cases involve an identical issue of law, we consolidate these appeals for decision. *See* Rule 12-317(B) NMRA.

1 {2} Autovest additionally challenges the district court’s attorney fee decisions in
2 *Autovest I*. Because we conclude the district court erred in its disposition of both
3 parties’ fee requests, we reverse and remand for further consideration of those
4 matters.

5 **BACKGROUND**

6 **I. *Autovest I***

7 {3} In June 2006, Defendants Debra and Debbie Agosto, mother and daughter
8 (hereinafter, the Agostos), bought a used Saturn L200 from a dealer pursuant to a
9 sales contract and purchase money security agreement. The Agostos financed
10 approximately \$14,000 to complete the purchase and agreed to repay this debt in
11 monthly installments. The dealer assigned its interest in the agreement to Wells
12 Fargo Auto Finance, Inc., which in turn assigned it to Wells Fargo Bank, N.A. (Wells
13 Fargo). The Agostos defaulted in 2008. Wells Fargo repossessed and sold the vehicle
14 that winter, but a deficiency of approximately \$9,000 remained. Wells Fargo
15 assigned its interest in the agreement to Autovest in January 2011.

16 {4} Autovest referred the debt to a collection agency, which obtained a payment
17 of \$1,000 from Debra via check dated February 25, 2011. Autovest filed suit for the
18 remaining deficiency on June 5, 2014. Debbie² answered and asserted as an

²Another attorney filed a limited entry of appearance on behalf of Debra. More than a year later, this attorney filed an answer and counterclaims on behalf of Debra

1 affirmative defense that the complaint was barred by the statute of limitations. She
2 also counterclaimed, alleging that Autovest violated New Mexico’s Unfair Practices
3 Act (UPA), NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019), and
4 committed tortious debt collection by “willfully . . . filing time-barred complaints.”

5 {5} Autovest moved for summary judgment on Debbie’s counterclaims, arguing,
6 among other things, that its lawsuit was not barred by the applicable four-year statute
7 of limitations because Debra’s \$1,000 payment revived the limitations period
8 pursuant to Section 37-1-16, and the complaint was filed within four years of her
9 payment. At the hearing on the motion, the district court granted Autovest’s motion
10 but also, sua sponte, dismissed Autovest’s complaint. The district court reasoned that
11 although Section 37-1-16 is applicable to a claim under Article 2 of the UCC, the
12 statute requires both a partial payment and a writing to revive the limitations period.
13 According to the court, Autovest had not provided evidence that Debra’s payment
14 was accompanied by an admission in writing or a new promise to pay.³

that were similar to Debbie’s answer and counterclaims. Autovest moved to strike
this filing as untimely and the district court granted this motion.

³The Agostos acknowledge that the district court’s reading of Section 37-1-16 “conflicts with the decisions of this Court construing that section” and do not advance the district court’s reasoning on appeal. *See Joslin v. Gregory*, 2003-NMCA-133, ¶¶ 12, 14, 134 N.M. 527, 80 P.3d 464 (stating that “New Mexico, unlike some other jurisdictions, permits revival by way of an admission even where the debtor’s acknowledgment does not constitute a new promise, for example, where the admission is accompanied by an expression of unwillingness to pay” and affirming that a partial payment may constitute an admission through non-verbal conduct). However, we “may affirm a district court if it was right for any reason and

1 {6} Following the district court’s ruling, the Agostos submitted billing statements
2 and fee affidavits collectively seeking over \$115,000 in attorney fees pursuant to
3 NMSA 1978, Section 39-2-2 (1981). The district court awarded attorney fees to the
4 Agostos in the amount of \$39,111.27. Autovest also sought attorney fees of over
5 \$143,000 for successfully defending against Debbie’s UPA counterclaim. The
6 district court declined to award a monetary judgment in favor of Autovest, saying
7 that “an award of attorneys’ fees to Autovest, LLC is reflected in the [c]ourt’s
8 reduction of the attorneys’ fees sought by Debra Agosto and Debbie Agosto by two-
9 thirds.” Autovest appeals.

10 **II. *Autovest II***

11 {7} In August 2007, Defendant Maria Estrada executed a motor vehicle retail
12 installment contract in the amount of approximately \$17,900 for the purchase of a
13 2006 Nissan Frontier truck. As in *Autovest I*, the dealer assigned the contract to
14 Wells Fargo Auto Finance, Inc., which then assigned its interest to Wells Fargo
15 Bank, N.A. Estrada defaulted in September 2008. Wells Fargo repossessed the truck
16 and sold it in January 2009, but a deficiency of approximately \$9,100 remained.
17 Wells Fargo received a payment in the amount of \$999.20 on February 6, 2009,
18 shortly after the truck was sold at auction. This was the last payment on the account.

affirming on new grounds would not be unfair to the appellant.” *Wild Horse
Observers Ass’n, Inc. v. N.M. Livestock Bd.*, 2016-NMCA-001, ¶ 29, 363 P.3d 1222.

1 As with the Agostos' contract, Wells Fargo assigned its interest in the Estrada
2 contract to Autovest in January 2011; Autovest filed suit for the remaining
3 deficiency on January 18, 2013.

4 {8} Estrada moved for summary judgment, arguing that Autovest's complaint was
5 time-barred because it was filed more than four years after the date of default. In
6 response, Autovest argued that the February 6, 2009, payment revived the statute of
7 limitations pursuant to Section 37-1-16 such that the complaint, filed within four
8 years of that payment, was timely. The district court orally denied Estrada's motion
9 at the hearing, finding that Section 37-1-16 applied but that disputed issues of
10 material fact remained as to when and how the final payment was made. After a
11 bench trial later that year, the district court found that Estrada or her agent had made
12 a voluntary payment of \$999.20 on February 6, 2009, and concluded that the
13 payment had revived the statute of limitations pursuant to Section 37-1-16. The court
14 entered judgment in favor of Autovest on its breach of contract claim, awarding
15 \$9,153.54 for the deficiency and \$48,650.75 for attorney fees, plus prejudgment and
16 postjudgment interest. Estrada appeals.

17 **DISCUSSION**

18 **I. Section 37-1-16 Does Not Apply in an Action Governed by Section 55-2-** 19 **725**

20 {9} We first address the common question raised in these appeals: whether
21 Defendants' partial payments revived the statute of limitations and started the clock

1 anew from the date of the last payment. Where, as here, “facts relevant to a statute
2 of limitations issue are not in dispute, the standard of review is whether the district
3 court correctly applied the law to the undisputed facts.” *Haas Enters., Inc. v. Davis*,
4 2003-NMCA-143, ¶ 9, 134 N.M. 675, 82 P.3d 42. “We review questions of law de
5 novo.” *Id.*

6 {10} It is undisputed in these cases that an action to recover a deficiency on a motor
7 vehicle installment contract is governed by Article 2 of the UCC and subject to the
8 four-year statute of limitations set forth in Section 55-2-725:

9 (1) An action for breach of any contract for sale must be
10 commenced within four years after the cause of action has accrued. By
11 the original agreement the parties may reduce the period of limitation
12 to not less than one year but may not extend it.

13 (2) A cause of action accrues when the breach occurs,
14 regardless of the aggrieved party’s lack of knowledge of the breach. A
15 breach of warranty occurs when tender of delivery is made, except that
16 where a warranty explicitly extends to future performance of the goods
17 and discovery of the breach must await the time of such performance,
18 the cause of action accrues when the breach is or should have been
19 discovered.

20 (3) Where an action commenced within the time limited by
21 Subsection (1) is so terminated as to leave available a remedy by
22 another action for the same breach, such other action may be
23 commenced after the expiration of the time limited and within six
24 months after the termination of the first action unless the termination
25 resulted from voluntary discontinuance or from dismissal for failure or
26 neglect to prosecute.

27 (4) This section does not alter the law on tolling of the statute
28 of limitations nor does it apply to causes of action which have accrued
29 before this act [this chapter] becomes effective.

1 *Id.*; see *First Nat'l Bank v. Chase*, 1994-NMSC-127, ¶¶ 9, 11, 118 N.M. 783, 887
2 P.2d 1250 (holding that the four-year statute of limitations in Section 55-2-725
3 governs a suit for deficiency following repossession and sale of an automobile).
4 There is also no dispute that Autovest filed each lawsuit more than four years after
5 the actions accrued—i.e., four years after each defendant first breached its
6 installment contract by failing to make an installment payment. See § 55-2-725(2).
7 {11} Nevertheless, Autovest maintains that its complaints are timely because
8 Defendants' partial payments operated to start the running of the statute anew.
9 Autovest points out that Section 55-2-725(4) incorporates New Mexico's "law on
10 tolling of the statute of limitations" for Article 2 claims and argues that such "law
11 on tolling" includes New Mexico's revival statute, Section 37-1-16.⁴ Section 37-1-
12 16 provides in relevant part:

⁴New Mexico courts have referred to Section 37-1-16 as both a "tolling" and a "revival" statute for over a century. See *Citizens Bank of Clovis v. Teel*, 1987-NMSC-087, ¶ 10, 106 N.M. 290, 742 P.2d 502 (considering, as part of its analysis of Section 37-1-16, the principle "that a statute which tolls the statute of limitations should be liberally construed to reach the merits if possible"); *Pugh v. Heating & Plumbing Fin. Corp.*, 1945-NMSC-031, ¶ 30, 49 N.M. 234, 161 P.2d 714 ("There is no evidence in the case at bar that [the attorney for the plaintiff] was specifically authorized by the plaintiff to make any admissions that the judgment was due and unpaid, or authorized to make such admissions as would have the effect to toll or remove the statute of limitations."); *Joyce-Pruit Co. v. Meadows*, 1921-NMSC-108, ¶ 9, 27 N.M. 529, 203 P. 537 ("To say that the admission is ineffective to toll the statute because the statute has already run and the debtor intends to avail himself of it is to reason in a circle."); *Cleland v. Hostetter*, 1905-NMSC-008, ¶ 12, 13 N.M. 43, 79 P. 801 ("Unlike the statute of James, our statute in terms provides that either

1 Causes of action founded upon contract shall be revived by the
2 making of any partial or installment payment thereon or by an
3 admission that the debt is unpaid, as well as by a new promise to pay
4 the same; but such admission or new promise must be in writing, signed
5 by the party to be charged therewith.

6 Autovest contends that when measured from the date of the last payment, its
7 complaints were timely filed within four years. Defendants counter that Section 37-
8 1-16 does not apply to an Article 2 action based on the plain language of its statutory
9 neighbor, NMSA 1978, Section 37-1-17, (1880), which provides:

a new promise or an acknowledgment may revive the action; and, not content with leaving no uncertainty or to diversity of authority the scope of the acknowledgment necessary to toll the statute, it in terms provides that ‘an admission that the debt is unpaid’ shall have that effect.”); *Reymond v. Newcomb*, 1900-NMSC-016, ¶ 2, 10 N.M. 151, 61 P. 205 (“[D]oes a part payment of principal or interest on a promissory note within the period of the statute of limitations toll the statute?”); *Lea Cnty. State Bank v. Markum Ranch P’ship*, 2015-NMCA-026, ¶ 11 n.1, 344 P.3d 1089 (noting that “tolling” is one “[o]ther similar term[] for ‘revival’ ” that was used by authorities relied on by the Court in its analysis of Section 37-1-16); *Joslin v. Gregory*, 2003-NMCA-133, ¶ 11, 134 N.M. 527, 80 P.3d 464 (indicating that “the concept that permits a debtor’s actions to toll the statute of limitations” is important to an analysis of Section 37-1-16). Such usage is imprecise; our appellate courts have attempted to clarify the difference. *Compare Lea Cnty. State Bank*, 2015-NMCA-026, ¶ 11 (“When a debt is revived, the statute of limitations starts anew.”), *with Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep’t*, 2013-NMSC-013, ¶ 14, ___ P.3d ___ (“Tolling interrupts the time of a period for the limitations of action under a statute of limitations, effectively adding on time to commence an action after the moment when the statute would otherwise have barred an action. Tolling persists as long as the cause of the tolling persists, and when that cause ends, the calculation of time under the statute commences again.” (omission, internal quotation marks, and citation omitted)). However, because our courts have not strictly distinguished between “tolling” and “revival” in past applications of Section 37-1-16, we will not exclude consideration of Section 37-1-16 simply because it is titled a “revival” provision and not a “tolling” provision.

1 None of the provisions of this chapter shall apply to any action
2 or suit which, by any particular statute of this state, is limited to be
3 commenced within a different time, nor shall this chapter be construed
4 to repeal any existing statute of the state which provides a limitation of
5 any action; but in such cases the limitation shall be as provided by such
6 statutes.

7 (Emphasis added.)

8 {12} This Court has recognized that the emphasized language is unambiguous,
9 making interpretation unnecessary. *See Noriega v. City of Albuquerque*, 1974-
10 NMCA-040, ¶ 8, 86 N.M. 294, 523 P.2d 29 (stating that NMSA 1953, Section 23-
11 1-17 (1880), recompiled as Section 37-1-17, “is unambiguous; there is no room for
12 construction”); *see also State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 24,
13 117 N.M. 346, 871 P.2d 1352 (stating that “a statute, clear and unambiguous on its
14 face, need not and cannot be interpreted by a court” (internal quotation marks and
15 citation omitted)). Applying the plain statutory language, our Supreme Court has
16 observed that Section 37-1-17 applies whenever an action is governed by any
17 particular statute of limitation outside of NMSA 1978, Sections 37-1-1 to -19 (1880,
18 as amended through 2015). *See Romero v. N.M. Health & Env’t Dep’t*, 1988-NMSC-
19 073, ¶ 14, 107 N.M. 516, 760 P.2d 1282 (construing former compilation and stating
20 that “ ‘any particular statute of this state,’ to which reference is made in Section [37-
21 1-17], would be a statute outside of those sections included within Sections [37-1-1
22 to -19] that were enacted originally under [1880 N.M. Laws, ch. 5, §§ 1-19]”).
23 Because the actions in the cases before us are governed by Section 55-2-725, which

1 is outside of Sections 37-1-1 to -19, Section 55-2-725 is a “particular statute of this
2 state” within the meaning of Section 37-1-17. Section 55-2-725 requires that an
3 action for breach of a sales contract be commenced within four years rather than the
4 six-year period that is generally applicable to actions on written contracts under
5 Section 37-1-3(A). Therefore, by its plain terms, Section 37-1-17 renders the tolling
6 provisions of Section 37-1-16 inapplicable to a claim subject to the limitations period
7 in Section 55-2-725.

8 {13} Precedents applying Section 37-1-17 support this straightforward application
9 of the plain language of the statute. For example, our courts have consistently held
10 that when a lawsuit is governed by a particular statute of limitations outside of
11 Sections 37-1-1 to -19, Section 37-1-17 prohibits application of the savings clause
12 in Section 37-1-14, which allows a second suit following dismissal of the first to be
13 “deemed a continuation of the first” under certain circumstances. In *Gathman-*
14 *Matotan Architects & Planners, Inc. v. Dep’t of Fin. & Admin.*, 1990-NMSC-013,
15 ¶¶ 1, 4, 109 N.M. 492, 787 P.2d 411, our Supreme Court held that 37-1-17 prevented
16 application of Section 37-1-14 in a contract action against the state governed by
17 NMSA 1978, Section 37-1-23 (1976). The Court reasoned:

18 Section 37-1-23(B) provides: “Every claim permitted by this section
19 shall be forever barred unless brought within two years from the time
20 of accrual.” Therefore, under the express terms of Section 37-1-17, the
21 limitations period is that provided in Section 37-1-23(B)—two years.
22 Section 37-1-14 does not apply to lengthen this period.

1 *Gathman-Matotan Architects & Planners, Inc.*, 1990-NMSC-013, ¶ 4. The Court
2 looked no further than whether “any particular statute of this state” limited the
3 commencement of the suit at issue to a different time. *Id.* (emphasis, internal
4 quotation marks, and citation omitted). Answering this question in the affirmative
5 was “sufficient to thwart [the] plaintiff’s attempt to invoke Section 37-1-14.” *Id.* ¶ 5.
6 Other cases are in accord. *See Estate of Gutierrez ex rel. Haney v. Albuquerque*
7 *Police Dep’t*, 1986-NMCA-023, ¶ 15, 104 N.M. 111, 717 P.2d 87 (holding that
8 Section 37-1-14 is inapplicable to the Tort Claims Act), *overruled on other grounds*
9 *by Bracken v. Yates Petroleum Corp.*, 1988-NMSC-072, ¶ 12, 107 N.M. 463, 760
10 P.2d 155 (holding on public policy grounds that the filing of a workers’
11 compensation claim in an improper venue tolls the statute of limitations); *Ortega v.*
12 *Shube*, 1979-NMCA-130, ¶ 9, 93 N.M. 584, 603 P.2d 323 (holding that Section 37-
13 1-17 prohibits Section 37-1-14 from applying in workers’ compensation and
14 occupational disablement cases because both sets of laws contain specific statutes of
15 limitations and noting that “[t]he court is powerless to change the plain meaning of
16 the statutes”), *overruled on other grounds by Bracken*, 1988-NMSC-072, ¶ 12; *Perry*
17 *v. Staver*, 1970-NMCA-096, ¶¶ 8, 13-14, 81 N.M. 766, 473 P.2d 380 (holding that
18 under a former compilation, Section 37-1-17 applied to prevent application of
19 Section 37-1-14 to a wrongful-death suit limited by the Wrongful Death Act),
20 *overruled on other grounds by Estate of Brice v. Toyota Motor Corp.*, 2016-NMSC-

1 018, ¶¶ 17, 42, 373 P.3d 977 (holding that the doctrine of fraudulent concealment
2 may toll the three-year statute of limitations for wrongful death actions).

3 {14} Likewise, New Mexico courts have consistently held that Section 37-1-17
4 prohibits application of the tolling provisions in Section 37-1-10 on the same basis.

5 See Section 37-1-10 (tolling the limitations period for minors and incapacitated
6 persons “so that they shall have one year from and after the termination of such

7 incapacity within which to commence said actions”); see *Natseway v. Jojola*, 1952-
8 NMSC-104, ¶¶ 16-17, 56 N.M. 793, 251 P.2d 274 (construing the former

9 compilation and holding that Section 37-1-17 prevented application of Section 37-
10 1-10 to a wrongful death suit and noting that “the courts cannot provide a saving

11 clause or create an exception where the statute contains none”), *superseded by*
12 *statute on other grounds as stated in Estate of Brice*, 2016-NMSC-018, ¶ 22; *Lent v.*

13 *Emp. Sec. Comm’n*, 1982-NMCA-147, ¶ 32, 99 N.M. 407, 658 P.2d 1134 (holding
14 that under Section 37-1-17, Section 37-1-10 does not apply to a workers’

15 compensation claim); *Noriega*, 1974-NMCA-040, ¶ 6 (construing the former
16 compilation of Section 37-1-10 and holding that under Section 23-1-17 (now Section

17 37-1-17), Section 32-1-10 (now Section 37-1-10) does not apply to a negligence
18 action against a municipality). Autovest has not directed us to any authority

19 demonstrating a contrary application of Section 37-1-17, and we found none. In light
20 of the longstanding, consistent application of Section 37-1-17 by the appellate courts

1 of New Mexico, we are bound to conclude that Section 37-1-17 renders Section 37-
2 1-16 inapplicable to an action governed by Section 55-2-725.

3 {15} The two UCC provisions that Autovest relies upon do not alter our analysis.
4 To the extent that NMSA 1978, Section 55-1-103(b) (2005) (stating that “[u]nless
5 displaced by the particular provisions of the [UCC], the principles of law and
6 equity . . . supplement its provisions”), and Section 55-2-725(4) (explaining that
7 “[t]his section does not alter the law on tolling of the statute of limitations”), can be
8 read to incorporate the law on tolling set out in Chapter 37, Autovest has not
9 explained why these UCC provisions would include Section 37-1-16 but not Section
10 37-1-17, and we are not aware of any legal authority or any reasonable justification
11 for treating the two statutes differently.

12 {16} Incorporating Section 37-1-16 but excluding Section 37-1-17 would be
13 arbitrary, and it would require us to ignore the history of the statutory provisions at
14 issue. When the Legislature enacted Section 55-2-725 as part of the UCC in 1961,
15 Sections 37-1-16 and -17 had been in effect for over eighty years, having been
16 enacted by our territorial legislature in 1880. “The Legislature is presumed to know
17 existing statutory law and to take that law into consideration when enacting new
18 law.” *Gutierrez v. W. Las Vegas Sch. Dist.*, 2002-NMCA-068, ¶ 15, 132 N.M. 372,
19 48 P.3d 761. In this case, we presume that the Legislature knew that Section 37-1-
20 17 would preclude the application of Section 37-1-16 to an Article 2 UCC claim,

1 particularly given that our Supreme Court had construed Section 37-1-17's effect
2 before the UCC was adopted. *See, e.g., Natseway*, 1952-NMSC-104, ¶¶ 16-17.
3 Given the statutory landscape, if the Legislature intended for the revival principles
4 articulated in Section 37-1-16 to apply to Article 2 UCC claims, it could have said
5 so expressly, as it did when it enacted Section 55-2-725(3), a savings provision
6 within Article 2 that is similar to Section 37-1-14. *Cf. Bd. of Cnty. Comm'rs v. Bd.*
7 *of Cnty. Comm'rs*, 2020-NMCA-017, ¶ 13, 460 P.3d 36 (“The Legislature knows
8 how to include language in a statute if it so desires.” (internal quotation marks and
9 citation omitted)).

10 {17} Finally, while Autovest argues that courts in other states have consistently
11 held that a partial payment will toll or renew the statute of limitations for an Article
12 2 claim, we find such out-of-state authority distinguishable. The primary case
13 Autovest points to, *Hamilton v. Pearce*, 547 P.2d 866, 869 (Wash. Ct. App. 1976),
14 considered a partial payment statute similar to Section 37-1-16, but there is no
15 indication that the State of Washington has a statute similar to New Mexico's
16 Section 37-1-17. Consequently, *Hamilton* does not speak to the dispositive issue in
17 this case.

18 {18} The remaining cases cited by Autovest addressed partial payment rules
19 grounded in the common law rather than a statutory partial payment provision. *See*
20 *Zelby Holdings, Inc. v. Videogenix, Inc.*, 82 N.E.3d 1067, 1069 (Mass. App. Ct.

1 2017) (holding that the primary issue on appeal was whether the common law partial
2 payment rule applies to actions subject to the six-year statute of limitations in Article
3 3 (negotiable instruments) of Massachusetts’s UCC); *Greer Limestone Co. v. Nestor*,
4 332 S.E.2d 589, 595-96 (W. Va. 1985) (applying the common law partial payment
5 doctrine to an Article 2 UCC claim); *see also Hamilton*, 547 P.2d at 870 (“It should
6 first be noted what the partial payment statute is. It is substantially a [codification]
7 of the common-law rule. Most, if not all states, have a similar rule of law, if not by
8 statute then as a part of their common law.” (citation omitted)). Although New
9 Mexico’s territorial Legislature adopted the common law as the rule of practice and
10 decision in 1876, *Beals v. Ares*, 1919-NMSC-067, ¶ 26, 25 N.M. 459, 185 P. 780,
11 our courts have never addressed the partial payment doctrine as a matter of common
12 law. It remains an open question whether New Mexico would recognize or apply the
13 common law partial payment doctrine, particularly in light of the Legislature’s
14 codification of the rule in Section 37-1-16 in 1957.⁵ *See Sims v. Sims*, 1996-NMSC-
15 078, ¶ 23, 122 N.M. 618, 930 P.2d 153 (discussing the effect of the common law

⁵As originally enacted in 1880, Section 37-1-16 did not recognize revival by partial payment. *See* 1880 N.M. Laws, ch. 5, § 13 (“Causes of action founded upon contract shall be revived by an admission that the debt is unpaid, as well as by a new promise to pay the same; but such admission or new promise must be in writing, signed by the party to be charged therewith.”). The Legislature added the partial payment provision in 1957, two years after our Supreme Court’s holding in *Gentry v. Gentry*, 1955-NMSC-055, ¶¶ 14-15, 59 N.M. 395, 285 P.2d 503 (noting that a partial payment was not a written admission within the meaning of Section 37-1-16 as then in effect).

1 upon a statutory enactment and vice versa). However, that question is not before us
2 today and we limit our review to the question of statutory interpretation presented
3 on appeal.

4 {19} We conclude that Section 37-1-17 prohibits the application of Section 37-1-
5 16 in these cases. Accordingly, we hold that the partial payments did not revive the
6 statute of limitations, that the four-year limitations periods set by Section 55-2-725
7 expired before Autovest filed its lawsuits, and Autovest’s claims against Defendants
8 are therefore time-barred.

9 **II. Attorney Fees**

10 {20} Autovest separately appealed from the district court’s attorney fee decisions
11 in *Autovest I*, arguing that the award to the Agostos must be reversed because (1)
12 Section 39-2-2 does not apply and thus there was no basis to award attorney fees to
13 the Agostos and, alternatively, (2) the district court incorrectly calculated the amount
14 of the award. Autovest also challenges the district court’s denial of Autovest’s
15 motion for attorney fees. “We review the court’s award of attorney fees for abuse of
16 discretion, but when the issue involves misapplication of law to facts, we review the
17 application of the law to the facts de novo.” *J.R. Hale Contracting Co. v. Union Pac.*
18 *R.R.*, 2008-NMCA-037, ¶ 93, 143 N.M. 574, 179 P.3d 579.

1 **A. Attorney Fees Awarded to the Agostos**

2 {21} Autovest first contends that Section 39-2-2 does not allow for fee shifting in
3 favor of the Agostos. We disagree.

4 {22} Section 39-2-2 provides that “[i]n any civil action involving liability for a
5 deficiency pursuant to [NMSA 1978,] Section 55-9-504 [(2001)] or [NMSA 1978,]
6 Section 58-19-7 [(2013)], the debtor, if prevailing, may in the discretion of the court
7 be allowed a reasonable attorney fee set by the court and taxed and collected as
8 costs.” We note initially that the Legislature’s reference to Section 55-9-504 is
9 apparently out of date; that section was recompiled as NMSA 1978, Sections 55-9-
10 608 and -610 in 2001, but Section 39-2-2 has not been amended since its enactment
11 in 1981. In their current form, Sections 55-9-608 and -610 are part of a statutory
12 scheme governing defaults on secured transactions under Article 9 of the UCC.

13 {23} The plain language and purpose of Section 39-2-2 and the statutes it refers
14 to—Sections 55-9-608 and -610, and Section 58-19-7—indicate that the Legislature
15 intended for Section 39-2-2 to allow an award of attorney fees in deficiency actions
16 arising from defaults on automobile purchase contracts. Section 55-9-610 allows the
17 secured party to sell the collateral in the event of a default, and Section 55-9-
18 608(a)(4) states that an obligor remains liable for any deficiency following collection
19 or enforcement. Similarly, Section 58-19-7(M), which is part of the Motor Vehicle
20 Sales Finance Act, NMSA 1978 §§ 58-19-1 to -14 (1959, as amended through 2019),

1 provides that “[i]n the event that the seller or the holder of the retail installment
2 contract repossesses a motor vehicle, the buyer shall be responsible and liable for
3 any deficiency in accordance with Section 55-9-608[.]” It is evident that a deficiency
4 arising from the repossession and sale of an automobile is “pursuant to” the statutes
5 referenced in Section 39-2-2. *See Pursuant to, Black’s Law Dictionary* (11th ed.
6 2019) (defining “pursuant to” as (1) “[i]n compliance with; in accordance with; (2)
7 “[a]s authorized by; under”; and (3) “[i]n carrying out”). And although Autovest
8 makes much of our holding in *First Nat’l Bank*, it makes no practical difference that
9 the deficiency action is governed by the statute of limitations in Article 2. *See* 1994-
10 NMSC-127, ¶ 9 (noting that an automobile installment purchase contract is a “hybrid
11 involving both sales and security aspects”). Accordingly, the district court did not
12 err by concluding that Section 39-2-2 permitted it to award attorney fees in *Autovest*
13 *I*.

14 {24} Turning to Autovest’s challenges to the amount of the award, Autovest argues
15 that the district court abused its discretion by arbitrarily reducing the gross amount
16 of the Agostos’ requested attorney fees by two-thirds and by failing to segregate
17 recoverable fees from non-recoverable fees. “While an award of attorney fees is
18 discretionary, the exercise of that discretion must be reasonable when measured
19 against objective standards and criteria.” *Rio Grande Sun v. Jemez Mountains Pub.*
20 *Sch. Dist.*, 2012-NMCA-091, ¶ 13, 287 P.3d 318 (internal quotation marks and

1 citation omitted). “The lodestar provides an objective basis for valuing the attorney’s
2 services,” *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 34,
3 140 N.M. 879, 149 P.3d 976, and “[i]n statutory fee-shifting cases . . . the lodestar
4 method for determining attorney fees is generally used because it provides adequate
5 fees to attorneys who undertake litigation that is socially beneficial, irrespective of
6 the pecuniary value to the claimant.” *Rio Grande Sun*, 2012-NMCA-091, ¶ 20
7 (alteration, internal quotation marks, and citation omitted).

8 {25} “A lodestar is determined by multiplying counsel’s total hours reasonably
9 spent on the case by a reasonable hourly rate.” *Id.* (internal quotation marks and
10 citation omitted). “This value serves as a starting point for the calculation”; the fee
11 awarded must also be reasonable. *Atherton v. Gopin*, 2012-NMCA-023, ¶ 7, 272
12 P.3d 700. New Mexico courts traditionally use the factors set forth in Rule 16-105
13 NMRA of the Rules of Professional Conduct to examine the reasonableness of
14 attorney fees. *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007,
15 ¶¶ 76-77. These factors include:

- 16 (1) the time and labor required, the novelty and difficulty of the
17 questions involved, and the skill requisite to perform the legal service
18 properly;
- 19 (2) the likelihood that the acceptance of the particular employment
20 will preclude other employment by the lawyer;
- 21 (3) the fee customarily charged in the locality for similar legal
22 services;

- 1 (4) the amount involved and the results obtained;
- 2 (5) the time limitations imposed by the client or by the
3 circumstances;
- 4 (6) the nature and length of the professional relationship with the
5 client;
- 6 (7) the experience, reputation, and ability of the lawyer performing
7 the services; and
- 8 (8) whether the fee is fixed or contingent.

9 *Id.* ¶ 77 (citing factors set forth in Rule 16-105(A)). “A court need not consider all
10 factors or give all the factors equal weight.” *Behrens v. Gateway Ct., LLC*, 2013-
11 NMCA-097, ¶ 33, 311 P.3d 822.

12 {26} In this case, the amount sought by the Agostos was based on a lodestar
13 calculation; counsel provided the district court with affidavits and billing records
14 detailing their hourly rates and the time spent on the case. *See id.* The district court
15 found that counsels’ hourly rates were reasonable, as was the time expended, but
16 reduced the fee request by 66.6667%, saying:

17 [The Agostos] have prevailed on the ultimate issue of law, and are
18 entitled to reasonable attorneys’ fees. However, the [c]ourt has elected
19 to award net attorneys’ fees to Counsel for [the Agostos], recognizing
20 that [Autovest] has prevailed on numerous issues including but not
21 limited to a Motion to Compel. A reduction of 2/3rds of the requested
22 fees is appropriate.

1 The court stated that it “considered and applied the factors going into an award of
2 attorney fees expressed in [Rule] 1-054(D) [NMRA] and [*Gavin Maloof & Co. v.*
3 *Sw. Distrib. Co.*, 1987-NMSC-103, ¶ 9, 106 N.M. 413, 744 P.2d 541].”

4 {27} The district court strayed from objective standards when it arbitrarily reduced
5 the fees award by two thirds. *See Rio Grande Sun*, 2012-NMCA-091, ¶ 20. This case
6 is similar to *Behrens*, where the district court acknowledged the plaintiff’s proposed
7 lodestar calculation but reduced the fee award in part “because [the d]efendant
8 successfully defended against [the p]laintiff’s other claims for punitive damages,
9 emotional distress damages, and civil penalty damages.” 2013-NMCA-097, ¶ 37.
10 Though we said the district court may properly reduce the attorney fee calculation
11 to the extent it includes fees for claims on which the plaintiff had not prevailed, the
12 court must still “assess the time involved in each claim or defense.” *Id.*; *see also*
13 *Dean v. Brizuela*, 2010-NMCA-076, ¶ 17, 148 N.M. 548, 238 P.3d 917 (“Our
14 Supreme Court has continued to direct that recoverable fees be segregated from non-
15 recoverable fees to ensure that only those fees for which there is authority to award
16 attorney fees are in fact awarded.”). Instead of undertaking that evaluation, however,
17 “the district court awarded [the p]laintiff an arbitrary fee of \$10,000 that was then
18 reduced by \$5,000 without any analysis of the actual factual circumstances and time
19 involved to support these calculations.” *Behrens*, 2013-NMCA-097, ¶ 37. We
20 concluded that the district court had abused its discretion by failing to “utilize the

1 lodestar method or any objective analysis of the facts in order to determine [the
2 p]laintiff’s reasonable attorney fees.” *Id.* ¶ 38.

3 {28} The law requires the same conclusion here. The district court expressly
4 declined to use the lodestar method and the record contains no indication that the
5 district court considered any objective criteria other than the reasonableness of
6 counsels’ hourly rates. The district court reduced the Agostos’ fee award because
7 Autovest had prevailed on a number of matters, including the Agostos’
8 counterclaims, but the reduction was not grounded in an analysis of the time
9 involved or an effort to segregate recoverable from non-recoverable fees. *See id.*
10 ¶ 37. And while the district court apparently relied on *Gavin Maloof Co.* for the
11 proposition that it may use its own knowledge and expertise in determining the value
12 of an attorney’s legal services, *Gavin Maloof Co.* does not stand for the proposition
13 that a district court may disregard objective standards and criteria. *See* 1987-NMSC-
14 103, ¶ 9 (“Based upon its knowledge of the case and the pleadings filed, and without
15 submission of time records and testimony, the trial court could properly have
16 determined that [the plaintiff’s] counsel was entitled to \$832 as a reasonable fee.”).
17 On the contrary, we recognized that *Gavin Maloof Co.* is but one part of the
18 reasonableness analysis, explaining that “[h]istorically, New Mexico courts have
19 *also* used the factors now found in Rule 16-105 . . . to examine the reasonableness
20 of attorney fees.” *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-

1 007, ¶ 76 (emphasis added) (citing *Gavin Maloof Co.* as one of the considerations
2 relevant to the reasonableness of an attorney fee award).

3 {29} Because the district court “failed to utilize the lodestar method or any
4 objective basis for determining a reasonable award of attorney fees,” we hold that
5 the court abused its discretion. *Rio Grande Sun*, 2012-NMCA-091, ¶ 21. We reverse
6 the district court’s award of attorney fees and remand for recalculation. The district
7 court should use the lodestar method as a starting point for its calculation and enter
8 findings of fact and conclusions of law that take into account the factors set forth in
9 Rule 16-105. Further, because fees are authorized under Section 39-2-2 only for
10 work related to the defense of the deficiency action, the court should take care “to
11 ensure that only those fees for which there is authority to award attorney fees are in
12 fact awarded.” *Dean*, 2010-NMCA-076, ¶ 17.

13 **B. Attorney Fees Requested by Autovest**

14 {30} Autovest also argues the district court abused its discretion in its handling of
15 Autovest’s motion for attorney fees. About two weeks after the district court entered
16 its order awarding fees to the Agostos, Autovest filed a motion for attorney fees on
17 the basis that it had defeated Debbie’s UPA counterclaim. Under the UPA, a party
18 who successfully defends against a UPA claim is entitled to an award of attorney
19 fees if the district court “finds that the party complaining of such trade practice
20 brought an action that was *groundless*.” Section 57-12-10(C) (emphasis added). The

1 district court ultimately declined to award Autovest a monetary judgment, writing
2 that the two-thirds reduction of the Agostos' award reflected an award of attorney
3 fees to Autovest:

4 2. For the reasons articulated on the record at the [hearing on the
5 Agostos' request for attorney fees], the [c]ourt will not enter a
6 monetary judgment in favor of Autovest, LLC based on its fee
7 request;

8 3. As explained at the [hearing on the Agostos' motions], an award
9 of attorneys' fees to Autovest, LLC is reflected in the [c]ourt's
10 reduction of the attorneys' fees sought by Debra Agosto and
11 Debbie Agosto by two-thirds (66.6667%), in the Order &
12 Judgment for Attorneys' Fees, entered June 1, 2018[.]⁶

13 {31} Autovest argues that the district court could not have accounted for Autovest's
14 fees when it reduced the Agostos' fees by two-thirds because Autovest had not yet
15 filed its motion, and there was no evidence in the record as to the amount Autovest

⁶At the hearing on the Agostos' motion for attorney fees, the district court stated:

[Autovest] may assume that there is an award of attorneys' fees to you in this regard: The attorney fee affidavit I have cut by 66 percent. That gives you some sense of the fact that I think that you prevailed, and I recognize that you prevailed on the motion to strike and three of the four motions. The only one that you didn't prevail on was the one that was most dispositive, which was the statute of limitations. . . . And I have recognized the power and winning position that Autovest took on many issues, including the motion to compel, including the motion to strike and three of the four—all of the Unfair Practices Act. . . . That's why [D]efendants' affidavit for attorneys' fees has been cut by 66 percent.

1 incurred in connection with defending against the counterclaim. We agree and
2 reverse. *See Behrens*, 2013-NMCA-097, ¶ 34.

3 {32} On remand, the starting point for the district court’s analysis must be to
4 determine whether Debbie’s UPA counterclaim was “groundless.” *See Robey v.*
5 *Parnell*, 2017-NMCA-038, ¶ 44, 392 P.3d 642 (“[W]e do not read the statute to
6 authorize an award of attorney fees to the [counter]defendants merely because they
7 successfully prevailed against the claims asserted by the [counter]plaintiff.”
8 (alterations, internal quotation marks, and citation omitted)). “A claim is considered
9 groundless, which we have held is synonymous with frivolous, when there is no
10 arguable basis in law or fact to support the cause of action and the claim is not
11 supported by a good-faith argument for the extension, modification, or reversal of
12 existing law.” *Id.* (internal quotation marks and citations omitted); *Jones v. Beavers*,
13 1993-NMCA-100, ¶ 23, 116 N.M. 634, 866 P.2d 362 (“The party must also establish
14 that, at the time such claim was filed, the claim was initiated in bad faith or there
15 was no credible evidence to support it.”). While Autovest urges us to conclude that
16 the district court necessarily found that the UPA claim was groundless when it
17 decided to reduce the Agostos’ fee award, the district court never made an explicit
18 finding on this point as required by Section 57-12-10(C). *See also Robey*, 2017-
19 NMCA-038, ¶ 46 (stating that the district court’s “conclusions of law must be

1 supported by findings of ultimate fact” (alteration, internal quotation marks, and
2 citation omitted)).

3 {33} If the district court finds that Debbie’s UPA counterclaim was groundless, it
4 must then determine Autovest’s reasonable attorney fees. *See Behrens*, 2013-
5 NMCA-097, ¶¶ 34, 37. As with the calculation of the Agostos’ attorney fee award,
6 the district court should use the lodestar method as a starting point for its calculation
7 and enter findings of fact and conclusions of law that account for the factors set forth
8 in Rule 16-105. Further, because the UPA claim is the only claim for which Autovest
9 could be awarded attorney fees, the district court must take care to ensure that the
10 fee award relates solely to the UPA claim. *See Jaramillo v. Gonzales*, 2002-NMCA-
11 072, ¶ 41, 132 N.M. 459, 50 P.3d 554 (“Because the UPA claim was the only claim
12 for which [the p]laintiffs could be awarded attorney fees, the trial court was obligated
13 to separate the claims and determine the amount of time spent on each.”); *see also*
14 *Dean*, 2010-NMCA-076, ¶ 16 (“[I]t has long been the rule in New Mexico that a
15 party is only entitled to those fees resulting from the cause of action for which there
16 is authority to award attorney fees.”).

17 {34} Finally, we reject Autovest’s contention that the Agostos have waived any
18 challenge to the reasonableness of Autovest’s requested attorney fees. *See Dean*,
19 2010-NMCA-076, ¶ 18 (stating that once the plaintiff made its claim for attorney
20 fees, “it was left to the discretion of the trial court to make the award based upon

1 [the p]laintiff[’s] proof of the reasonableness of the fees. The defendant[s] did not
2 have to object to the time or show that it was separate. It was for the trial court to
3 review the claim made by [the p]laintiff[] and in its discretion determine what fees
4 to award” (alteration, internal quotation marks, and citation omitted)).

5 **CONCLUSION**

6 {35} In *Autovest I*, we affirm the district court’s dismissal of Autovest’s complaint
7 but reverse the court’s award of attorney fees to the Agostos and remand for
8 recalculation. We also reverse the district court’s order on Autovest’s motion for
9 attorney fees and remand for reconsideration. The court must consider the Agostos’
10 claim separately from Autovest’s claim.

11 {36} In *Autovest II*, we reverse the district court’s judgment in favor of Autovest
12 and remand with instructions to enter judgment in favor of Estrada.

13 {37} **IT IS SO ORDERED.**

14 
15 _____
MEGAN P. DUFFY, Judge

16 **WE CONCUR:**

17 
18 _____
ZACHARY A. IVES, Judge

19 
20 _____
SHAMMARA H. HENDERSON, Judge