

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

Court of Appeals of New Mexico
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2 **NEW MEXICO PUBLIC REGULATION**
3 **COMMISSION; PUBLIC SERVICE**
4 **COMPANY OF NEW MEXICO;**
5 **WESTMORELAND COAL COMPANY;**
6 **and BHP BILLITON NEW MEXICO**
7 **COAL, INC.,**



Mark Reynolds

8 Plaintiffs/Counterdefendants-Appellees,

9 v.

No. A-1-CA-38898

10 **THE NEW MEXICAN, INC.,**

11 Defendant/Counterclaimant-Appellant.

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

13 **Francis J. Mathew, District Judge**

14 Miller Stratvert P.A.

15 Dylan O'Reilly

16 Luke A. Salganek

17 Santa Fe, NM

18 Richard L. Alvidrez

19 Albuquerque, NM

20 for Appellee Public Service Company of New Mexico

21 Modrall, Sperling, Roehl, Harris & Sisk, P.A.

22 Martha G. Brown

23 Elizabeth A. Martinez

24 Albuquerque, NM

25 for Appellee BHP Billiton New Mexico Coal, Inc.

1 Peifer, Hanson, Mullins & Baker, P.A.
2 Charles R. Peifer
3 Gregory P. Williams
4 Albuquerque, NM

5 for Appellants

6 Daniel Yohalem
7 Santa Fe, NM

8 Katie Townsend
9 Washington, D.C.

10 for Amici Curiae

11 **DECISION**

12 **HANISEE, Chief Judge.**

13 {1} The New Mexican, Inc. (the New Mexican) appeals the district court’s order
14 granting the motions of BHP Billiton New Mexico Coal (BHP) and Public Service
15 Company of New Mexico (PNM) (collectively, Intervenors) for judgment on the
16 pleadings as to all counterclaims asserted against Intervenors by the New Mexican.
17 The New Mexican’s counterclaims were filed in response to Intervenors’ effort to
18 participate in the Public Regulation Commission’s (PRC) lawsuit seeking to prevent
19 the New Mexican’s publication of certain documents. The documents had been
20 inadvertently supplied to the New Mexican in response to the New Mexican’s
21 Inspection of Public Records Act (IPRA), NMSA 1978, § 14-2-1 (2019), request
22 related to an ongoing administrative proceeding before the PRC.

1 {2} On appeal, the New Mexican broadly contends that the district court’s order
2 violates the New Mexican’s First Amendment rights and specifically argues that the
3 district court misconstrued *Cordova v. Cline*, 2017-NMSC-020, 396 P.3d 159, in
4 which our Supreme Court adopted the *Noerr-Pennington* doctrine, providing that
5 “those who engage in conduct aimed at influencing the government, including
6 litigation, are shielded from retaliation provided their conduct is not a sham.”
7 *Cordova*, 2017-NMSC-020, ¶ 24. The New Mexican further asserts that pursuant to
8 the *Noerr-Pennington* doctrine, it was authorized to file a counterclaim for malicious
9 abuse of process against Intervenors. Finally, the New Mexican argues that the
10 district court’s order of judgment in favor of BHP and PNM resulted in a denial of
11 the New Mexican’s due process rights and violates the Anti-SLAPP statute. *See*
12 NMSA 1978, § 38-2-9.2 (2001) (explaining that baseless civil lawsuits filed “against
13 persons for exercising their right to petition . . . can be an abuse of the legal process”
14 and such “lawsuits should be subject to prompt dismissal or judgment to prevent the
15 abuse of the legal process”). Determining that the New Mexican fails to demonstrate
16 any error by the district court, we affirm.

17 {3} As the appellant, the New Mexican must clearly demonstrate—with clear and
18 well-supported arguments—that the district court erred in concluding that the New
19 Mexican “failed to meet the heightened pleading standard . . . to bring its claims
20 within the narrow exception of the *Noerr-Pennington* doctrine,” and in granting

1 Intervenor’s motions for judgment on the pleadings. *See Farmers, Inc. v. Dal Mach.*
2 *& Fabricating, Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d 1063 (“The
3 presumption upon review favors the correctness of the [district] court’s actions.”);
4 *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (“[The
5 appellate courts] require[] that the parties adequately brief all appellate issues to
6 include an argument, the standard of review, and citations to authorities for each
7 issue presented. We will not review unclear arguments, or guess at what a party’s
8 arguments might be.” (alteration, internal quotation marks, and citations omitted));
9 *Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 (“This Court has no duty
10 to review an argument that is not adequately developed.”).

11 {4} Here, the district court determined that because PNM and BHP were permitted
12 to intervene in a matter brought by the PRC and affecting the interests of the
13 Intervenor, each had a legitimate interest implicating the *Noerr-Pennington*
14 doctrine, which declares that petitioners who seek to influence the government
15 through litigation, are entitled to immunity from retaliatory claims—such as the New
16 Mexican’s malicious abuse of process counterclaim—“unless the petitioners (1)
17 lacked sufficient factual or legal support, and (2) had a subjective illegitimate motive
18 for exercising their right to petition.” *Cordova*, 2017-NMSC-020, ¶ 1. The district
19 court additionally concluded that the New Mexican’s counterclaim “failed to meet
20 the heightened pleading standard set forth in *Cordova*,” under which


1 counterclaimants must plead with “sufficient factual and legal specificity to
2 establish” that the conduct complained of was a sham “to overcome both the *Noerr-*
3 *Pennington* doctrine and the affirmative defense under the Anti-SLAPP statute.” *Id.*
4 ¶ 30; *see* § 38-2-9.2.

5 {5} While we have doubts that the *Noerr-Pennington* doctrine and the heightened
6 pleading standard of *Cordova* are applicable when, as in this case, both parties in
7 question are private entities, and neither are government entities or officials, we
8 decline to address this issue and assume without deciding that the doctrine and the
9 heightened pleading standard apply under such circumstances. Limiting our analysis
10 to the arguments the New Mexican makes on appeal, we conclude that the New
11 Mexican has failed to demonstrate error.

12 {6} The New Mexican argues that the district court erred in rejecting its argument
13 that the sham exception applies. To prevail under the sham exception, the New
14 Mexican must demonstrate that the complaints in intervention “(1) lacked sufficient
15 factual or legal support, and (2) [the Intervenors] had a subjective illegitimate motive
16 for exercising their right to petition.” *See Cordova*, 2017-NMSC-020, ¶ 1. The New
17 Mexican’s arguments before the district court as well as those contained in its
18 appellate briefing suffer from a fatal structural flaw. The New Mexican argues *only*
19 that it has established BHP and PNM had a subjective illegitimate motive—“a prior
20 restraint against the news media.” But even if we were to conclude that the New

1 Mexican is correct as to the subjective element of the sham exception, we would
2 have no basis for reversal because the New Mexican has presented no argument as
3 to the objective element—that the complaints in intervention “lacked sufficient
4 factual or legal support.” *See id.* ¶ 2. Thus, we conclude, after a thorough and careful
5 review of the briefing, the authorities cited therein, and the record, that the New
6 Mexican failed to demonstrate any error on the part of the district court. *See*
7 *Farmers, Inc.*, 1990-NMSC-100, ¶ 8; *Elane Photography, LLC*, 2013-NMSC-040,
8 ¶ 70; *Corona*, 2014-NMCA-071, ¶ 28. We, therefore, affirm.

9 {7} **IT IS SO ORDERED.**

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J. MILES HANISEE, Chief Judge

12 **WE CONCUR:**

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14 _____
JENNIFER L. ATTREP, Judge

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16 _____
ZACHARY A. IVES, Judge