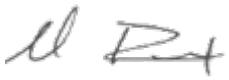
IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO



BARRY WIELAND,

Plaintiff-Appellant,

v. **No. A-1-CA-42070**

LYLE LOVE,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
Sarah V. Weaver, District Court Judge

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MEMORANDUM OPINION

HENDERSON, Judge.

{1} Plaintiff Barry Wieland appeals the district court's order dismissing his claims of fraud and financial mismanagement against his business partner, Defendant Lyle Love, in the operation of their jointly-owned businesses after the district court

determined that Plaintiff's claims were barred by the statute of limitations. Plaintiff contends that (1) the district court erred in applying New Mexico's discovery rule to determine the accrual date for his claims; or alternatively, (2) Defendant's concealment of his fraud tolled the statute of limitations. For the following reasons, we affirm.

BACKGROUND

{2} In 2006, Plaintiff and Defendant formed B & L Investments LLC, as a property management company in which they were equal members. In 2010, they formed a separate beauty salon and spa business, Le Petit, LLC, in which they were also equal members. Around February 2013, and allegedly without Plaintiff's approval, Defendant formed another entity, Le Petit, Inc., as a Subchapter S corporation, which engaged in the same business as Le Petit, LLC. Defendant transferred all assets from Le Petit, LLC to Le Petit, Inc. and Defendant and Plaintiff were equal shareholders in the Subchapter S corporation. To accomplish the transfer, falsified incorporation documents were created for Le Petit, Inc., bearing Plaintiff's forged signature.

{3} On June 7, 2021, Plaintiff filed suit against Defendant alleging fraud, conversion, and breach of fiduciary duty, among other claims, arising out of Defendant's management of their jointly-owned businesses. In his complaint, Plaintiff alleged that he began to note discrepancies in cash withdrawals from the

businesses, irregular transfers between business bank accounts, fees assessed against the bank accounts, unpaid debts and taxes, a lack of capital contributions from Defendant, discrepancies in the businesses' capital accounts, and conversion of Le Petit, LLC to Le Petit, Inc. without Plaintiff's knowledge or consent. In discovery, Plaintiff alleged that the discrepancies and suspicious transactions occurred between 2011 and 2017.

{4} Defendant later filed a motion to dismiss, arguing that the statute of limitations governing Plaintiff's claims had expired. In response, Plaintiff asserted that the financial discrepancies were not discovered until the fall of 2017, approximately three years and nine months before filing his lawsuit. In September 2022, the district court denied the motion after holding a hearing at which the parties agreed the motion should be considered on summary judgment grounds. The district court found there to be a material factual dispute as to whether Plaintiff exercised due diligence such that equitable tolling under the fraudulent concealment doctrine would apply to toll the statute of limitations.

{5} The parties later agreed to a bifurcated bench trial, with the district court first determining the statute of limitations issue. Prior to trial, the parties agreed that a four-year statute of limitations applied to Plaintiff's claims. At the bench trial, Plaintiff testified that he never requested financial documents or bank statements for B & L Investments LLC or Le Petit, LLC until the fall of 2017, when he began to

suspect financial malfeasance on the part of Defendant. Plaintiff argued that he had no duty to review any of the businesses' financial records prior to the fall of 2017 because he could rely on Defendant, who owed Plaintiff fiduciary duties as the managing partner of their jointly-owned businesses. Plaintiff testified that he trusted Defendant, Defendant was responsible for all the businesses' financial affairs, and that Plaintiff assumed Defendant was making cash investment contributions equal to his own in B & L Investments LLC and Le Petite, LLC. Plaintiff also testified that he "was not made aware of [the conversion] when that [entity] change happened" but admitted that he received annual Schedule K-1 tax forms from 2013 to 2017 for the unauthorized Subchapter S corporation, Le Petit, Inc. Before the trial's conclusion, Plaintiff called a local business owner and an accountant who both testified as to the practice of business partners in the local community in reviewing financial records.

{6} Following the bench trial, the district court dismissed the case after determining that the statute of limitations had expired. The district court issued a final order, finding that Plaintiff had not met "his burden of proof in showing that he exercised due diligence under the reasonable person standard, nor that the cause of action was undiscoverable had he exercised due diligence," such that neither the discovery rule nor the doctrine of fraudulent concealment tolled the statute of limitations. This finding forms the basis of Plaintiff's appeal.

DISCUSSION

{7} Plaintiff argues that the district court erred in concluding that Plaintiff's claims against Defendant are barred by the statute of limitations. Specifically, Plaintiff contends that (1) under New Mexico's discovery rule Plaintiff's claims did not accrue for purposes of the statute of limitations until the fall of 2017, when Plaintiff alleges he became aware of Defendant's financial mismanagement; or alternatively, (2) Defendant had a fiduciary duty to disclose his malfeasance such that Defendant's "silence" amounted to fraudulent concealment that tolled the statute of limitations. We disagree.

I. The Discovery Rule and Reasonable Diligence

{8} Plaintiff argues that under New Mexico's discovery rule his claims did not accrue for purposes of the statute of limitations until the fall of 2017, when Plaintiff became aware of Defendant's financial mismanagement. On appeal from the judgment following a bench trial, we review the district court's findings of fact for substantial evidence and application of the law to the facts de novo. *See Giant Cab, Inc. v. CT Towing, Inc.*, 2019-NMCA-072, ¶¶ 5-6, 453 P.3d 466 (applying this standard of review on appeal following a bench trial); *Williams v. Mann*, 2017-NMCA-012, ¶ 25, 388 P.3d 295 (noting that "when a district court holds a bench trial, we ordinarily give deference to the district court's findings of fact to the extent they are supported by substantial evidence"); *cf. Roberts v. Sw. Cmty. Health Servs.*,

1992-NMSC-042, ¶ 28, 114 N.M. 248, 837 P.2d 442 (concluding that the accrual date for purposes of the discovery rule "is a question of fact that is specifically within the [district] court's competence"); *McNeill v. Burlington Res. Oil & Gas Co.*, 2007-NMCA-024, ¶ 16, 141 N.M. 212, 153 P.3d 46 (reviewing a discovery rule determination for substantial evidence "[s]ince the issue was presented to the jury to determine as a factual issue"). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Ruiz v. Vigil-Giron*, 2008-NMSC-063, ¶ 13, 145 N.M. 280, 196 P.3d 1286 (internal quotation marks and citation omitted). "Under this standard, [appellate courts] resolve all factual disputes and indulge all reasonable inferences in favor of the party who prevailed in the [district] court." *Id.* "The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *N.M. Tax'n & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶ 20, 336 P.3d 436 (internal quotation marks and citation omitted). "We will not reweigh the evidence nor substitute our judgment for that of the fact finder." *Ruiz*, 2008-NMSC-063, ¶ 13 (alteration, internal quotation marks, and citation omitted). Accordingly, we will "not weigh the credibility of live witnesses." *Casias Trucking*, 2014-NMCA-099, ¶ 23; *see id.* ("It is the sole responsibility of the trier of fact to weigh the testimony, determine the credibility of the witnesses, reconcile inconsistencies, and determine where the truth lies, and we, as the reviewing court,

do not weigh the credibility of live witnesses." (alteration, internal quotation marks, and citation omitted)). "To the extent that [a party] contends that there are errors of law in the [district] court's conclusions or in those findings that function as conclusions, we apply a de novo standard of review." *Jones v. Schoellkopf*, 2005-NMCA-124, ¶ 8, 138 N.M. 477, 122 P.3d 844.

{9} In New Mexico, "[t]he discovery rule dictates when the statute of limitations begins to run in a case." *Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073, ¶ 7, 306 P.3d 524. Under the discovery rule, a cause of action accrues when the claimant knows, or with reasonable diligence, should have known of the cause of action. *See McNeill*, 2007-NMCA-024, ¶ 17; NMSA 1978, § 37-1-7 (1880) (providing that a cause of action for fraud or conversion does not accrue "until the fraud . . . or conversion complained of, shall have been discovered by the party aggrieved"). More precisely, the discovery rule dictates that the statute of limitations begins to run when the plaintiff "acquires knowledge of facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action." *Martinez v. Showa Denko, K.K.*, 1998-NMCA-111, ¶ 24, 125 N.M. 615, 964 P.2d 176 (internal quotation marks and citation omitted). "When a defendant makes a prima facie showing that a claim is time barred, a plaintiff attempting to invoke the discovery rule has the burden of demonstrating that if [they] had diligently investigated the problem [they] would

have been unable to discover the facts underlying the claim." *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 28, 140 N.M. 111, 140 P.3d 532 (alterations, internal quotation marks, and citation omitted). "The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 29, 267 P.3d 70 (internal quotation marks and citation omitted). "If a reasonable person in the plaintiff's position would have made an inquiry leading to the discovery of the fraud, then the plaintiff is said to be on 'inquiry notice' and deemed to have discovered the cause of action for purposes of the rule." *Sandel v. Sandel*, 2020-NMCA-025, ¶ 23, 463 P.3d 510.

{10} Before trial on the statute of limitations issue, the parties agreed that a four-year statute of limitations period under NMSA 1978, Section 37-1-4 (1880) applies to the claims in this case; a stipulation that the district court adopted in its final order. *See id.* (establishing a four-year limitations period for conversion of personal property, fraud, and other actions "founded upon accounts and unwritten contracts"). When applying the discovery rule to Defendant's contention that Plaintiff filed his lawsuit outside of the four-year limitations period, we are concerned with when Plaintiff knew or should have known relevant facts sufficient to have caused him to

inquire further about a potential cause of action. *See Christus St. Vincent Reg'l Med. Ctr.*, 2011-NMCA-112, ¶ 29; *see also Slusser*, 2013-NMCA-073, ¶ 8 ("With regard to the discovery rule, our case law thus plainly differentiates between discovering the existence of predicate facts to a cause of action and discerning the theory of law under which to proceed.").

{11} As relevant to the discovery rule, Plaintiff challenges the district court's finding that he did not meet "his burden of proof in showing that he exercised due diligence under the reasonable person standard." Plaintiff contends that he could not have discovered Defendant's wrongdoing earlier than the fall of 2017 because he had no reason to inquire into the financial records of either B & L Investments LLC or Le Petit, LLC. Defendant claims that the statute of limitations began to run in 2014, after Plaintiff discovered the unauthorized conversion of Le Petit, LLC to Le Petit, Inc. and when Plaintiff received his Schedule K-1 tax form for the newly formed business. We agree with the district court that nothing in the discovery rule serves to toll the accrual of the statute of limitations under the circumstances present in this case and explain.

{12} In its final written order, the district court concluded that a person acting with "the care that a reasonable person exercises to avoid harm to other persons or their property" would have discovered Defendant's cause of action using an "ordinary degree of reason, prudence, care, foresight, or intelligence," having been made aware

of the forged incorporation of Le Petit, Inc. in 2013. On appeal, Plaintiff continues to argue that he had no duty to review any financial records of their business entities as Defendant was the managing partner. Yet, Plaintiff cites no authority supportive of his sweeping proposition. *See Lee v. Lee* (*In re Adoption of Doe*), 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that where a party cites no authority to support an argument, we may assume no such authority exists). Rather, at the bench trial Plaintiff argued that his actions were reasonable because they were in accordance with industry practice in the local business community to not review financial records when the other partner is the managing partner. While Plaintiff's tax accountant testified that it is not unusual in San Juan County for "one partner [to take] care of the financial part of a partnership," and that while her old partner had "access to the books and records," they "never talked about" finances, the district court concluded in its final order, "[t]he practices of the local business community are not automatically the same as the reasonable person standard." *See, e.g.*, *Martinez*, 1998-NMCA-111, ¶ 24 (applying the reasonable person standard to New Mexico's discovery rule despite divergent expert opinions); *Yurcic v. City of Gallup*, 2013-NMCA-039, ¶ 9, 298 P.3d 500 (same).

{13} In fact, the weight of authority appears to contradict Plaintiff's assertion that he had no fiduciary duty generally to review financial records. *Cf. Fate v. Owens*, 2001-NMCA-040, ¶ 16, 130 N.M. 503, 27 P.3d 990 ("[T]he relationship of a partner

to the partnership and to the other partners is a fiduciary relationship."); *C.B. & T. Co. v. Hefner*, 1982-NMCA-131, ¶ 39, 98 N.M. 594, 651 P.2d 1029 (partners "bear a fiduciary relationship to each other" (internal quotation marks and citation omitted)); *Walta v. Gallegos Law Firm, P.C.*, 2002-NMCA-015, ¶ 35, 131 N.M. 544, 40 P.3d 449 ("Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another." (internal quotation marks and citation omitted)). Even Plaintiff's second witness, his former business partner, testified that it is the responsibility of a business owner to review financial documents and that for his businesses, he may "see a statement every six months or on an annual basis at the time for tax purposes." Moreover, Plaintiff agreed on cross-examination by Defendant that on occasion he received bank records from Defendant and that it was Plaintiff's responsibility to review the financial documents sent to him by Defendant. Plaintiff also testified that had he so much as reviewed bank records, he would have been alerted to potential concerns because Plaintiff would have noticed Defendant "was writing the checks to himself and to cash and that there w[ere] no receipts with them, and so it was not, therefore, they weren't legitimate transactions." Thus, we

decline Plaintiff's invitation to assume his inaction was reasonable and examine the critical question under the discovery rule—when a reasonable person in Plaintiff's position, through diligent investigation, knew or should have known the relevant predicate facts to a cause of action. *See Butler*, 2006-NMCA-084, ¶ 28; *Christus St. Vincent Reg'l Med. Ctr.*, 2011-NMCA-112, ¶ 29.

{14} Plaintiff asserts that he first became concerned that he should review the businesses' financial records in the fall of 2017, "because there w[ere] huge discrepancies on the partner contribution, capital contribution." Plaintiff's complaint asserts that upon "review of the banking records, Plaintiff noted, among other discrepancies, . . . [c]onversion of Le Petit, LLC to Le Petit, Inc. without Plaintiff's knowledge or consent." Plaintiff's assertion that the conversion of the salon business from Le Petit, LLC to Le Petit, Inc. was unauthorized and that his signature was forged on incorporation documents forms in part the basis for the counts pleaded in Plaintiff's complaint. However, the district court found that Plaintiff was aware of the unauthorized conversion of Le Petit, LLC to Le Petit, Inc. long before 2017—and we hold that substantial evidence supports this determination.

{15} Plaintiff's trial testimony demonstrates that he was aware as far back as 2013 there had been an unauthorized change to the Le Petit salon business to a Subchapter S corporation—and that for four years he received Schedule K-1 tax forms for the newly created Le Petit, Inc., and failed to further inquire into this change in his

business. Plaintiff testified that once he began receiving Schedule K-1 tax forms for Le Petit, Inc.—which he received annually from 2014 to 2017, he no longer received a Schedule K-1 tax form for La Petit, LLC—the last being from 2013. Plaintiff's testimony therefore further established that he was aware by 2014 that Le Petit, Inc. had been created with documents bearing his forged signature. The district court also questioned Plaintiff about seeing his Schedule K-1 tax form change for his 2013 taxes, and Plaintiff again acknowledged that his signature was forged to initiate the incorporation. The court then asked, "You did nothing about being put on a corporation without your permission from 2013 to the filing of this lawsuit?" to which Plaintiff responded he "didn't question it," because he "trusted the man." Yet, Plaintiff further asserts that the change from Le Petit, LLC to Le Petit, Inc., as reflected on the Schedule K-1 tax forms, was insufficient to cause him to inquire into the financial affairs of the business at that time because the change "was subtle and easily overlooked or . . . insignificant; it was not a 'red flag' that could serve as inquiry notice relating to business finances." We are unpersuaded.

{16} Such an unauthorized change to the Le Petit salon business—accomplished "without Plaintiff's knowledge or consent," through the filing of incorporation documents bearing Plaintiff's forged signature, and naming him an equal shareholder, director, and treasurer of the new business—would assuredly cause a reasonable person to investigate the business as a whole—to include its finances—

further at that time, given that Plaintiff was now legally and financially responsible for the unauthorized business conversion. *See Martinez*, 1998-NMCA-111, ¶ 24 (stating that tolling of the applicable statute of limitations "ends when the person claiming the benefit of the rule acquires knowledge of facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action").

{17} The facts relied upon by the district court were sufficient to alert a reasonable person that they should inquire further into their business dealings at that time. Yet, Plaintiff did nothing—never reviewing any financial documents for the jointly-owned business until fall of 2017. The information known, or that should have been known, by Plaintiff in 2014 was sufficient to activate the commencement of the statute of limitations seven years before the filing of his complaint. *See Butler*, 2006-NMCA-084, ¶ 28. Plaintiff has failed to meet his burden in proving due diligence under the discovery rule. Next, we must determine whether Defendant's fraudulent concealment tolled the limitations period.

II. Fraudulent Concealment

{18} Plaintiff next argues that Defendant had an affirmative duty to disclose his wrongdoings such that Defendant's silence constituted concealment of his fraud. "[E]quitable estoppel bars a defendant from raising the statute of limitations defense when the defendant actively prevents the plaintiff from filing within the period of

limitation," *Slusser*, 2013-NMCA-073, ¶ 7, such as when a defendant fraudulently conceals the cause of action from the plaintiff. *See Beneficial Fin. Co. of N.M. v. Alarcon*, 1991-NMSC-074, ¶ 19, 112 N.M. 420, 816 P.2d 489. "We review the district court's application of equitable estoppel under an abuse of discretion standard." *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.* 1993-NMSC-039, ¶ 26, 115 N.M. 690, 858 P.2d 66. "An abuse of discretion will be found when the [district] court's decision is clearly untenable or contrary to logic or reason." *Id.* (internal quotation marks and citation omitted).

{19} "When a litigant is relying on fraudulent concealment or estoppel to toll the running of a statute of limitations, the statute is tolled until the right of action is discovered or, by the exercise of ordinary diligence, could have been discovered." *Slusser*, 2013-NMCA-073, ¶ 22 (internal quotation marks and citation omitted). In order to toll the statute of limitations under the fraudulent concealment doctrine, a plaintiff is required to establish that (1) the defendant was aware of their own bad conduct but concealed it from the plaintiff; and (2) the plaintiff did not have knowledge of their cause of action and could not have discovered it by timely exercising reasonable diligence. *See Blea v. Fields*, 2005-NMSC-029, ¶ 28, 138 N.M. 348, 120 P.3d 430; *Gerke v. Romero*, 2010-NMCA-060, ¶ 19, 148 N.M. 367, 237 P.3d 111. A defendant's silence or failure to disclose material facts may also constitute fraudulent concealment. *See Cont'l Potash, Inc.*, 1993-NMSC-039, ¶¶ 42-

43. To prove fraudulent concealment by silence or a failure to disclose, the plaintiff "must first establish that there was a duty to speak, and [the plaintiff] must show that the silent party knew that [the plaintiff] was relying upon that silence." *Id.* ¶ 43.

{20} Even assuming without deciding that Defendant had a duty to speak and that Defendant knew Plaintiff was relying on that silence, Plaintiff has failed to establish that he could not have discovered the fraudulent conduct by timely exercising reasonable diligence.[1] *See Blea*, 2005-NMSC-029, ¶ 28. Plaintiff had the burden of

[1]Plaintiff also argues that the district court impermissibly relied on a series of exhibits after they were raised by Defendant during closing arguments, which were never introduced or admitted at the bifurcated trial, but which were attached to Defendant's motion to dismiss. The exhibits Plaintiff complains of are email communications and annual financial reports and records sent from Defendant to Plaintiff between 2013 and 2017 that the district court had previously considered in denying Defendant's motion to dismiss. Plaintiff solely points to the closing argument made by defense counsel and states there was no evidence presented during the trial to cast doubt as to whether the parties had ever communicated regarding the finances. However, during cross-examination, seemingly in an attempt to impeach Plaintiff, defense counsel asserted that Defendant had provided "all the information" to Plaintiff about the jointly-owned businesses' financials at that time, referencing the exhibits attached to Defendant's motion to dismiss, to which Plaintiff generally denied receiving. Plaintiff raised no objection to Defendant referencing the exhibits during the cross-examination. In fact, on redirect examination of Plaintiff, his counsel questioned Plaintiff about whether he recalled receiving the financial documents from Defendant, which he again denied. Nor did Plaintiff object to Defendant relying on the documents during closing arguments. Yet, Plaintiff argues that it was error for the district court to consider these exhibits in its final order and that even if the district court could consider them, the exhibits constitute hearsay. *See State v. Gutierrez*, 1996-NMCA-001, ¶ 4, 121 N.M. 191, 909 P.2d 751 ("In a bench trial, the [district] court is presumed to have disregarded improper evidence," such that reversible error occurs if "it appears the [district] court must have relied upon it in reaching its decision" (internal quotation marks and citation omitted)). However, even assuming without deciding that the exhibits were

demonstrating that Defendant's fraud would have been undiscoverable had Plaintiff exercised diligence. However, having already concluded that Plaintiff was aware of the conversion of Le Petit, LLC to Le Petit, Inc. by 2014, we are unpersuaded by Plaintiff's contention that Defendant's silence about any wrongdoing amounted to concealment. In fact, Plaintiff testified that he never requested bank statements or financial records for the jointly-owned businesses until 2017. Plaintiff also admitted that had he reviewed the bank records, he would have been alerted to potential concerns, because Plaintiff would have noticed Defendant was cashing unaccounted for checks to himself. The district court could and did properly dispose of Plaintiff's fraudulent concealment claim regardless of any argument that Defendant concealed the fraud, as the cause of action was discoverable through reasonable diligence. *See Blea*, 2005-NMSC-029, ¶ 36 (holding that because claimant had knowledge of a cause of action through reasonable diligence during the statutory period despite any

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erroneously considered, Plaintiff fails to develop an argument as to how he was prejudiced by the district court's reliance on the exhibits in making its findings of fact and conclusions of law in light of the other evidence supporting the district court's judgment. *See Cumming v. Nielson's, Inc.*, 1988-NMCA-095, ¶ 28, 108 N.M. 198, 769 P.2d 732 ("[T]he complaining party on appeal must show the erroneous admission . . . of evidence was prejudicial in order to obtain a reversal."); *Normand v. Ray*, 1990-NMSC-006, ¶ 35, 109 N.M. 403, 785 P.2d 743 ("Even where specific findings adopted by the trial court are shown to be erroneous, if they are unnecessary to support the judgment of the court and other valid material findings uphold the trial court's decision, the [district] court's decision will not be overturned."). "This Court has no duty to review an argument that is not adequately developed." *Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701. Thus, we decline to consider this issue further.

concealment by the defendant, the issue of concealment was immaterial). Thus, we cannot say the district court's determination that the statute of limitations had expired is clearly untenable or contrary to logic or reason.

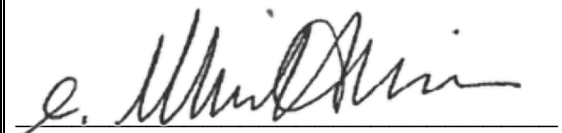
CONCLUSION

{21} Based on the foregoing, we affirm.

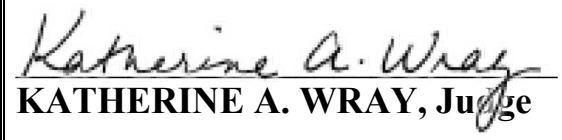
{22} **IT IS SO ORDERED.**

SHAMMARA H. HENDERSON, Judge

WE CONCUR:



J. MILES HANISEE, Judge



KATHERINE A. WRAY, Judge