

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

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**ALTO MESA ESTATES LAND
PARTNERS, LLC,**

Plaintiff-Appellant,

v.

No. A-1-CA-42660

TDS BROADBAND SERVICE, LLC,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

Kathleen McGarry Ellenwood, District Court Judge

Newell Law Firm

Michael Newell

Lovington, NM

for Appellant

Snell & Wilmer L.L.P.

Todd Rinner

Albuquerque, NM

for Appellee

MEMORANDUM OPINION

IVES, Judge.

{1} Plaintiff appeals the district court's order containing findings of fact,
conclusions of law, and entry of judgment in favor of Defendant on all of Plaintiff's
claims and Defendant's counterclaims. We issued a notice proposing to summarily
affirm. Plaintiff has responded to our notice with a memorandum in opposition. We

1 have considered Plaintiff's response and remain unpersuaded that Plaintiff has
2 demonstrated error. We therefore affirm.

3 {2} In its docketing statement, Plaintiff's issues included whether the district court
4 erred: (1) as a matter of law by concluding that Defendant did not trespass on
5 Plaintiff's property; (2) by refusing to toll the statute of limitations under the
6 fraudulent concealment doctrine; and (3) by concluding that Defendant had a
7 prescriptive easement. [DS 4-6] Because Plaintiff's docketing statement did not
8 contain sufficient information to support the issues listed, we issued a notice
9 proposing summarily to affirm. In it, we explained what our rules require, what
10 information was omitted from Plaintiff's docketing statement, the burden an
11 appellant bears to demonstrate error, and our limited role on appeal. [CN 3-6]

12 {3} Plaintiff's response to our notice asserts the following: (1) this case presents
13 an issue of first impression in New Mexico as to whether a pole attachment
14 agreement from one utility to another for use of a utility pole assigns easement rights
15 to the utility that owns the pole or merely provides the ability to attach lines to the
16 poles of another utility, the latter of which requires the landowner's approval in the
17 form of a right-of-way or an easement [MIO 1-3]; (2) the district court erred by
18 ruling that the abandoned materials did not constitute a trespass [MIO 3-4]; and (3)
19 the district court erred by refusing to toll the statute of limitations on the basis of
20 fraudulent concealment [MIO 4-5]. Plaintiff, however, makes no argument

1 challenging our proposed affirmance of the district court’s ruling that Defendant
2 established a prescriptive easement. This constitutes an abandonment of the issue
3 and requires us to affirm this aspect of the district court’s ruling. *See State v. Salenas*,
4 1991-NMCA-056, ¶ 2, 112 N.M. 208, 814 P.2d 136 (explaining that where a party
5 has not responded to the Court’s proposed disposition of an issue, that issue is
6 deemed abandoned); *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754,
7 955 P.2d 683 (“Our courts have repeatedly held that, in summary calendar cases, the
8 burden is on the party opposing the proposed disposition to clearly point out errors
9 in fact or law.”); *cf. Frick v. Veazey*, 1993-NMCA-119, ¶ 2, 116 N.M. 246, 861 P.2d
10 287 (“Failure to file a memorandum in opposition constitutes acceptance of the
11 disposition proposed in the calendar notice.”).

12 {4} Plaintiff’s memorandum in opposition describes various exhibits and various
13 witnesses’ testimony without explaining how that evidence was used in the parties’
14 arguments. [MIO 6-19] We address the contentions in Plaintiff’s memorandum in
15 opposition in turn.

16 {5} First, Plaintiff’s response provides some detail regarding its docketing
17 statement claim that the district court erred as a matter of law when it failed to find
18 Defendant in trespass. We understand Plaintiff’s response to argue that Defendant
19 had no express easement on Plaintiff’s property by virtue of the pole attachment
20 agreements. [MIO 3-4] Plaintiff asserts for the first time in its memorandum in

1 opposition that the district court's error presents an issue of first impression on which
2 out-of-state case law is split. [Id.] However, Plaintiff does not explain why it is
3 necessary to address the asserted novel issue regarding an express easement where
4 the district court separately ruled that Defendant had prescriptive easement rights to
5 construct, operate, maintain, and replace the lines attached to the poles and to enter
6 the property as necessary to perform those tasks. [RP 1259-60 COL 31-34] As we
7 stated above, Plaintiff's response to our proposed affirmance accepts that Defendant
8 established prescriptive easement rights. Thus, Plaintiff does not show that a
9 determination on the asserted issue of first impression would result in reversal, and
10 therefore we are not persuaded that Plaintiff has demonstrated error. *See, e.g.,*
11 *Antillon v. N.M. State Highway Dep't*, 1991-NMCA-093, ¶ 26, 113 N.M. 2, 8, 820
12 P.2d 436 (refusing to address arguments, where, in light of other rulings, the issue
13 would not change the result).

14 {6} Second, Plaintiff's response to our notice pursues its docketing statement
15 claim that the materials Defendant left on Plaintiff's property constituted a trespass.
16 [MIO 3-4] Plaintiff complains that the district court's findings relative to the
17 discarded materials were sparse. [Id.] However, Plaintiff does not address several
18 relevant findings that were intermingled with the district court's legal conclusions
19 and that support the result. *See, e.g., Jones v. Augé, II*, 2015-NMCA-016, ¶ 2, 344

1 P.3d 989 (illustrating that it is not error to intermingle matters of fact with
2 conclusions of law in trial court orders).

3 {7} Lastly, Plaintiff pursues the claim in its docketing statement claim that the
4 district court should have tolled the statute of limitations for trespass due to
5 Defendant's fraudulent concealment of the discarded materials. [MIO 4-5] The
6 doctrine of fraudulent concealment requires the plaintiff to prove: "(1) the defendant
7 knew of the alleged wrongful act and concealed it from the plaintiff or had material
8 information pertinent to its discovery which he failed to disclose, and (2) the plaintiff
9 did not know, or could not have known through the exercise of reasonable diligence,
10 of the cause of action within the statutory period." *Estate of Brice v. Toyota Motor*
11 *Corp.*, 2016-NMSC-018, ¶ 10, 373 P.3d 977. Plaintiff argues that Defendant was
12 aware that it did not have an easement and did not explain its claim to easement
13 rights until over four years after Ms. Angell had inquired about it. [MIO 4-5] We are
14 not persuaded that this establishes Defendant knew the discarded materials were left
15 on the property, and the district court found that Defendant unintentionally left them
16 behind, which Plaintiff does not dispute. [RP 1255 FOF 54] "Unless findings are
17 directly attacked, they are the facts in this [C]ourt, and a party claiming error on the
18 part of the trial court must be able to point clearly to the alleged error." *Baker v.*
19 *Endeavor Servs., Inc.*, 2018-NMSC-035, ¶ 2, 428 P.3d 265. Additionally, Plaintiff's
20 argument does not challenge the district court's findings and conclusions relative to


1 Plaintiff's failure to exercise reasonable diligence to discover the items left on the
2 property. [RP 1257 COL 16-19, 21] *See id.*


3 {8} For the reasons set forth above and in our notice, we affirm the district court's
4 judgment.

5 {9} **IT IS SO ORDERED.**

6
7 
ZACHARY A. IVES, Judge

8 **WE CONCUR:**

9 
10 **J. MILES HANISEE, Judge**

11 
12 **KATHERINE A. WRAY, Judge**