

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

2 Opinion Number: _____

3 Filing Date: August 4, 2015

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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Monte R. Rife

4 **NO. 34,097**

5 **WILD HORSE OBSERVERS**
6 **ASSOCIATION, INC.,**

7 Plaintiff-Appellant,

8 v.

9 **NEW MEXICO LIVESTOCK BOARD,**

10 Defendant-Appellee,

11 and

12 **SUSAN BLUMENTHAL, ASH COLLINS,**
13 **SUSAN COLLINS, JON COUCH, PETER**
14 **HURLEY, JUDITH HURLEY, ZANE**
15 **DOHNER, CAROLYN E. KENNEDY,**
16 **LYNN MONTGOMERY, JOE NEAS,**
17 **MIKE NEAS, and PAMELA NEAS,**

18 Defendants by Intervention-Appellees.

19 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

20 **Valerie A. Huling, District Judge**

1 Steven K. Sanders & Associates, LLC
2 Steven K. Sanders
3 Albuquerque, NM

4 for Appellant

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6 Andrea Buzzard
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9 for Appellee

10 David G. Reynolds
11 Corrales, NM

12 for Intervenors

OPINION

SUTIN, Judge.

{1} Plaintiff Wild Horse Observers Association, Inc. (the Association) appeals the district court's dismissal for failure to state a claim under Rule 1-012(B)(6) NMRA. The Association claims that Defendant New Mexico Livestock Board (the Board) has unlawfully treated a group of undomesticated, unowned, free-roaming horses near Placitas, New Mexico (the Placitas horses) as "livestock" and "estrays" rather than as "wild horses" under the Livestock Code, NMSA 1978, §§ 77-2-1 to -18-6 (1967, as amended through 2015). The Board and various residents and homeowners in Placitas (Intervenors) maintain that the horses are stray livestock and argue that the Association's appeal is both moot and barred by collateral estoppel.

{2} Primarily at issue is whether the Association pleaded facts that, when accepted as true, sufficiently demonstrated that the Placitas horses are legally "wild horses" rather than "livestock" and "estrays." We conclude that "livestock" does not include undomesticated, unowned animals, including undomesticated and unowned horses; therefore, undomesticated, unowned horses may not be "estrays." We also conclude that Section 77-18-5(B) requires the Board to DNA test and relocate wild horses. We hold that the Association pleaded sufficient facts in its complaint to withstand a motion to dismiss under Rule 1-012(B)(6).

1 BACKGROUND

2 {3} In February 2014, the Association filed a complaint for declaratory and
3 injunctive relief, claiming that the Board had unlawfully treated the Placitas horses
4 as if they were stray livestock rather than wild horses. The Association claimed that
5 only livestock may be stray, and since the Placitas horses are not livestock, they
6 cannot be stray. The Association sought an order declaring the Placitas horses wild
7 as opposed to stray; declaring that the Board failed to comply with Section 77-18-
8 5(B) because the Board did not DNA test and relocate the wild horses; declaring that
9 the Board acted ultra vires by capturing wild horses on public land and subsequently
10 selling the wild horses; enjoining the Board from disallowing the Association from
11 managing the Placitas horse population with equine birth control; and awarding the
12 Association equitable costs and relief.

13 {4} The following averments appear in the Association's complaint. The Placitas
14 horses are a group of ownerless, unbranded horses that have lived and roamed on
15 public land near Placitas, New Mexico, since at least 1965. The Placitas horses do not
16 now have nor have ever had owners, and no private landowner, rancher, horse rescue,
17 or Indian tribe currently claims the horses. The Board has no record of ownership for
18 the Placitas horses. At the time of the Association's initial complaint, approximately
19 forty Placitas horses still roamed the Placitas area.

1 {5} The Association further averred that the Board impounded and auctioned at
2 least twenty-five of the Placitas horses. The Association averred that the Board took
3 the auctioned Placitas horses directly from public land before auctioning them.
4 According to the complaint, no owner claimed the horses during the auction process
5 and no owners have claimed the Placitas horses since they were sold.

6 {6} The Board responded to the Association's complaint by filing a motion to
7 dismiss for failure to state a claim under Rule 1-012(B)(6). The Board argued that
8 "livestock" as defined in the Livestock Code includes horses, and therefore the
9 Placitas horses were livestock. The Board further argued that because "estrays" means
10 "livestock found running at large . . . whose owner is unknown," as defined in Section
11 77-2-1.1(N), and because the Placitas horses' owners are unknown, the Placitas
12 horses are plainly both livestock and estrays—not wild as the Association contended.
13 The Board also argued that carving out wild horses, including the Placitas horses, as
14 an exception to the definition of "livestock" would create an absurd exception to the
15 Livestock Code, as wild horses would be exempt from all laws pertaining to
16 livestock, including transportation, inspection, and cruelty statutes. As a second
17 ground to dismiss for failure to state a claim, the Board argued that Section 77-18-
18 5(B) does not require the Board itself to test and relocate horses, so no claim may be
19 stated against it under that statute. Finally, the Board argued that the Association's

1 claims were barred by collateral estoppel and that the Association lacked standing to
2 maintain the action.

3 {7} The district court granted the Board's motion to dismiss on the ground that the
4 Association failed to state a claim upon which relief could be granted and did not
5 reach the collateral estoppel and standing issues. Specifically, the district court held
6 that the Association's "claims fail to demonstrate that the [Placitas] horses . . . are not
7 estray livestock[.]" The district court reasoned that "horses" are included within the
8 definition of "livestock," and therefore the Placitas horses were livestock. The district
9 court additionally reasoned that "the definition of estray does not require an
10 affirmative determination of ownership or lack of ownership but rather broadly
11 encompasses 'livestock . . . whose owner is unknown.' " As such, the district court
12 determined that the Association's complaint failed to plead facts establishing that the
13 Placitas horses were not legally livestock or estray and that the Board had acted
14 unlawfully.

15 {8} On appeal, the Association argues that the Placitas horses are not "livestock"
16 as defined in Section 77-2-1.1(A) because they have never been raised or used on a
17 farm or ranch and that only livestock may be "estray" as defined in Section 77-2-
18 1.1(N). The Board counters that the Placitas horses are livestock whose owners are
19 unknown; therefore, the horses are plainly estray. The Board and Intervenors also

1 argue that the district court's order should be affirmed under the "right for any
2 reason" doctrine because the Association's claim and appeal are moot and barred by
3 collateral estoppel. Additionally, the Board and Intervenor claim that Section 77-18-
4 5(B) does not require the Board to test or relocate any wild horses.

5 {9} We hold that "livestock," as defined in the Livestock Code, does not include
6 animals that are not domesticated and that the Board is required to test and relocate
7 wild horses under Section 77-18-5. We do not reach the merits of the arguments that
8 the appeal is moot or barred by collateral estoppel. We reverse the district court's
9 dismissal of the Association's complaint and remand for further proceedings.

10 **DISCUSSION**

11 **Standard of Review**

12 {10} We review de novo the district court's dismissal for failure to state a claim
13 under Rule 1-012(B)(6). *Valdez v. State*, 2002-NMSC-028, ¶ 4, 132 N.M. 667, 54
14 P.3d 71. In doing so, "we accept all well-pleaded factual allegations in the complaint
15 as true and resolve all doubts in favor of sufficiency of the complaint." *Id.* Dismissal
16 under Rule 1-012(B)(6) is appropriate only if the plaintiff is unable to recover under
17 any theory of the facts alleged in the complaint. *Callahan v. N.M. Fed'n of Teachers-*
18 *TVI*, 2006-NMSC-010, ¶ 4, 139 N.M. 201, 131 P.3d 51. In this case, the district court

1 determined that the Association did not plead sufficient facts to show the Placitas
2 horses were “wild horses” as defined in the Livestock Code.

3 {11} In resolving the issues before us, we must not only examine the complaint, we
4 must also interpret provisions of the Livestock Code. We undertake statutory
5 interpretation de novo. *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm’n*, 1999-
6 NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860. We are “to determine and give effect
7 to the Legislature’s intent. In discerning the Legislature’s intent, . . . [the appellate
8 courts] look first to the plain language of the statute, giving the words their ordinary
9 meaning, unless the Legislature indicates a different one was intended.” *Marbob*
10 *Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶ 9, 146 N.M.
11 24, 206 P.3d 135 (internal quotation marks and citations omitted). In construing a
12 statute, we give effect to a statute’s unambiguous meaning, but we will not interpret
13 a statute literally when doing so would lead to an absurd or unreasonable result. *State*
14 *v. Wyrostek*, 1988-NMCA-107, ¶ 8, 108 N.M. 140, 767 P.2d 379. “Where possible,
15 each and every part of [a] statute must be given some effect in an effort to reconcile
16 it in meaning with every other part.” *Postal Fin. Co. v. Sisneros*, 1973-NMSC-029,
17 ¶ 8, 84 N.M. 724, 507 P.2d 785.

1 Wild, Undomesticated Horses Are Not Estray Because They Are Not Livestock

2 {12} Under the Livestock Code, “estrays” means in pertinent part “*livestock* found
3 running at large upon public or private lands, either fenced or unfenced, whose owner
4 is unknown[.]” Section 77-2-1.1(N) (emphasis added). “Livestock” means “all
5 domestic or domesticated animals that are used or raised on a farm or ranch . . . and
6 includes horses, asses, mules, cattle, sheep, goats, swine, bison, poultry, ostriches,
7 emus, rheas, camelids[,], and farmed cervidae upon any land in New Mexico.” Section
8 77-2-1.1(A). A “wild horse” is “an unclaimed horse on public land that is not an
9 estray.” Section 77-18-5(A)(4).

10 {13} The Association contends that the Placitas horses are not livestock because the
11 Placitas horses have never been domesticated or used or raised on a farm or ranch.
12 According to the Association, the language “domestic or domesticated” and “used or
13 raised on a farm or ranch” is a definitional requirement. Thus, a horse must be
14 domesticated and used or raised on a farm or ranch to be considered livestock, and
15 the language “livestock . . . includes horses . . . upon any land in New Mexico” does
16 not change the definitional requirement. Section 77-2-1.1(A). The Board and
17 Intervenors, on the other hand, contend that the plain and unambiguous definition of
18 “livestock” means and includes all horses everywhere in New Mexico. The Board and
19 Intervenors further argue that carving wild horses out of the definition of “livestock”

1 would be illogical, impractical, and unfeasible to implement because wild horses
2 would be exempt from cruelty, sale, and transportation provisions of the Livestock
3 Code.

4 {14} We agree with the Association and conclude that “livestock” does not include
5 undomesticated animals. We also agree that enumerated examples of “domestic or
6 domesticated animals that are used or raised on a farm or ranch” in Section 77-2-
7 1.1(A) do not mean all such animals in New Mexico are livestock and potentially
8 estray. For example, sheep, bison, poultry, and farmed cervidae (e.g., deer and elk),
9 like horses, are all included in the definition of “livestock.” *See id.* However, a
10 substantial amount of bighorn sheep, bison, turkey, deer, and elk are wild animals
11 commonly found in New Mexico. The Board is required to search for the owner of
12 estray livestock, publish notice of the impoundment of estray livestock, and
13 eventually sell estray livestock for the benefit of the legal owner. *See* §§ 77-13-1 to
14 -10. Surely, the Legislature did not intend to require that the Board search for the
15 owner of wild animals, including sheep, bison, turkey, deer, elk, and other wild
16 animals that are not domesticated, impound them, proceed to publish notification of
17 the impoundment, and then proceed to sell them.

18 {15} Further, wild sheep, bison, turkey, deer, and elk are all considered game
19 animals elsewhere in our statutes. *See* NMSA 1978, § 17-2-3 (1967, amended 2015)

1 (defining “game mammals” to include American bison “except where raised in
2 captivity for domestic or commercial meat production[,]” bighorn sheep “except for
3 the domestic species of sheep[,]” deer and elk, and “game birds” to include turkeys
4 “except for the domestic strains of turkeys”). Interpreting these definitions together,
5 it would be absurd to consider all sheep, bison, turkey, deer, and elk anywhere in New
6 Mexico to be livestock, but that some are allowed to be hunted and killed, with the
7 appropriate license, rather than impounded and auctioned. Rather, in order to give
8 effect to both statutes and avoid an unreasonable result, we interpret the definition of
9 “livestock” to include only domestic or domesticated animals, while “game animal”
10 includes only wild animals. Thus, we reject the argument that all horses anywhere in
11 New Mexico are livestock because horses are included within the definition of
12 livestock.

13 {16} Other case law dealing with whether an animal is wild or domesticated is
14 instructive. In *State v. Parson*, this Court considered whether a criminal defendant
15 could be charged under two laws covering roughly the same conduct. 2005-NMCA-
16 083, 137 N.M. 773, 115 P.3d 236. In *Parson*, the defendant was convicted for
17 transporting elk heads under animal cruelty laws, but the defendant argued that he
18 should have been convicted under more specific game and fish laws providing for
19 illegal possession of game animal parts. *Id.* ¶ 1. Relying in part on the

1 general/specific rule of statutory interpretation, we held that game and fish laws
2 covered wild, undomesticated, free-roaming elk, while the general animal cruelty
3 statute pertained to domesticated elk. *Id.* ¶ 22. We treated the question whether the
4 elk was domesticated or wild as a factual issue and reversed the defendant's
5 conviction under general animal cruelty laws. *Id.* ¶ 24. The Association's argument
6 is similar here: the Placitas horses are wild, undomesticated, unowned, and free-
7 roaming and are therefore not subject to livestock and estray provisions, but rather
8 the more specific statute pertaining to wild horses. Our interpretation of the Livestock
9 Code and its definition of "livestock" accords with *Parson* in that we interpret the
10 livestock and estray provisions to pertain only to domesticated horses rather than
11 wild, free-roaming horses.

12 {17} The Board and Intervenors contend that considering wild horses as outside the
13 definition of "livestock" is an absurd interpretation that would create dangerous
14 loopholes in the law. These supposed loopholes, however, do not survive close
15 examination. First, the Board and Intervenors argue that wild horses would be exempt
16 from transportation laws pertaining to livestock, specifically laws requiring permits
17 to transport livestock. However, the statutes governing horse transportation refer
18 specifically to "any horses" and "each horse" rather than "livestock," so it appears
19 that wild horses would be subject to those provisions although they are not livestock.

1 See §§ 77-9-41 to -42 (providing for the unlawful transport of “any horses” and
2 requiring an owner’s transportation permit “for each horse”). Second, the Board and
3 Intervenor argue that wild horses will be exempt from cruelty statutes that refer
4 specifically to “livestock.” See § 77-18-2. Although wild horses may not be protected
5 by cruelty to livestock statutes, they would be covered by general animal cruelty
6 statutes if they are in captivity. See *State v. Cleve*, 1999-NMSC-017, ¶ 12, 127 N.M.
7 240, 980 P.2d 23 (interpreting NMSA 1978, Section 30-18-1 (1999, amended 2007)
8 to apply to domesticated animals and wild animals in captivity). Further, the
9 protections available in the general animal cruelty statute, NMSA 1978, § 30-18-1.1
10 (1999), are identical to the ones in the more specific cruelty to livestock statute, § 77-
11 18-2, therefore, there would be no gap in the protection of wild horses in captivity
12 and domesticated horses in captivity.¹ Thus, interpreting wild horses as distinct from
13 livestock does not create as dangerous a loophole as the Board and Intervenor
14 suggest. To the extent that wild horses not in captivity appear to be unprotected by
15 animal cruelty statutes, perhaps our Legislature has a void to fill.

16 {18} The Board also asserts that it would be “novel, unworkable[,] and foreign to
17 the [Livestock] Code” to require a livestock inspector to make a determination about

18 ¹ Wild animals not in captivity are not protected by animal cruelty statutes.
19 *Cleve*, 1999-NMSC-017, ¶ 15 (concluding that “the Legislature intended the phrase
20 ‘any animal’ [throughout Section 30] to include domesticated animals and wild
21 animals in captivity and did not intend to include other wild animals”).

1 whether a horse is domesticated or wild. We disagree. Wild horses are referred to in
2 two statutes in the Livestock Code. Section 77-18-5 pertains to testing and relocating
3 wild horses captured on public land, and Section 77-2-30 pertains to horse rescue and
4 retirement facilities. *See* § 77-2-30(A) (providing for horse rescue or retirement
5 facilities, including preserves and reserves, that care for “captured wild horses that
6 cannot be returned to their range”). Section 77-2-30 does not define “wild horses,”
7 but the New Mexico Administrative Code does, in 21.30.5.7(F) NMAC (07/15/2005,
8 as amended through 07/15/2014), governing horse rescue facilities. Given that
9 21.30.5.7(F) NMAC, defining a “wild horse” as a feral horse that “exist[s] in an
10 untamed state having returned to a wild state from domestication[,]” is among the
11 governing regulations issued by the Board itself in July 2005, and given the language
12 within the Livestock Code that a “feral hog” is a pig that “exists in an untamed state
13 from domestication[,]” § 77-18-6(D), it does not appear to be novel or foreign to the
14 Livestock Code or the Board to require an inspector to make such a determination
15 with regard to a horse.

16 **Section 77-18-5(B) Creates Duties for the Board**

17 {19} The Board and Intervenors cursorily argue that even if the Placitas horses are
18 wild the Association still failed to state a claim against the Board since Section 77-
19 18-5(B) does not explicitly name the Board as responsible to test and relocate wild

1 horses. Thus, according to the Board and Intervenors, no claim may be asserted
2 against the Board under Section 77-18-5(B).

3 {20} Section 77-18-5(B) states that a wild horse captured on public land “shall have
4 its conformation, history[,] and [DNA] tested[.]” If a horse tests positive as a Spanish
5 colonial, the horse “shall be relocated to a state or private wild horse preserve[,]” and
6 if the horse is not a Spanish colonial, the horse “shall be returned to the public land,
7 relocated to a public or private wild horse preserve[,] or put up for adoption by the
8 agency on whose land the wild horse was captured.” *Id.*

9 {21} The existence of a legal duty is a question of law. *Delfino v. Griffio*, 2011-
10 NMSC-015, ¶ 12, 150 N.M. 97, 257 P.3d 917. Our charge in construing a statute is
11 to give effect to legislative intent. *See id.* “If the Legislature is silent on an issue, we
12 look at the overall structure and function of the statute, as well as the public policy
13 embodied in the statute.” *Id.* In interpreting any omission in a statute, we are required
14 to “look at the objectives the [L]egislature sought to accomplish and thereby interpret
15 the statute to achieve [those] purposes.” *Morningstar Water Users Ass’n v. N.M. Pub.*
16 *Util. Comm’n*, 1995-NMSC-062, ¶ 34, 120 N.M. 579, 904 P.2d 28 (internal quotation
17 marks and citation omitted).

18 {22} We conclude that the Legislature intended to require the Board to test and
19 relocate horses captured on public land as provided under Section 77-18-5(B). The

1 Legislature provided that the Livestock Code “shall be liberally construed to carry out
2 its purposes[.]” Section 77-2-1. The Board was created in order to achieve those
3 purposes, which include goals associated with the “administration of the laws relating
4 to the livestock industry of New Mexico[.]” *Id.*; see § 77-2-2 (creating the Board).
5 Section 77-18-5(B) is located within the Livestock Code; therefore, it is
6 counterintuitive to argue that a statute within the Livestock Code was not actually
7 meant to affect the powers and responsibilities of the Board, which is tasked with
8 administering the Livestock Code.

9 {23} Further, sections within the Livestock Code that do not confer a duty on the
10 Board do so explicitly. Section 77-18-1 provides that the sale, purchase, trade, and
11 possession of certain animals are to be regulated by the Department of Health. As the
12 Board points out, other duties and rights in Section 77-18-5 are explicitly given to
13 parties other than the Board. See § 77-18-5(B) (providing that a horse may be put up
14 for adoption “by the agency on whose land the wild horse was captured”); § 77-18-
15 5(C) (providing that the Mammal Division of the Museum of Southwestern Biology
16 at the University of New Mexico may capture, relocate, and, if required, euthanize
17 wild horses). These provisions indicate that if the Legislature meant to task someone
18 other than the Board with testing and relocating wild horses, the Legislature would
19 have done so explicitly.

1 {24} Given the placement of Section 77-18-5 within the Livestock Code and explicit
2 language that creates a right or duty for parties that are not the Board, we conclude
3 that it was the Legislature's intent to require the Board to test and relocate wild horses
4 captured on public land as provided in Section 77-18-5(B).

5 {25} The Board and Intervenors essentially ask this Court to render Section 77-18-
6 5(B) inert. The Board and Intervenors argue that it is not the Board's responsibility
7 to test and relocate wild horses because the Board is not explicitly tasked with testing
8 and relocating wild horses. No other agency is explicitly tasked with testing and
9 relocating wild horses. *See, e.g.*, § 77-18-1; § 77-18-5(C). If we were to agree with
10 the Board and Intervenors on this argument, the practical effect would be that no one
11 would be required to test or relocate wild horses captured on public land, which is in
12 direct contrast to Section 77-18-5(B). The logical extension of this argument once
13 again leads to an unreasonable result that we cannot accept. In order to give effect to
14 each part of the statute and implement the legislative intent, we conclude that the
15 Board is required to test and relocate horses captured on public land as required by
16 Section 77-18-5(B).

17 **The Association Pleaded Facts Sufficient to State a Claim**

18 {26} Having determined that "livestock" does not include horses that are not
19 domesticated and that Section 77-18-5(B) creates duties for the Board, we turn to the

1 Association's initial complaint. We hold that the Association pleaded facts sufficient
2 to state a claim.

3 {27} First, the Association's complaint is replete with references to the Placitas
4 horses as wild rather than domestic. Although "wild horses" has a technical definition
5 under the Livestock Code, *see* § 77-18-5(A)(4), we interpret the Association's claims
6 to be that the horses are factually not domesticated, just as the *Parson* case involved
7 whether elk were wild or domesticated as a matter of fact. The Association also
8 repeatedly averred that the Placitas horses are not owned now nor have they been
9 owned in their lives. The Association also averred that the Placitas horses are
10 unbranded, unclaimed, and free-roaming. The Association further asserted that the
11 Board has captured and auctioned at least twenty-five Placitas horses and that the
12 auctioned horses were "taken directly from public land[,] " presumably the Placitas
13 Open Space. Finally, the Association averred that the captured Placitas horses have
14 not been tested to confirm whether they are Spanish colonial horses, as Section 77-
15 18-5(B) requires. These facts, taken as true, adequately state a contention that the
16 Placitas horses fit the criteria of "wild horses" under Section 77-18-5(A)(4), (B),
17 rather than "estrays" under Section 77-2-1.1(N), and that the Board unlawfully failed
18 to test and relocate the wild horses it captured. Thus, the Association sufficiently
19 stated a claim against the Board.

1 **Right for Any Reason**

2 {28} Intervenor nonetheless urge this Court to affirm the dismissal below under the
3 right-for-any-reason doctrine. Intervenor make the argument under this theory that
4 the Association's appeal is moot. For the following reasons, we decline to affirm
5 based on this argument.

6 {29} An appellate court may affirm a district court if it was right for any reason and
7 affirming on new grounds would not be unfair to the appellant. *Bd. of Cnty. Comm'rs*
8 *v. Chavez*, 2008-NMCA-028, ¶ 12, 143 N.M. 543, 178 P.3d 828. An appellee is not
9 required to preserve arguments to affirm so long as those arguments are not fact-
10 based "such that it would be unfair to the appellant to entertain those arguments."
11 *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 17, 137 N.M. 57, 107 P.3d 11.
12 Further, an appellate court may affirm the district court on different grounds than
13 those relied on by the district court only if those grounds do not require looking
14 "beyond the factual allegations that were raised and considered below." *State v.*
15 *Wasson*, 1998-NMCA-087, ¶ 16, 125 N.M. 656, 964 P.2d 820.

16 {30} The basis for Intervenor's mootness argument is found in factual allegations
17 that were not considered below; therefore, it would be unfair to affirm on those
18 grounds, and we decline to do so. Intervenor assert that the Placitas Open Space has
19 been completely rid of horses and completely fenced off since two weeks before the

1 Association filed its claim. As such, Intervenors contend, any controversy that existed
2 over the Board's treatment of horses in the Placitas Open Space is now resolved
3 because there are no horses currently there and no horses are likely to return. In
4 support of these assertions, Intervenors cite a number of affidavits filed in the district
5 court. However, nothing in the record indicates the district court actually considered
6 these affidavits in dismissing the Association's claims. The district court's amended
7 opinion and order does not refer to the affidavits or to any mootness argument.
8 Because these factual allegations were not both raised and considered below,
9 affirming on these grounds would be unfair to the Association, and we will not affirm
10 under the right-for-any-reason doctrine on these grounds.

11 **Collateral Estoppel**

12 {31} The Board and Intervenors argue that the Association's claims and appeal are
13 barred by collateral estoppel based on earlier, federal court litigation regarding the
14 Placitas horses. The Association replies that it would be unfair to affirm on this
15 ground because it was not adequately considered below. In *Silva v. State*, our
16 Supreme Court held that "defensive collateral estoppel may be applied when a
17 defendant seeks to preclude a plaintiff from relitigating an issue the plaintiff has
18 previously litigated and lost regardless of whether [the] defendant was privy to the
19 prior suit[.]" 1987-NMSC-107, ¶ 11, 106 N.M. 472, 745 P.2d 380. However, the


1 “[a]pplicability of collateral estoppel requires factual findings that (1) the party
2 against whom collateral estoppel is asserted must have been a party in . . . the original
3 action; and (2) the two cases must have concerned the same ultimate issue or fact,
4 which was (a) actually litigated, and (b) necessarily determined in the first suit.” *Clay*
5 *v. N.M. Title Loans, Inc.*, 2012-NMCA-102, ¶ 44, 288 P.3d 888 (omission in original)
6 (internal quotation marks and citation omitted). Further, collateral estoppel “should
7 be applied only where the trial [court] determines that its application would not be
8 fundamentally unfair.” *Reeves v. Wimberly*, 1988-NMCA-038, ¶ 14, 107 N.M. 231,
9 755 P.2d 75; *see Padilla v. Intel Corp.*, 1998-NMCA-125, ¶ 10, 125 N.M. 698, 964
10 P.2d 862; *Callison v. Naylor*, 1989-NMCA-055, ¶ 7, 108 N.M. 674, 777 P.2d 913.

11 {32} The district court did not reach the issue of collateral estoppel in its opinion
12 and order, and as such did not make necessary factual findings regarding the
13 applicability of collateral estoppel. *See Silva*, 1987-NMSC-107, ¶ 13 (“In deciding
14 whether to apply the doctrine of collateral estoppel, the threshold issues of fact are
15 for the [district] court to resolve.”). Absent any factual findings related to collateral
16 estoppel below, deciding this appeal based on collateral estoppel now would be unfair
17 to the Association. Accordingly, we decline to affirm under the right-for-any-reason
18 doctrine.

1 **CONCLUSION**

2 {33} We reverse the district court's opinion and order dismissing the Association's
3 claim and remand for further proceedings.

4 {34} **IT IS SO ORDERED.**

5 
6 JONATHAN B. SUTIN, Judge

7 **WE CONCUR:**

8 
9 MICHAEL D. BUSTAMANTE, Judge

10 
11 CYNTHIA A. FRY, Judge