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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: **March 25, 2024**

No. A-1-CA-40031

**LYNN POLLOCK, as Trustee of the
Lewis G. and Lynn J. Pollock Revocable
Trust, dated December 3, 2001, as
amended,**

Plaintiff-Appellant/Cross-Appellee,

v.

**PAUL THOMPSON and PAUL
THOMPSON & ASSOCIATES, INC.,**

Defendants-Appellees/Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

Bryan Biedscheid and David K. Thomson, District Court Judges

Herdman MacGillivray Fullerton Cameron
Pumarejo Honeycutt, PC
Frank T. Herdman
David J. Pumarejo
Santa Fe, NM

for Appellant

Fuqua Law & Policy, P.C.
Scott Fuqua
Santa Fe, NM

for Appellees

1 **OPINION**

2 **BUSTAMANTE, Judge, retired, sitting by designation.**

3 {1} The issues in this case involve the meaning and effect of two one-page,
4 handwritten documents—a promissory note for money lent (the Note), and a profit
5 sharing agreement (the Agreement)—hastily negotiated, drafted and signed by the
6 parties in April 2007. After a bench trial, the district court ruled, in part, that the
7 Note and the Agreement comprised one contract enforceable against Defendants
8 Paul Thompson and Paul Thompson & Associates, Inc. (collectively, Defendants),
9 but that the Agreement terminated when the Note was paid in full. Plaintiff Lewis
10 Pollock appeals from this judgment. Thompson and Paul Thompson & Associates,
11 Inc. (the Company) defend the district court’s ruling in response to Pollock’s
12 arguments, but cross-appeal, arguing that the district court erred in concluding that
13 there was a meeting of the minds or sufficient consideration to support imposing any
14 obligations on them under the Agreement. In addition, Defendants appeal from the
15 district court’s summary judgment dismissing their counterclaim for malicious abuse
16 of process against Pollock. We affirm, though on different grounds than the district
17 court’s rationale.

18 **Factual and Procedural Background**

19 {2} Drawn from the district court’s order, we provide a short summary of the
20 undisputed events leading up to and culminating in the creation of the Note and the

1 Agreement. Pollock and Thompson first met at the Eldorado Hotel in Santa Fe where
2 Thompson worked as a parking valet. Pollock and Thompson remained
3 acquaintances and became casual but not social friends. Thompson also ran a
4 business driving people—including Pollock and his family—to and from the airport
5 in Albuquerque in their cars.

6 {3} On April 19, 2007, Thompson telephoned Pollock asking to meet with him to
7 discuss a business matter. The following morning Thompson and Pollock met at
8 Pollock's home. Thompson explained that he needed money quickly to buy a certain
9 1998 740 iL BMW (the BMW), so he could start a limousine/auto for hire business.
10 Thompson asked Pollock for a loan in the amount of \$9,000 so he could buy the
11 BMW. Thompson asserted that the BMW was worth \$11,000 and that he needed to
12 act quickly before it was sold to someone else. Pollock responded that he did not
13 make loans to anyone and suggested that Thompson look elsewhere. Thompson
14 replied that Pollock was his "only hope to get the money," and suggested that he
15 would be willing to share the profits from the limousine/auto for hire business on a
16 50/50 basis.

17 {4} After further discussion, Thompson and Pollock agreed to an arrangement
18 then acceptable to both of them with regard to the repayment terms of the Note and
19 the percentage level of profit sharing under the Agreement. Pollock—a Harvard-
20 educated lawyer—drafted the handwritten Note and Agreement that morning.

1 Thompson and Pollock signed the Note and the Agreement immediately, and
2 Pollock gave Thompson a \$9,000 check for purchase of the BMW.¹ Thompson paid
3 the Note in full in early October 2007.

4 {5} Pollock filed his first complaint in November 2015 alleging that Defendants
5 had breached their duty under the Agreement to share profits. Following a period of
6 discovery and motion practice, Pollock filed a first amended complaint broadening
7 his theories of recovery to include breach of the covenant of good faith and fair
8 dealing, unjust enrichment, and to request an accounting as well as punitive
9 damages. Two weeks later—following the depositions of Pollock and Thompson—
10 Pollock submitted an unopposed motion to file a second amended complaint deleting
11 the counts requesting damages and limiting the case to a declaratory judgment action
12 addressing the “validity, enforceability and interpretation of the Agreement,” which
13 was granted. Thompson’s answer to Pollock’s second amended complaint included
14 a counterclaim for malicious abuse of process.

15 {6} The district court held a bench trial limited to the issues raised in the second
16 amended complaint. The only witnesses at the trial were Pollock and Thompson.
17 Following the trial, the district court entered a detailed twenty-one page order.
18 Following additional motion practice and two failed attempts to perfect an appeal to

¹Copies of the Note and the Agreement are attached to this opinion.

1 this Court, the parties agreed to a stipulated final order that summarized the district
2 court's order as follows:

3 [The district court] entered that certain [o]rder on April 16, 2018
4 ("Order") after a one-day bench trial. The Order held that [Pollock] was
5 entitled to a share of profits, for the subject BMW only, from the date
6 the original parties to this action entered into an agreement, April 20,
7 2007, through the date [the district court] determined such agreement
8 was terminated, October 3, 2007. [The district court] determined that
9 . . . Plaintiff[']s share of the profits included information related to the
10 sale of [the] BMW, including how, where and to whom the BMW was
11 sold.

12 {7} The stipulated order also noted the parties' agreement that "no damages are to
13 be awarded to Plaintiff based on the accounting provided by Defendants" unless the
14 district court's order "is reversed on appeal in whole or in part."

15 **DISCUSSION**

16 **Pollock's Appeal**

17 {8} On first review, the Note and the Agreement seem straightforward. But that
18 surface simplicity does not bear up under closer examination. The two documents
19 present a surprisingly slippery scenario for interpretation and construction that the
20 parties have litigated thoroughly here and in the district court. The parties disagree,
21 for example, as to whether the two documents comprise one "agreement," or whether
22 they should be treated as two separate contracts. They disagree as to whether the
23 contract was solely for a loan. They disagree as to whether documents are ambiguous
24 or not. They disagree as to whether the profit sharing aspect of the Agreement

1 covered only profits from use of the BMW, or instead extends to all businesses
2 Thompson has developed over the seventeen years since it was signed. Assuming
3 that the Agreement can be interpreted to encompass all of Thompson’s businesses,
4 they argue about whether there was sufficient consideration to support a contract of
5 that magnitude. They disagree whether there was a “meeting of the minds” sufficient
6 to support the creation of a contract—in particular the expanded scope Pollock
7 argues for.

8 {9} The district court’s order wrestled with these arguments with varying degrees
9 of success. Interesting as these issues might be, we do not need to address them all.
10 The district court concluded that the parties’ arrangement—whatever its content and
11 parameters might be—was terminated when the Note was paid in full on October 3,
12 2007. Affirming the district court on this point would as a practical matter resolve
13 all of the issues regarding the scope of the Agreement. It is necessary, however, to
14 decide whether any enforceable contract was created between the parties. The
15 following analysis addresses the contract formation issues first and then turns to
16 assess the district court’s ruling that payment of the Note ended the parties’ contract
17 entirely.

18 **I. The Parties Entered Into an Enforceable Contractual Arrangement**

19 {10} The parties’ arguments on the issue of whether a contract was formed are at
20 extremes. Pollock maintains that Thompson agreed to share with him—and his

1 daughter after Pollock’s death—35 percent of “all profits” from “the limousine/auto
2 for hire business” for as long as Thompson maintained the business. Pollock also
3 argues that he is owed 35 percent of all profits represented in the proceeds of any
4 sale or liquidation of the business. Thompson’s position on appeal is more nuanced.
5 In his answer to Pollock’s appeal, he argues that the district court’s decision that the
6 contract was limited to profits from use of the BMW should be affirmed. In his cross-
7 appeal briefing, however, he argues that there was no contract formed at all.

8 {11} It is unclear how the district court resolved the issue.² The district court’s
9 order found as a matter of fact that “[t]here were not materially different
10 understandings of the parties concerning the obligation . . . Thompson would bear to
11 [Pollock] under the Agreement.” But the order does not explain what undergirds this
12 finding. The district court also found as a matter of fact that the Note and the
13 Agreement “constitute the full and complete extent of any contractual relationships”
14 between Pollock and Defendants. The district court thus rejected Pollock’s
15 assertions and requested findings—supported by testimony at trial—that the parties
16 also entered into verbal side agreements that were not reflected in the documents
17 Pollock drafted. We note that this finding can also function as a conclusion of law.
18 Reading it as a conclusion of law helps explain the district court’s decision to try and

²We note that neither party adequately addresses the internal conflicts in the district court’s order. Each party instead relied on only the portions of the order that supported their position. This complicated our review.

1 treat the Agreement as unambiguous. *Jaramillo v. Gonzales*, 2002-NMCA-072,
2 ¶ 31, 132 N.M. 459, 50 P.3d 554 (“We construe findings to uphold, rather than
3 defeat, a judgment.”).

4 {12} The district court also concluded as a matter of law that “[t]he Agreement does
5 not entitle [Pollock] to a 35[percent] share of every business venture pursued by the
6 Company,” but rather that the share-of-profits language of the Agreement was
7 limited to profits generated from the use of the BMW. Again, it is unclear what
8 factual background the district court relied on for this conclusion. We find it
9 significant that in this conclusion of law the district court relied on concepts related
10 to the interpretation of ambiguous contracts to bolster its rationale even though it
11 had previously concluded that the “contracts are not ambiguous.” Conclusion of Law
12 No. 12 of the order states in pertinent part:

13 The language [Pollock] used to describe the scope of . . . Thompson’s
14 obligations under the Agreement cannot reasonably be construed so
15 broadly. Assuming that the phrases “all profits” and “limousine/auto
16 for hire business” are ambiguous, that ambiguity is to be construed
17 strictly against [Pollock]. Consequently, the Agreement would entitle
18 [Pollock] to a 35[percent] share of all profits generated by the
19 Company’s “limousine/auto for hire business[,]” as used by the BMW.

20 {13} The portions of the district court’s order referenced above demonstrate cross
21 currents in the district court’s ruling that make it difficult to interpret and analyze.
22 Perhaps the most problematic aspect of the order is the district court’s apparent
23 decision to interpret the language of the Agreement without directly referencing any

1 of the testimony it heard at the trial. That approach is proper if the language of a
2 writing is actually unambiguous. *See Benz v. Town Ctr. Land, LLC*, 2013-NMCA-
3 111, ¶ 31, 314 P.3d 688 (“The purpose, meaning, and intent of the parties to a
4 contract is to be deduced from the language employed by them; and where such
5 language is not ambiguous, it is conclusive.” (alteration, internal quotation marks,
6 and citation omitted)). Conversely, to rely purely on the language in a document is
7 not appropriate if the language is ambiguous. *ConocoPhillips Co. v. Lyons*, 2013-
8 NMSC-009, ¶ 10, 299 P.3d 844 (“If the proffered evidence of surrounding facts and
9 circumstances is in dispute, turns on witness credibility, or is susceptible of
10 conflicting inferences, the meaning must be resolved by the appropriate fact-finder.”
11 (alteration, internal quotation marks, and citation omitted)).

12 {14} Ambiguity is a question this Court reviews de novo. *Env’t Control, Inc. v. City*
13 *of Santa Fe*, 2002-NMCA-003, ¶ 14, 131 N.M. 450, 38 P.3d 891 (“A contract is
14 deemed ambiguous only if it is reasonably and fairly susceptible of different
15 constructions. Whether ambiguity exists is a question of law; therefore, this Court
16 reviews the district court’s decision de novo.” (citation omitted)). We conclude that
17 the Agreement is ambiguous.

18 {15} The Agreement includes at least three provisions that are reasonably
19 susceptible to different constructions. Two are not directly at play in this appeal and

1 we need not discuss them further.³ The meaning of and intent behind the phrase “the
2 limousine/auto for hire business,” however, is vexingly vague. On its face, there is
3 no definitive way to determine the scope of the obligation imposed on Thompson by
4 the phrase. Viewed in isolation—that is, as words without context—the phrase can
5 be read to contemplate only a “limousine/auto for hire business” conducted solely
6 through the BMW. But it could also reasonably be construed more broadly to
7 contemplate the continuing enterprise that the Company has become. Both obviously
8 fit within the abstract concept of the phrase, and there are no other internal terms
9 that help explain its scope. Thus, we conclude that the phrase cannot reasonably be
10 viewed as clearly and unambiguously expressing the agreed upon intent of the
11 parties. It is simply too broad and vague. As such the Agreement is ambiguous. *See*
12 *id.* (concluding that the settlement agreement at issue there was not ambiguous
13 because the meaning of “minimum” was elucidated by the stated term of the contract
14 itself).

15 {16} Broadly speaking, our case law recognizes two pathways for resolving
16 ambiguities in contract documents. If the parties do not offer evidence of the facts

³First, it is unclear how the payment obligation under the Note should be coordinated with the requirement in the Agreement that Pollock would be owed \$9,000 if the BMW was sold. In his testimony, Pollock disclaimed any right he might have under the Agreement to the payment. Second the meaning of “all profits” is not a material issue given the district court’s ruling that the profit sharing provision was limited to profits from use of the BMW described in the Agreement. In the absence of that ruling, the meaning of “all profits” would pose a vexing problem.

1 and circumstances surrounding the execution of a document, courts may interpret—
2 or construe—documents memorializing agreements “using accepted canons of
3 contract construction and traditional rules of grammar and punctuation.” *Mark V,*
4 *Inc. v. Mellekas*, 1993-NMSC-001, ¶¶ 11-13, 114 N.M. 778, 845 P.2d 1232. That
5 route was not available to the district court in this case because both parties
6 introduced evidence—without objection—as to the circumstances surrounding the
7 genesis, negotiation, creation, and signing of the Note and the Agreement. Given the
8 plethora of evidence submitted, the district court was bound to resolve the issue of
9 the meaning of the phrase in the context of the evidence. *See ConocoPhillips*, 2013-
10 NMSC-009, ¶ 10.

11 {17} In attempting to interpret the Agreement on its face, the district court set itself
12 an impossible task. Without context provided by the evidence, there is no way to
13 choose between the parties’ interpretations. The order reflects this dilemma in that
14 the district court ultimately settled on an interpretation that necessarily relied on the
15 parties’ testimony.

16 {18} As noted above, the district court’s order reflects two conclusions of law
17 directly addressing the meaning of the phrase “limousine/auto for hire business.”
18 Conclusion of Law No. 4 flatly states that the “contracts are not ambiguous” and that
19 Thompson’s obligation under the Agreement is to pay Pollock 35 percent of the

1 profits generated by operation of “a limousine/auto for hire business, using the
2 BMW.”⁴

3 {19} In Conclusion of Law No. 12, the district court first decided that the
4 “Agreement cannot reasonably be construed so broadly” as to encompass “every
5 business venture pursued by the Company.” But then—perhaps out of an abundance
6 of caution—the district court also concluded that “assuming” the phrase is
7 ambiguous, the “ambiguity is to be construed strictly against [Pollock]” and thus
8 limited the reach of the phrase to income derived from the BMW.

9 {20} It is clear to this Court that in ruling as it did, the district court—consciously
10 or unconsciously—accepted Thompson’s version of the conversations and
11 negotiations that occurred at the parties’ meeting in April 2007. The ruling “fits”
12 Thompson’s testimony that the parties’ focus was on the BMW, that they talked only
13 about the BMW, and that they did not discuss future development of the
14 “limousine/auto for hire business.”

15 {21} Fortunately, the district court entered a finding of fact that supports that
16 reading of its ruling. Describing the conversation and negotiation leading up to the
17 signing of the Note and the Agreement, Finding of Fact No. 18 states, “Thompson

⁴Pollock makes much of the fact that the conclusion of law mistakenly includes the words “using the BMW” when quoting the Agreement. There is no indication that the district court thought those words were in the Agreement, and we ignore the mistake as a simple typographical error. *See Jaramillo*, 2002-NMCA-072, ¶ 31.

1 proceeded to state that if Pollock would loan the Company \$9,000[] for the purchase
2 of the BMW, Thompson (who owned the Company) was willing to share a portion
3 of profits arising from the limousine/auto for hire business with Pollock, as it related
4 to the use of the BMW.” This is a clear finding that the district court credited
5 Thompson’s testimony that the parties only discussed profit sharing in connection
6 with use of the BMW. It is also noteworthy that Pollock did not provide any
7 testimony contradicting Thompson’s description of the conversation. Thompson’s
8 testimony provides substantial evidence supporting the district court’s findings of
9 fact. *See Las Cruces Pro. Fire Fighters v. City of Las Cruces*, 1997-NMCA-044,
10 ¶ 12, 123 N.M. 329, 940 P.2d 177 (noting that in reviewing a substantial evidence
11 claim, “[t]he question is not whether substantial evidence exists to support the
12 opposite result, but rather whether such evidence supports the result reached” and
13 “we will not reweigh the evidence nor substitute our judgment for that of the fact[-
14]finder”). And Finding of Fact No. 18 in turn supports the district court’s ultimate
15 ruling that the profit sharing arrangement was limited to use of the BMW.

16 {22} The discussion above disposes of Pollock’s appeal in Thompson’s favor,
17 though on different grounds. In his cross-appeal, Thompson argues that there was
18 no meeting of the minds as to the scope of the arrangement between him and
19 Pollock—that is, whether the deal was limited to use of the BMW, or whether it was

broader—and thus no contract was created at all. For the sake of completeness we address his argument.

{23} “For an offer and acceptance to create a binding contract, there must be an objective manifestation of mutual assent by the parties to the material terms of the contract.” *Pope v. Gap, Inc.*, 1998-NMCA-103, ¶ 11, 125 N.M. 376, 961 P.2d 1283. Unexpressed intentions or understandings of the parties will not be given operative effect in deciding what the parties agreed to. *Id.* ¶ 13. As such, misunderstandings concerning the meaning of the terms in a written contract can result in a failure to form an enforceable agreement. But, as our case law makes clear, misunderstandings between the parties can be resolved depending on the evidence presented at trial concerning the circumstances surrounding the parties’ interaction as they discussed their arrangement. In *Pope*, this Court recognized that

[t]he manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if

(a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or

(b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

Id. (citing Restatement (Second) of Contracts § 20(2) (1981)). Our discussion above affirms the district court’s finding that Thompson described an arrangement involving only use of the BMW, and that Pollock did not describe any other

1 conversation in April 2007. In addition, the district court refused to accept Pollock’s
2 assertion that Thompson agreed to extend the profit sharing to Pollock’s daughter in
3 the event of his death. Thus, Pollock knew what Thompson thought he was agreeing
4 to and Pollock did not express any different understanding. Under *Pope* and the
5 Restatement, that is sufficient to form an enforceable agreement.

6 {24} We, of course, appreciate that we have diverged from the decisional path the
7 district court followed. Thus, we must consider whether our approach adheres to our
8 “right for any reason” case law. New Mexico cases make clear that “even if the
9 district court offered erroneous rationale for its decision, it will be affirmed if right
10 for any reason” so long as reliance on a new ground is not unfair to the appellant.
11 *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154. In this
12 case, we need to be mindful that our approach is fair to both parties given that we
13 are presented with an appeal and a cross-appeal.

14 {25} The primary source of potential unfairness when applying the right for any
15 reason approach involves factual issues. Appellate courts must be careful not to
16 “delve into fact-dependent inquiries.” *Id.* (alteration, omission, internal quotation
17 mark, and citation omitted). We should not “look beyond the factual allegations
18 raised and considered in the district court.” *TexasFile LLC v. Bd. of Cnty. Comm’rs*,
19 2019-NMCA-038, ¶ 10, 446 P.3d 1173.

1 {26} We have not overstepped our bounds. The parties fully argued all of the
2 factual and legal issues we address—at times switching positions as they apparently
3 deemed their legal strategy to require.⁵ And, the parties fully argued the legal effect
4 of the testimony provided by Pollock and Thompson in their proposed findings of
5 fact and conclusions of law as well as their written closing arguments to the district
6 court. Our resolution simply reframes and resolves the arguments in a more
7 appropriate context.

8 **II. The Note and the Agreement Formed One Contract**

9 {27} We agree with the district court’s analysis concerning the unitary nature of
10 the Note and the Agreement. It bears repeating that the two documents were
11 negotiated, created, and signed all in the same morning. The district court relied, in
12 part, on an Illinois case that stated the applicable principle succinctly. “The well-
13 settled rule of contract law is that when two or more written documents are executed
14 by the same contracting parties as part of the same transaction, those documents will
15 be read and considered together as one contract encompassing the entire agreement
16 between the parties, unless there is evidence that the parties intended for the
17 documents to be read separately.” *Int’l Supply Co. v. Campbell*, 907 N.E.2d 478,

⁵ Pollock argued to the district court that the Note and Agreement are ambiguous, whereas he argues the opposite in the briefs to us. Similarly, Thompson argued that the documents were not to the district court, and argues the opposite here.

1 486 (Ill. App. Ct. 2009). We agree with the Illinois Court’s statement of the principle.
2 We also note that New Mexico case law agrees with this approach. *Levenson v.*
3 *Haynes*, 1997-NMCA-020, ¶ 14, 123 N.M. 106, 934 P.2d 300; *Master Builders, Inc.*
4 *v. Cabbell*, 1980 NMCA-178, ¶ 8, 95 N.M. 371, 622 P.2d 276. And, finally, there is
5 no evidence contraindicating use of that approach here.

6 **III. Payment of the Note Terminated the Entire Contract**

7 {28} The district court followed two independent paths to its termination decision.
8 One path involved a complicated exploration of the differences between debt and
9 capital contributions as a means of funding businesses. The district court first
10 determined that the two documents comprised one contract. The district then
11 concluded that the transaction most closely resembled debt, and as such, once the
12 debt was satisfied, the contract was ended. We note that neither party mentioned—
13 much less argued—this theory in their arguments to the district court. As such, it
14 appears that the district court undertook the inquiry sua sponte.

15 {29} The district court’s other path is more straightforward. Thompson testified
16 that in September 2007 his girlfriend read the Agreement and told him that it could
17 be interpreted to cover much more than the profits derived from just use of the
18 BMW. Alarmed, Thompson spoke with Pollock and asked him if he intended that
19 broad a reading. Pollock responded “yes.” Thompson testified that he told Pollock
20 that was not his understanding and asked how he could get out of the arrangement.

1 Thompson testified that Pollock told him he would release him from the obligation
2 if the Note was paid in full. Pollock provided Thompson an account number and
3 Thompson paid the Note in full within a few days by depositing \$8,100 in the
4 account. Pollock denied having the conversation described by Thompson.

5 {30} The district court accepted Thompson’s version of the September meeting
6 when it concluded that

7 [t]he Agreement had been successfully formed and was supported by
8 adequate consideration and it terminated on October 3, 2007 when, in
9 accordance with [Pollock]’s instructions and agreement, . . . Thompson
10 deposited in an account owned or controlled by [Pollock] the \$8,100[]
11 still outstanding on the . . . Note. Given that agreed termination,
12 [Pollock] can no longer claim any entitlement to any share of the profits
13 of the Company.

14 {31} We recognize that this language appears in the “Conclusions of Law” portion
15 of the district court’s order. The intermingling of findings of fact and conclusions of
16 law is not a preferred practice, but it is also not uncommon. This Court has observed
17 in a few cases that “the occasional intermixture of matters of fact and conclusions of
18 law is not reversible error.” *Sheraden v. Black*, 1988-NMCA-016, ¶ 10, 107 N.M.
19 76, 752 P.2d 791; *see In re Estate of Hilton*, 1982-NMCA-104, ¶ 17, 98 N.M. 420,
20 649 P.2d 488 (“Ultimate facts and conclusions of law are often indistinguishable,
21 and their intermixture in the court’s decision as written does not create reversible
22 error where a fair construction of them justifies the court’s judgment.”). In this case
23 the combined findings of fact and conclusions of law fit the testimony the district

1 court heard. And, Thompson’s testimony stands as substantial evidence supporting
2 the district court’s decision. It cannot be denied that Thompson’s testimony
3 constitutes “evidence that a reasonable mind would find adequate to support a
4 conclusion” of law. *See Weidler v. Big J. Enters., Inc.*, 1998-NMCA-021, ¶ 30, 124
5 N.M. 591, 953 P.2d 1089.

6 {32} Pollock argues that Thompson had the burden to provide evidence that met
7 the “clear and convincing” rubric to adequately support the assertion that Pollock
8 agreed to terminate the Agreement. We are not aware of any authority in New
9 Mexico requiring an elevated standard of proof in this context, and Pollock does not
10 cite to any. We thus assume there is none. Pollock’s only citation is to 17A Am. Jur.
11 2d *Contracts* § 527 (2024). That section does not address, much less support,
12 Pollock’s broad assertion. 17A Am. Jur. 2d *Contracts* § 527. In any event, we fail to
13 see why Thompson’s testimony does not—or could not—meet the standard. *See*
14 *Duke City Lumber Co. v. Terrel*, 1975-NMSC-041, ¶ 5, 88 N.M. 299, 540 P.2d 229.

15 {33} We recognize that termination of the Agreement as described requires “new”
16 consideration to support it. *See* Restatement (Second) of *Contracts* § 273 (1981).
17 Pollock argues that early payment in full of the Note cannot stand as consideration
18 for termination of the Agreement because payment simply took care of an existing
19 obligation. In making this argument Pollock ignores the fact that while the Note
20 *allowed* prepayment without penalty, it in no way required any early payment. By

1 paying the Note in full before it became due, Thompson undertook something he
2 was not required to do. And, the payment bestowed a real benefit on Pollock: he got
3 his money back early, with interest, and he was relieved of the risk he had undertaken
4 in loaning the money to a start-up operation with no track record. Reducing risk was
5 an obvious and real benefit to Pollock. As Pollock noted in his briefing to the district
6 court, consideration consists—or can consist—of a promise to do something that a
7 person is under no obligation to do. *Luginbuhl v. City of Gallup*, 2013-NMCA-053,
8 ¶ 15, 302 P.3d 751. Prepayment of the Note fits that description.

9 **Thompson’s Cross-Appeal**

10 {34} Thompson filed a counterclaim for malicious abuse of process as part of his
11 answer to Pollock’s second amended complaint. The parties agreed to bifurcate and
12 try the counterclaim after the trial on the second amended complaint. Nine and a half
13 months after entry of the order discussed above, Pollock filed a motion for summary
14 judgment on the counterclaim. Thompson responded within three weeks, and the
15 district court entered its order granting the motion five days after. The district court
16 did not provide any detailed explanation of its rationale in the order.

17 {35} On appeal, Thompson argues that summary judgment was improper because
18 the district court’s order following the declaratory action trial did not resolve the
19 factual question as to whether Pollock agreed to terminate the Agreement in
20 September 2007. If the district court were to find that Pollock did agree to terminate

1 the Agreement, Thompson argues, he would be in a strong position to prove one of
2 the elements of his malicious abuse of process claim: that Pollock did not have
3 probable cause to file the action. *See Fleetwood Retail Corp. of N.M. v. LeDoux*,
4 2007-NMSC-047, ¶¶ 12-13, 142 N.M. 150, 164 P.3d 31.⁶ In response, Pollock
5 appears to agree that the district court’s order did not resolve the termination issue,
6 but then—curiously—goes on to note that the testimony on the issue at trial was
7 essentially diametrically opposed. Comparing the arguments would in most cases
8 result in reversal because they highlight the existence of factual questions. That
9 result is not appropriate here because Pollock also argues that under *Fleetwood* any
10 recovery by Pollock provides an absolute defense on a malicious abuse of process
11 claim founded on lack of probable cause.

12 {36} In *Fleetwood* the Supreme Court answered two questions certified by this
13 Court concerning the contours of the new malicious abuse of process tort described
14 in *Devaney v. Thriftway Marketing Corp.*, 1998-NMSC-001, ¶¶ 13-17, 24, 124 N.M.
15 512, 953 P.2d 277 (combining previously separate torts of “abuse of process” and
16 “malicious prosecution” and holding that the new tort could asserted as a
17 counterclaim to the original action). *Fleetwood*, 2007-NMSC-047, ¶ 19. The
18 certified questions were:

⁶We note that this argument is contrary to Thompson’s briefing on appeal on the same subject. The switch in position is interesting, but not dispositive of the summary judgment issue.

1 (1) When a [malicious abuse of process] plaintiff relies on lack of
2 probable cause to demonstrate misuse of process, is the lack of probable
3 cause determined as to the underlying complaint generally, or as to each
4 count separately?

5 (2) Does a verdict for the [original proceeding plaintiff] on one or more
6 counts provide an absolute defense to the [malicious abuse of process]
7 plaintiff's entire . . . claim even though other counts brought by the
8 [original proceeding plaintiff] were brought without probable cause or
9 for an improper purpose and even though the [malicious abuse of
10 process] plaintiff incurred substantial attorney's fees in defending
11 against the non-meritorious claims?

12 *Id.* ¶ 18.

13 {37} The Supreme Court concluded that lack of probable cause should be
14 determined taking into account the underlying complaint as a whole. *Id.* And, the
15 Court also reaffirmed that a “win” for the original proceeding plaintiff as to one or
16 more counts of their complaint provides an absolute defense against a claim of
17 malicious abuse of process. *Id.* ¶¶ 2, 19. As the Court phrased it, “the defendant must
18 win the entire case as a condition to proceeding with a malicious abuse of process
19 counterclaim based on lack of probable cause.” *Id.* ¶ 2. The Supreme Court's ruling
20 was based on traditional concerns for safeguarding the right of access to the courts
21 for honest litigants and avoiding the multiplicity of suits that might be encouraged
22 by a more lax rule. *Id.* ¶¶ 19, 21.

23 {38} We have affirmed the district court's ruling based on Pollock's argument that
24 the Note and the Agreement comprised one contractual arrangement that included
25 an aspect of profit sharing, and that Pollock was entitled to an accounting for the six

1 month period from April 2 to October 3, 2007. The conclusion that there was a
2 contract provides a complete defense under *Fleetwood*.⁷

3 **CONCLUSION**

4 {39} For the reasons stated herein, we affirm the district court.

5 {40} **IT IS SO ORDERED.**

6
7 **MICHAEL D. BUSTAMANTE, Judge,**
8 **retired, Sitting by designation.**

9 **WE CONCUR:**

10
11 **KRISTINA BOGARDUS, Judge**

12
13 **SHAMMARA H. HENDERSON, Judge**

⁷We do not understand Thompson to make any argument that he founds his counterclaim on any procedural impropriety. To the extent he might be attempting to do so, we would reject it as unpreserved given that he did not make such an argument to the district court. *See Benz*, 2013-NMCA-111, ¶ 24 (“To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.” (internal quotation marks and citation omitted)).

AGREEMENT

THIS AGREEMENT, DATED APRIL 20, 2007 BETWEEN
PAUL THOMPSON AND LEWIS POLLOCK, BOTH OF SANTA FE,
NEW MEXICO.

WHEREAS THE PARTIES WISH TO MEMORIALIZE CERTAIN
UNDERSTANDINGS BETWEEN THEM,
FOR VALUE RECEIVED, IT IS AGREED AS FOLLOWS

- WHEREVER A 1998 BMW 7SERIES 740IL SEDAN 4D OWNED BY
PAUL THOMPSON AND ASSOCIATES, INC IS SOLD, PAUL THOMPSON WILL
PAY ~~10%~~ ^{25%} OF ALL SALES PROCEEDS OVER \$9,000 TO LEWIS POLLOCK.
- SHOULD PAUL THOMPSON CONTINUE ON IN THE LIMO/SIDE/AUTO FOR HIRE
BUSINESS AFTER JANUARY 1, 2008, THEN POLLOCK SHALL SHARE
ALL PROFITS WITH THOMPSON ON A 65% (THOMPSON) AND
35% (POLLOCK) BASIS AFTER FIRST PAYING ALL EXPENSES INCLUDING
\$25 PER HOUR TO THOMPSON FOR SERVICES RENDERED BY
THOMPSON TO THE BUSINESS.

Paul Thompson

PAUL THOMPSON

L. Pollock

LEWIS POLLOCK

PROMISSORY NOTE

APRIL 20, 2007

FOR VALUE RECEIVED,

PAUL THOMPSON AND ASSOCIATES, INC. A NEW MEXICO CORPORATION
 PROMISES TO PAY TO LEWIS G. POLLOCK, OR ORDER, NINE THOUSAND
 (\$9,000) DOLLARS, PAYABLE AS FOLLOWS:

- \$300 PER MONTH PLUS \$40 PER MONTH ALLOCATED AS FOLLOWS:
 BEGINNING JULY 1, 2007
 \$300 TO REDUCE THE PRINCIPAL BALANCE OF THE NOTE

PLUS \$40 PER MONTH INTEREST UNTIL THE NOTE IS PAID IN FULL.
 FAILURE TO MAKE MONTHLY PAYMENTS WHEN DUE, SHALL MAKE THE ENTIRE BALANCE DUE AND PAYABLE
 THE PRINCIPAL BALANCE OF THIS NOTE MAY BE PAID AT ANY TIME
 WITHOUT PENALTY FOR PREPAYMENT.

THIS NOTE IS SECURED BY A LIEN ON A 1998 BMW 7 SERIES
 740IL SEDAN 4D AND IS PERSONALLY GUARANTEED BY PAUL THOMPSON.

PAUL THOMPSON AND ASSOCIATES, INC.

By Paul Thompson
 PAUL THOMPSON, PRESIDENT, DULY AUTHORIZED

4/20/07

FOR VALUE RECEIVED, I, PAUL THOMPSON, PERSONALLY
 GUARANTEE AND WILL PAY ON DEMAND, WITHOUT CONTRACT DEFENSES,
 ALL OF THE OBLIGATIONS OF PAUL THOMPSON AND ASSOCIATES, INC. TO CREDITORS
 INCLUDING REASONABLE COSTS OF COLLECTION.

Paul Thompson
 PAUL THOMPSON

Paid.