

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

2 **CATHRYN L. WALLACE,**

3 Plaintiff-Appellant,

4 v.

5 **MICHAEL SCOTT FREEMAN,**

6 Defendant-Appellee.

7 **APPEAL FROM THE DISTRICT COURT OF CATRON COUNTY**

8 **Shannon Murdock-Poff, District Court Judge**

9 The Law Office of Cathryn L. Wallace, LLC

10 Cathryn L. Wallace

11 Silver City, NM

12 for Appellant

13 Michael Scott Freeman

14 Mule Creek, NM

15 Pro Se Appellee

16 **MEMORANDUM OPINION**

17 **ATTREP, Chief Judge.**

18 {1} Plaintiff appeals from the district court's order determining Plaintiff's  
19 damages pursuant to a default judgment entered against Defendant. We issued a  
20 calendar notice proposing to affirm, in part, and to reverse, in part. Plaintiff has filed  
21 a memorandum in opposition, which we have duly considered. Defendant did not

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Ramon J. Maestas  
Chief Clerk

**No. A-1-CA-41258**

1 file no memorandum in opposition. Unpersuaded our calendar notice was erroneous,  
2 we affirm in part and reverse in part.

3 {2} Initially, we note that in her memorandum in opposition, Plaintiff only renews  
4 one of the five issues she raised in the docketing statement. We limit the scope of  
5 our discussion accordingly. *See State v. Salenas*, 1991-NMCA-056, ¶ 2, 112 N.M.  
6 268, 814 P.2d 136 (explaining that where a party has not responded to this Court’s  
7 proposed disposition of an issue, that issue is deemed abandoned). In her  
8 memorandum in opposition, Plaintiff continues to argue that the district court erred  
9 when it allowed Defendant to testify regarding the debt he owed Plaintiff. [MIO 7-  
10 22] We proposed to affirm on this issue on the grounds that the district court gave  
11 Defendant an opportunity to introduce his own testimony to mitigate his damages.  
12 [CN 4]

13 {3} In the memorandum in opposition, Plaintiff clarifies her assertion that the  
14 district court erred by allowing Defendant’s testimony about the nature of the debt.  
15 [MIO 8] At the hearing, Defendant testified that he believed that many of the loans  
16 he had received from Plaintiff were gifts. [RP 119] Plaintiff contends that when her  
17 motion for default judgment was granted, “Defendant’s ability to argue the nature of  
18 the debt itself, and to present a belated defense that the sum awarded was in fact  
19 gifted to the Defendant, was foreclosed.” [MIO 9] Plaintiff argues that by allowing  
20 Defendant’s testimony, the district court effectively set aside the facts set forth in

1 the complaint, and allowed Defendant to put on a defense concerning the nature of  
2 the debt despite the fact that he was in default and had never moved for the default  
3 judgment to be set aside. [MIO 9] Specifically, Plaintiff argues that by “[p]ermitting  
4 a party to defend or re[]characterize the nature of a debt at that stage of a proceeding  
5 is tantamount to setting aside the findings of fact that make up the [d]efault  
6 [j]udgment and [o]rder of [r]eplevin.” [MIO 15] *See Gallegos v. Franklin*, 1976-  
7 NMCA-019, ¶ 37, 89 N.M. 118, 547 P.2d 1160 (“Generally, a default judgment  
8 precludes a trial of facts, except as to damages. The allegations of the complaint, in  
9 effect, become findings of fact.”). Plaintiff maintains that the district court relied on  
10 this improper testimony in determining the amount Defendant owed Plaintiff.

11 {4} In addition, Plaintiff asserts that the district court erred when, after the  
12 damages hearing, it permitted the parties to file written closing statements, and  
13 Defendant filed what Plaintiff describes as an “[a]nswer” to the complaint in which  
14 he denied owing any money to Plaintiff. [MIO 17; RP 125] Plaintiff maintains that  
15 this “[a]nswer” “formed the basis for the court’s acceptance of . . . Defendant’s  
16 undocumented claim that he owed a total of \$40,000 . . . and that all other sums  
17 claimed had been ‘gifted.’” [MIO 21]

18 {5} Based on our review of the record proper, however, we are not persuaded that  
19 the district court relied on Defendant’s testimony regarding the nature of the debt.  
20 As stated in our calendar notice, the record proper indicates that the district court

1 admitted and reviewed Plaintiff’s exhibits. [CN 2-3] The district court’s order states  
2 that it “reviewed submitted exhibits” and found that “Plaintiff has not m[et] her  
3 burden of proving that Defendant was indeed the person who acquired all the debt  
4 requested and thus finds in favor of Plaintiff only to the \$40,000 that Defendant  
5 agreed he owed Plaintiff while under oath.” [RP 132] The district court’s order also  
6 provided reasoning, albeit under the wrong standard, as to why it did not find each  
7 of Plaintiff’s exhibits relevant, credible, or persuasive regarding the debt Plaintiff  
8 alleged Defendant owed. Accordingly, we are unpersuaded that the district court  
9 relied on improper testimony when it determined that Defendant was liable to  
10 Plaintiff only for the amount of \$40,000, to which he admitted while under oath. *See*  
11 *Gray v. Grayson*, 1966-NMSC-087, ¶ 4, 76 N.M. 255, 414 P.2d 228 (stating that  
12 “the trial court will be presumed to have disregarded incompetent evidence, in a case  
13 tried without a jury, absent a showing that the court was influenced thereby”); *Santa*  
14 *Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc.*, 2005-NMCA-051,  
15 ¶ 31, 137 N.M. 524, 113 P.3d 347 (explaining that “[i]n a bench trial, a district court  
16 frequently must disregard evidence that has been offered by a party, but which the  
17 court has excluded” and that “[i]n such cases, we presume that the district court  
18 disregarded the incompetent evidence”); *State v. Hernandez*, 1999-NMCA-105,  
19 ¶ 22, 127 N.M. 769, 987 P.2d 1156 (“We presume that a judge is able to properly  
20 weigh the evidence, and thus the erroneous admission of evidence in a bench trial is

1 harmless unless it appears that the judge must have relied upon the improper  
2 evidence in rendering a decision.”).

3 {6} To the extent that Plaintiff asserts that the district court’s failure to hold an in-  
4 person hearing affected her ability to present evidence, we are unpersuaded.  
5 Specifically, Plaintiff maintains that “the [district] court never provided sufficient  
6 access to the court in order to properly present evidence despite its own ruling that  
7 these proceedings would occur in person.” [MIO 19] As stated in our calendar notice,  
8 the district court encompasses four different counties, it rarely holds proceedings at  
9 the Catron County Courthouse, and its attempt to hold an in-person hearing had to  
10 be rescheduled due to inclement weather. [CN 7; RP 66, 89-91, 93] Plaintiff has not  
11 demonstrated that because there was no in-person hearing she was not able to present  
12 any of her evidence. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M.  
13 754, 955 P.2d 683 (“Our courts have repeatedly held that, in summary calendar  
14 cases, the burden is on the party opposing the proposed disposition to clearly point  
15 out errors in fact or law.”). To the contrary, as noted above, the district court  
16 reviewed Plaintiff’s submitted exhibits and considered them in making its ruling.

17 {7} Finally, because we are unpersuaded that the district court erred in its  
18 determination of the amount of debt owed to Plaintiff, we need not reach Plaintiff’s  
19 requests regarding the remand order [DS 22-30], except to state that we remand this

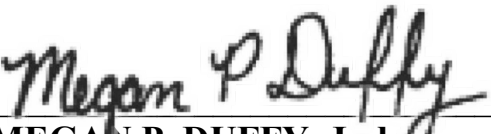
1 case back to the district court to consider Plaintiff's evidence under the correct  
2 evidentiary standard—a preponderance of the evidence.

3 {8} For the reasons stated in our notice of proposed disposition and herein, we  
4 reverse and remand this case back to the district court to reweigh Plaintiff's evidence  
5 under the proper standard of proof and otherwise affirm.

6 {9} **IT IS SO ORDERED.**

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**JENNIFER L. ATTREI, Chief Judge**

9 **WE CONCUR:**

10   
11 **MEGAN P. DUFFY, Judge**

12   
13 **JANE B. YOHALEM, Judge**