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

2       Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico  
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Mark Reynolds

4       **No. A-1-CA-42422**

5       **FC3 LTD. CO,**

6               Plaintiff-Appellant,

7       v.

8       **FOUR WINDS MECHANICAL**  
9       **HTC/AC, INC., a New Mexico corporation;**  
10      **and MVT CONTRACTING, LLC, a New**  
11      **Mexico limited liability company,**

12              Defendants-Appellees.

13      **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

14      **Matthew J. Wilson, District Court Judge**

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16      Cameron Pumarejo Honeycutt PC  
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1 **OPINION**

2 **HANISEE, Judge.**

3 {1} Plaintiff appeals the district court’s granting of subcontractor Defendants’  
4 motions to dismiss. The district court initially dismissed Plaintiff’s claims of breach  
5 of implied warranty and negligence without prejudice. Plaintiff filed an amended  
6 complaint with the negligence claims and additional claims for unjust enrichment,  
7 and the district court again dismissed them, reasoning that Plaintiff failed to allege a  
8 duty for the negligence claim or the nonrecoverable nature of its contract claims  
9 before seeking recovery for unjust enrichment from the subcontractor Defendants.

10 {2} Plaintiff appeals and argues that the original complaint stated a claim for  
11 breach of implied warranty, even though Plaintiff was not in privity with the contract  
12 between the general contractor and the subcontractors, and that the claims against  
13 the subcontractors in the amended complaint were sufficient as a matter of law. We  
14 do not reach the implied warranty issue, because Plaintiff abandoned the claim in  
15 the amended complaint. Otherwise, we hold that a contract between a property  
16 owner and a general contractor does not foreclose negligence and unjust enrichment  
17 claims against a subcontractor. Because the claims Plaintiff pleaded in the amended  
18 complaint were legally sufficient, we reverse.

1 **BACKGROUND**

2 {3} Plaintiff property owner FC3 Ltd. Co. contracted with J.M. Evans  
3 Constructions Co., Inc. (JMEC) to renovate a property owned by Plaintiff. JMEC  
4 subcontracted with Defendant Four Winds Mechanical HTC/AC, Inc. (Four Winds),  
5 a heating, ventilation, and cooling subcontractor, to supply and install heating and  
6 cooling equipment as part of the renovation. JMEC also subcontracted with  
7 Defendant MVT Contracting, LLC (MVT), to install exterior stucco and interior  
8 plaster. Dissatisfied by the allegedly defective work of Defendants Four Winds and  
9 MVT on the renovation, Plaintiff sued, asserting claims for breach of implied  
10 warranty, breach of contract, unfair trade practices, and negligence. Upon Defendant  
11 Four Winds' motion, this complaint was dismissed without prejudice. Plaintiff filed  
12 an amended complaint, this time omitting a claim for breach of implied warranty but  
13 including an additional claim for unjust enrichment. Again upon Defendants'  
14 motions, the district court dismissed the complaint, finding that Plaintiff failed to  
15 allege the required element of duty for its negligence claim, since the parties were  
16 not in privity. The district court further reasoned that Plaintiff failed to demonstrate  
17 that it would not be able to recover from its contract claims against JMEC, which  
18 were in arbitration, and therefore was barred from bringing an unjust enrichment  
19 claim against Defendants. Plaintiff appeals.

1 **DISCUSSION**

2 {4} Plaintiff asks this Court to reverse the district court’s granting of Defendants’  
3 motions to dismiss Plaintiff’s claims for breach of implied warranty, negligence, and  
4 unjust enrichment. “We review a district court’s grant of a motion to dismiss de  
5 novo, accepting as true all of the appellant’s well-pleaded allegations.” *Butler v.*  
6 *Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 6, 140 N.M. 111, 140 P.3d  
7 532. We address each claim in turn.

8 **I. Breach of Implied Warranty Claim**

9 {5} In the original complaint, Plaintiff brought a breach of implied warranty claim  
10 against Defendants and in response to Defendant Four Winds’ first motion to  
11 dismiss, argued that such a claim does not require privity between an owner and a  
12 subcontractor. However, after the district court granted the motion to dismiss  
13 without prejudice, allowing Plaintiff to amend the complaint, Plaintiff did not  
14 re-allege breach of implied warranty in the amended complaint.

15 {6} Plaintiff accepts that when the district court dismissed Plaintiff’s first  
16 complaint in response to a motion to dismiss from one subcontractor (Defendant  
17 Four Winds), it dismissed Plaintiff’s first complaint—and the breach of implied  
18 warranty claim—as to all the subcontractors. But Plaintiff asserts that dismissal of  
19 Plaintiff’s first complaint entitles Plaintiff to appellate review of its breach of  
20 implied warranty claim even though Plaintiff did not re-allege it in the amended

1 complaint. Defendant Four Winds disagrees, quoting the following from *Griego v.*  
2 *Roybal*, 1968-NMSC-077, ¶ 8, 79 N.M. 273, 442 P.2d 585: “Rule [1-015 NMRA]  
3 requires a party to set forth in one entire pleading all matters which are necessary to  
4 be determined; the failure to re-allege allegations of an original pleading constitutes  
5 an abandonment of those allegations not re-alleged.” *Id.*; *see* Rule 1-015(E). We  
6 agree with Defendant Four Winds and hold that Plaintiff abandoned its breach of  
7 implied warranty claim by not re-alleging the claim in its amended complaint.  
8 Therefore, we decline to address Plaintiff’s claim as to Defendants’ breach of  
9 implied warranty.

## 10 **II. Negligence Claim**

11 {7} In Plaintiff’s view, “[t]he proposition that a subcontractor owes no duties to  
12 owners and that they enjoy unconditional immunity for their negligent conduct  
13 would place subcontractors in a uniquely protected class contrary to fundamental  
14 public policy.” Defendants respond that Plaintiff failed to establish a tort duty, in  
15 large part because Plaintiff’s claims are contract claims that fail absent privity of  
16 contract between the parties.

17 {8} It is within this Court’s purview to determine whether a duty exists. *See Lopez*  
18 *v. Devon Energy Prod. Co., L.P.*, 2020-NMCA-033, ¶16, 468 P.3d 887 (“New  
19 Mexico courts have long held that duty is a matter of law to be determined by the  
20 court.”). Additionally, “New Mexico law recognizes that there exists a duty assigned

1 to all individuals requiring them to act reasonably under the circumstances according  
2 to the standard of conduct imposed upon them by the circumstances.” *Calkins v. Cox*  
3 *Est.*, 1990-NMSC-044, ¶ 11, 110 N.M. 59, 792 P.2d 36. “Duty may be based on  
4 common law, statutory law, or general negligence standard.” *Thompson v. Potter*,  
5 2012-NMCA-014, ¶ 19, 268 P.3d 57.

6 ¶9) Defendants argue that the nature of their relationship with Plaintiff established  
7 no duty and that Plaintiff may only seek recourse for damages from the party with  
8 whom Plaintiff had a contractual relationship, the general contractor (JMEC).  
9 Defendant Four Winds directs us to recent law from our Supreme Court establishing  
10 that our determination of duty “involves an analysis of the relationship of the parties,  
11 the plaintiff’s injured interests and the defendant’s conduct to determine whether the  
12 plaintiff’s interests are entitled to protection.” *Waterbury v. Nelson*, 2024-NMSC-  
13 020, ¶ 12, 557 P.3d 96 (internal quotation marks and citation omitted). In that vein,  
14 Defendant Four Winds asserts that the “existence of a valid avenue for relief against  
15 JMEC further supports the district court’s dismissal” and effectively exonerates  
16 Defendants from liability, at least liability to Plaintiff directly. Similarly, Defendant  
17 MVT contends that Plaintiff failed to established that they owed Plaintiff a duty of  
18 care, asserting that Plaintiff “couched” a breach of contract claim in terms of tort law  
19 and instead alleged facts that could support only a contract claim. In Defendant  
20 MVT’s view, Plaintiff alleges a duty that does not exist in New Mexico law. And

1 the cases Plaintiff relies on relate to categories of tort law that are absent from this  
2 case: contractual professional negligence, negligent misrepresentation, and  
3 subsequent purchaser construction defect.

4 {10} We address these arguments in turn, beginning with the contention that  
5 Plaintiff’s contractual relationship with JMEC is the only avenue through which  
6 Plaintiff can recover for Defendants’ alleged wrongs. That Plaintiff had a contract  
7 with JMEC explicating JMEC’s responsibilities and establishing JMEC’s duties  
8 related to subcontractors such as Defendants does not preclude Plaintiff from  
9 seeking compensation directly from subcontractors—with whom no contract  
10 exists—for their allegedly negligent acts. *See Stotlar v. Hester*, 1978-NMCA-067,  
11 ¶ 10, 92 N.M. 26, 582 P.2d 403 (explaining that privity of contract is not “recognized  
12 as a factor when considering liability on a negligence theory” (internal quotation  
13 marks and citation omitted)). Nor would doing so be a violation of the contract  
14 between JMEC and Plaintiff; Plaintiff complied with the terms of that contract by  
15 not entering into contracts with subcontractors and by bringing its claims against  
16 JMEC through arbitration, as required. Thus, Plaintiff has pleaded claims that do not  
17 arise from any contract with Defendants and do not violate any other contract. As a  
18 result, Plaintiff is not required to bring the claim in contract and may proceed in tort,  
19 if the elements of a tort claim are sufficiently pleaded. *See In re Consol. Vista Hills*  
20 *Retaining Wall Litig.*, 1995-NMSC-020, ¶ 28, 119 N.M. 542, 893 P.2d 438

1 (requiring parties with equal bargaining power to bring contract and not tort claims  
2 in order to limit damages “to those within the contemplation and control of the  
3 parties in framing their agreement” (internal quotation marks and citation omitted)).

4 {11} This leads us to the crux of Defendants’ and the district court’s reasoning for  
5 dismissing Plaintiff’s complaint: one sentence in *Tarin’s v. Tinley* isolated from the  
6 context in which it applies. *See* 2000-NMCA-048, ¶ 12, 129 N.M. 185, 3 P.3d 680.  
7 That sentence reads, “Absent privity, a subcontractor owes no duty to a property  
8 owner.” *Id.* The district court relied on *Tarin’s* in finding that Plaintiff failed to allege  
9 the required element of duty between the parties who were not in privity. *See id.*  
10 Defendant Four Winds encourages us to affirm this conclusion, arguing that Plaintiff  
11 attempted to circumvent its obligation to show that it was an intended beneficiary of  
12 the contract or prove some other right to seek the contract’s enforcement, as required  
13 by *Tarin’s*. Defendant Four Winds also asserts that Plaintiff’s allegations against  
14 them stemmed from actions that fell within Defendant Four Winds’ scope of work,  
15 as if to say that when harmful actions fall within a defendant’s scope of work a claim  
16 for damages from those actions must necessarily arise from a contractual duty as  
17 opposed to from common law negligence.

18 {12} Put simply, Defendants attempt to shoehorn Plaintiff’s negligence claim into  
19 a breach of contract claim, and then use *Tarin’s* to invalidate it. *Tarin’s* concerned a  
20 claim for breach of contract, not a claim for negligence. It therefore comes as no

1 surprise that for the *Tarin*'s plaintiff to recover, it needed to show some kind of  
2 contractual relationship from which a duty arose—something that would have been  
3 wholly unnecessary were the claim for common law negligence, as it is here. Here,  
4 Plaintiff never sought to show that it was an intended beneficiary of the contract, nor  
5 did it need to, since its negligence claim relies on a duty separate from that  
6 established by a contract. *See Thompson*, 2012-NMCA-014, ¶ 19 (“Duty may be  
7 based on common law, statutory law, or *general negligence standard*.” (emphasis  
8 added)).

9 {13} In response to the district court's reliance on *Tarin*'s, Plaintiff emphasizes on  
10 appeal the long-held law that privity of contract has no place in negligence theory.  
11 *See Steinberg v. Coda Roberson Const. Co.*, 1968-NMSC-055, ¶¶ 5, 7, 79 N.M. 123,  
12 440 P.2d 798. Plaintiff thus argues that even without a contract between Plaintiff and  
13 Defendants, Plaintiff was still entitled to bring a claim against them for negligence.  
14 Defendant Four Winds attempts to deflect *Steinberg*'s holding by noting that the  
15 parties in *Steinberg*—a defendant home builder who sold a home to a buyer, who  
16 later sold the home to the plaintiff—were different from the parties here, a  
17 subcontractor and property owner. *See id.* ¶¶ 1-2. In this attempt to distinguish  
18 *Steinberg*, Defendant Four Winds implies that a duty-bearing relationship existed  
19 between the home builder and the second buyer because the second buyer alleged it  
20 was a third-party beneficiary to the contract between the home builder and the first

1 buyer, but that no such relationship exists in this case. But that argument is both  
2 inaccurate and inapplicable: inaccurate because no beneficiary status was argued or  
3 addressed in *Steinberg* and inapplicable because it is not a contractual duty Plaintiff  
4 alleges with Defendants to begin with—whether as a third-party beneficiary or  
5 otherwise—but rather a common law duty under the doctrine of negligence.  
6 Furthermore, the relationship between the home builder and the second buyer in  
7 *Steinberg* established a duty because the second buyer was a member of the class of  
8 prospective homebuyers for whom the defendant built the house, and our Supreme  
9 Court held that “as a matter of legal effect the home may be considered to have been  
10 intended for the plaintiff[.]” *Id.* ¶ 9. The relationship between the home builder and  
11 the second buyer in *Steinberg*, though different, is nonetheless analogous to that of  
12 Defendants and Plaintiff because the building project in both cases could be  
13 considered to have been intended for the plaintiffs, and in neither case was privity  
14 of contract required in order for a claim of negligence to stand.<sup>1</sup> We disagree with

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<sup>1</sup>This is true even in light of *NM-Emerald, LLC v. Interstate Development, LLC*, 2021-NMCA-020, ¶¶ 15-16, 488 P.3d 707, which, as Defendants point out, distinguishes *Steinberg*. There, this Court held that unlike the second buyer in *Steinberg*, who was a member of the class of prospective homebuyers for whom the defendant built the house, the *Emerald* plaintiff was a commercial entity with “equal bargaining power” to the defendant builder and based on an assignment of interest, “in privity with the builder through a construction loan contract.” *Id.* ¶ 16. Thus, Plaintiff bears greater similarity to the plaintiff in *Steinberg* than to the plaintiff in *Emerald*, because the former two were not in privity of contract with the defendants and both were members of the class that was intended to receive the defendant’s

1 Defendants that *Steinberg* is meaningfully distinguishable from this case and apply  
2 its holding that “[p]rivacy of contract no longer [is] recognized as a factor when  
3 considering liability on a negligence theory” to the facts of this case. *Id.* ¶ 7.

4 {14} Finally, Defendant MVT’s contention that Plaintiff’s negligence claim is  
5 legally deficient because Plaintiff never established a duty of care ignores the notice  
6 pleading laws of this state, where “it is sufficient that defendants be given only a fair  
7 idea of the nature of the claim asserted against them sufficient to apprise them of the  
8 general basis of the claim; specific evidentiary detail is not required at this stage of  
9 the pleadings.” *Petty v. Bank of N.M. Holding Co.*, 1990-NMSC-021, ¶ 7, 109 N.M.  
10 524, 787 P.2d 443. “[A]ll well-pleaded factual allegations in the complaint [are  
11 taken] as true,” and “all doubts [resolved] in favor of sufficiency of the complaint.”  
12 *Delfino v. Griffio*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917. As Defendant  
13 notes, “[N]otice pleading does not require that every theory be denominated in the  
14 pleadings—general allegations of conduct are sufficient, as long as they show that  
15 the party is entitled to relief and the averments are set forth with sufficient detail so  
16 that the parties and the court will have a fair idea of the action about which the party  
17 is complaining and can see the basis for relief.” *See Schmitz v. Smentowski*, 1990-  
18 NMSC-002, ¶ 9, 109 N.M. 386, 785 P.2d 726.

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services. We therefore disagree with Defendants’ assertion that *Emerald* renders  
*Steinberg* inapposite here.

1 {15} With this in mind, Plaintiff adequately alleged its claims and provided  
2 Defendants fair notice of the basis for those claims. Plaintiff’s complaint also  
3 sufficiently alleged a duty, with language like the following: Defendants “and its  
4 employees owed [Plaintiff] a duty to exercise reasonable care, skill, attention and  
5 judgment and to act free of negligence in the performance of their work on the  
6 [p]roject.” The complaint does not mention the contract in relation to the  
7 subcontractors; however, it alleges the elements of negligence required: duty,  
8 breach, and damages. *See Thompson, 2012-NMCA-014, ¶ 18* (“It is axiomatic that  
9 a negligence action requires that there be a duty owed from the defendant to the  
10 plaintiff; that based on a standard of reasonable care under the circumstances, the  
11 defendant breached that duty; and that the breach was a cause in fact and proximate  
12 cause of the plaintiff’s damages.” (internal quotation marks and citation omitted)).  
13 We therefore hold Plaintiff’s complaint sufficient to fulfill the notice pleading  
14 requirements of this state as well as to establish a duty for its negligence claim. We  
15 reverse the district court’s contrary determination.

16 **III. Unjust Enrichment Claim**

17 {16} Plaintiff’s final claim centers on unjust enrichment. Plaintiff alleged that  
18 Defendants were unjustly enriched at Plaintiff’s expense when they were paid for  
19 their defective work. The district court dismissed this claim on the grounds that  
20 Plaintiff did not allege that it cannot recover from the general contractor, citing as

1 authority a federal case. *See Abraham v. WPX Energy Prod., LLC*, 20 F. Supp. 3d  
2 1244, 1276 (D.N.M. 2014) (holding that the existence of a contract between the  
3 plaintiff and a different party “does not automatically bar the unjust enrichment  
4 claim, but the plaintiff cannot pursue the unjust enrichment claim unless there is  
5 something—bankruptcy, statutes—prohibiting the plaintiff from pursuing the  
6 contract claim”). The district court reasoned that “New Mexico law allows a plaintiff  
7 to pursue an unjust enrichment claim when the claim is the subject of a contract  
8 between the plaintiff and a different party, but not when the plaintiff can obtain relief  
9 by pursuing the contract claim.”

10 {17} Plaintiff responds on appeal that it is not barred from pursuing a claim for  
11 unjust enrichment against the subcontractor Defendants, at least at the pleading stage  
12 of a case, just because it has asserted claims against the general contractor, especially  
13 when the case against the general contractor has not commenced and the outcome is  
14 unknown. *See Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053,  
15 ¶ 91, 276 P.3d 252 (holding that the fact that a plaintiff is the party to a contract with  
16 the defendant “does not foreclose a claim for unjust enrichment”), *rev’d on other*  
17 *grounds sub. nom., Starko, Inc. v. N.M. Hum. Servs. Dep’t*, 2014-NMSC-033, ¶ 42,  
18 333 P.3d 947. As Plaintiff sees it, that New Mexico law explicitly does not bar a  
19 claim for unjust enrichment when there is a contract between a plaintiff and a  
20 defendant means that New Mexico law likewise does not bar a claim for unjust

1 enrichment claim when there is a contract between a plaintiff and a third party, such  
2 as between Plaintiff and JMEC here. Furthermore, in response to the district court’s  
3 reliance on *Abraham*, Plaintiff argues that because the present case is only at the  
4 pleading stage, dismissing the unjust enrichment claim is premature since it is yet  
5 uncertain whether Plaintiff will be able to recover from its arbitration proceedings  
6 against JMEC.

7 {18} Defendant Four Winds responds that Plaintiff is merely “hedg[ing] against its  
8 uncertain recovery in the arbitration with JMEC” and that such “is not a valid basis  
9 for awarding equitable relief.” Similarly, Defendant MVT asserts that Plaintiff’s  
10 cited cases do not support its unjust enrichment claim and that Plaintiff’s discontent  
11 with the district court’s reliance on a nonprecedential case, *Abraham*, is unfounded  
12 because Plaintiff at no point showed how *Abraham* was wrong. *See* 20 F. Supp. 3d  
13 at 1276. Defendant MVT continues, repeating Defendant Four Winds’ argument and  
14 adding that there is nothing barring Plaintiff’s breach of contract claim against JMEC  
15 and that Plaintiff never alleged it could not recover from JMEC in this case, as it  
16 needed to in order to pursue an unjust enrichment claim against Defendants per  
17 *Abraham*.

18 {19} We acknowledge the nonprecedential but persuasive nature of *Abraham*. In  
19 doing so, however, we must mention other similarly situated case law that is likewise  
20 on point. In the *Order Denying Motion to Dismiss, United States for use of Sierra*

1 *Canyon Constr., LLC v. Markel Ins. Co.*, (No. 1:21-cv-00974-PJK-SCY), 2022 WL  
2 541032, at \*2 (D.N.M. Feb. 23, 2022), for example, the same federal district court  
3 reasoned that New Mexico courts “have consistently employed unjust enrichment  
4 remedies (and appear not to have adopted such a pleading rule[ that a party may not  
5 recover on an unjust enrichment theory when an enforceable contract remedy  
6 exists]”); from this, the court concluded “that it [was] premature to terminate the  
7 unjust enrichment claim at this early stage of the litigation”—denying a motion to  
8 dismiss for failure to state a claim. *Id.* The court further supported this decision by  
9 explaining that “[r]ecovery [was] uncertain on either the contract or unjust  
10 enrichment claim.” *Id.*; see *Farmer v. Walmart, Inc.*, 729 F. Supp. 3d 1202, at \*23  
11 (D.N.M. Apr. 9, 2024) (order) (declining to apply *Abraham* and instead relying on  
12 the holding in *Sierra* that a claim for unjust enrichment should not be dismissed at  
13 the pleading stage even if the plaintiff has a separate contract claim: “[P]ermitting a  
14 plaintiff to plead an unjust enrichment claim in the alternative to remedies at law is  
15 permissible.”).

16 {20} As both *Abraham* and *Sierra* acknowledge, New Mexico courts have “long  
17 recognized actions for unjust enrichment.” *Ontiveros Insulation Co. v. Sanchez*,  
18 2000-NMCA-051, ¶ 11, 129 N.M. 200, 3 P.3d 695. “To prevail on such a claim, one  
19 must show that: (1) another has been knowingly benefitted at one’s expense (2) in a  
20 manner such that allowance of the other to retain the benefit would be unjust. . . .

1 The theory has evolved largely to provide relief where, in the absence of privity, a  
2 party cannot claim relief in contract and instead must seek refuge in equity.” *Id.* ¶ 11.


3 {21} This is true perhaps especially at the early stages of proceedings, where a party  
4 is entitled to advance alternative claims. *See* Rule 1-008(E)(2) NMRA (“A party  
5 may set forth two or more statements of a claim or defense alternatively or  
6 hypothetically, either in one count or defense or in separate counts or defenses.”).  
7 Additionally, New Mexico adheres to liberal notice pleading standards, as discussed  
8 above. *See Petty*, 1990-NMSC-021, ¶ 7.

9 {22} Taken together, this New Mexico law provides a sure enough footing upon  
10 which to reverse the district court’s granting of Defendants’ motion to dismiss.  
11 Neither the existence of a contract between Plaintiff and JMEC nor Plaintiff’s failure  
12 to show that claims against JMEC are not recoverable foreclose Plaintiff from  
13 pleading to recover an equitable remedy from subcontractor Defendants. Although  
14 Defendant Four Winds argues that Plaintiff must first pursue its contractual remedies  
15 against JMEC before asserting an unjust enrichment claim against Defendants, New  
16 Mexico jurisprudence supports Plaintiff’s course thus far, recognizing that “equity  
17 is reluctant to permit a wrong to be suffered without remedy.” *See Ontiveros*, 2000-  
18 NMCA-051, ¶ 13 (internal quotation marks and citation omitted). New Mexico does  
19 not automatically foreclose unjust enrichment claims, even when the basis of the  
20 claim is also the subject of a contract with another party. *See id.* ¶¶ 20-22.

1 **CONCLUSION**

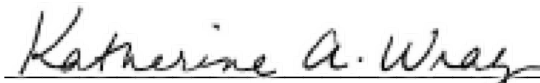
2 {23} In conclusion, we make two additional observations. This opinion addresses  
3 claims at the pleading stage in a complicated litigation involving multiple parties  
4 with varying relationships—contractual and otherwise—and multiple proceedings.  
5 Our holding is limited to the legal and factual sufficiency of Plaintiff’s pleadings  
6 against Defendants. We express no opinion about the merits of the claims and have  
7 not evaluated the allocation of responsibility for damages or the election of remedies.  
8 We affirm the district court’s dismissal of the claim for breach of implied warranty;  
9 we reverse the district court’s dismissal of the negligence and unjust enrichment  
10 claims.

11 {24} **IT IS SO ORDERED.**

12   
13 **J. MILES HANISEE, Judge**

14 **WE CONCUR:**

15   
16 **JACQUELINE R. MEDINA, Chief Judge**

17   
18 **KATHERINE A. WRAY, Judge**