



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ASHOK KAUSHAL,

Appellant-Petitioner/Cross-Respondent,

v.

No. S-1-SC-40119

SANTA FE COMMUNITY HOUSING
TRUST,

Appellee-Respondent/Cross-Petitioner.

PETITIONER-APPELLANT'S ANSWER BRIEF
TO CROSS APPEAL

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Oral Argument Requested

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This brief complies with Rule 12-318(F)(3) NMRA because it uses a proportionally-spaced typeface and its body contains 5722 words. This word count was obtained with Microsoft Word for Mac version 16.80.

By: /s/ David A. Ferrance

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I. INTRODUCTION

In *Kaushal v. Santa Fe Cmty. Hous. Trust* (“*Kaushal I*”), 2021-NMCA-010, 484 P.3d 1020, the Court of Appeals reversed a district court ruling granting summary judgment that Santa Fe Community Housing Trust (the “Trust”) had redeemed the property in this case (the “Property”) and that Mr. Kaushal (“Kaushal”) had not. Holding that an assignee of the rights of less than all of the heirs of the former owner could redeem, the court reversed the summary judgment and remanded for further proceedings.

Since then, the Trust has continuously misunderstood and misstated the effect of the Court of Appeals’ opinion in *Kaushal I*. The Trust believes that the opinion gave it a 50% interest in the property and that no other reading of the opinion is plausible. It contends—both here, at the Court of Appeals, and at the district court—that its reading of *Kaushal I* is the only possible reading, that it is the law of the case, and that no court may depart from it.

Nothing in *Kaushal I* states that the Trust has a 50% interest in the Property. Instead, the Trust relies on a few ambiguous phrases to stretch the opinion beyond what it can reasonably support. On remand,

however, a skeptical district court agreed with the Trust, ruling that the Trust and Kaushal owned the Property as tenants in common but noting that the Court of Appeals had upended redemption law.

Kaushal appealed, and the Court of Appeals again reversed. *See Kaushal v. Santa Fe Cmty. Hous. Trust* (“*Kaushal II*”), No. A-1-CA-39814 (N.M. Ct. App. May 16, 2023) (non-precedential). Because the same judge authored *Kaushal I* and *Kaushal II*, the court was in an excellent position to decide what its own recent opinion meant. The court explained that the Trust’s view of *Kaushal I* was a “misunderstanding” and that the Trust did not in fact own any part of the Property. Yet even now, the Trust still refuses to acknowledge that any reading of *Kaushal I* but its own is possible. Because *Kaushal I* did not decide that the Trust was a tenant in common, and because such a reading would be contrary to the redemption statute, the Court should affirm that portion of *Kaushal II*.¹

II. SUMMARY OF FACTS AND PROCEEDINGS

This cross appeal deals with a narrow portion of this case: whether the *Kaushal I* court decided that the Trust and Kaushal were tenants in

¹ The Court has granted Kaushal’s petition for certiorari to review other aspects of *Kaushal II*, which are argued separately in his Brief in Chief.

common, such that the district court and the Court of Appeals could not later conclude otherwise. Accordingly, this fact section provides only the limited background necessary to understand why the Trust's reading of *Kaushal I* is incorrect.

A. *Kaushal I* reversed the district court's 2018 summary judgment that Kaushal could not redeem

In 2018, both the Trust and Kaushal sought to redeem the property that was foreclosed on in this case. The district court ruled that the Trust—a junior lienholder—should prevail over Kaushal because, although Kaushal was the assignee of the redemption rights of some of the heirs, he was not the assignee of the rights of *all* of the heirs. Kaushal appealed, and the Court of Appeals reversed.

Kaushal's first appeal raised three arguments: (1) that a former defendant owner need not possess 100% of the possible redemption interests to redeem; (2) that a former defendant owner's heirs need not first have received title before exercising or assigning their redemption rights; and (3) that the Trust had not met the statutory prerequisites to redeem. The court addressed those issues in three corresponding sections, concluding that (1) under the New Mexico redemption statute, Kaushal need not possess a unified redemption interest to redeem,

Kaushal I, 2021-NMCA-010, ¶¶ 9-17, (2) the heirs of a former defendant owner did not need to possess title to assign redemption rights, *id.* ¶¶ 18-22, and (3) both the Trust and Kaushal had substantially complied with the statutory requirements of redemption. *Id.* ¶¶ 23-27. Having essentially undone the district court’s ruling as to ownership, the court remanded for further proceedings. *Id.* ¶ 28.

B. On remand, the Trust persuaded the district court that *Kaushal I* made it a tenant in common with Kaushal

On remand, the Trust filed a one-paragraph “Motion to Present Judgment on the Mandate.” [RP 660-61] The motion contained no citations to authority, no legal argument, and no discussion of this Court’s opinion in *Kaushal I*. Rather, it simply asked the court to enter an attached order. The order contained proposed findings that *Kaushal I* had held that Kaushal and the Trust were each entitled to 50% of the Property as tenants in common. [RP 663-64] In particular, the Trust asked the court to find that the Trust “as a junior lienholder has redeemed the remaining 50% interest in the subject property, resulting in [Kaushal] and the Housing Trust each owning a 50% tenancy in common interest in the subject property.” [RP 664]

In response, Kaushal argued that *Kaushal I* had not decided the issue of ownership and that the Trust, as a junior lienholder, had no right to redeem. **[RP 692-95]** First, he noted that *Kaushal I* decided only the three issues that he had raised in his prior appeal: that there was no unity of title requirement, that the heirs did not need to have title to redeem, and that both parties had substantially complied with the petition and deposit requirements of the redemption statute. **[RP 693]** Everything else, including the issue of redemption and ownership, had been left to the district court to decide in the first instance on remand. **[RP 693]** Accordingly, Kaushal argued that the Trust, as junior lienholder, had no right to redeem if—as was the case here—a former defendant owner also petitioned to redeem.

The Trust, for the first time in its reply, explained why it believed that *Kaushal I* had held that it was entitled to 50% of the Property. **[RP 696-98]** First, the Trust took out of context two sentences in *Kaushal I* describing the factual record. Paragraph 4 footnote one, in declining to decide whether the Trust had any priority rights from Ms. Urioste, noted that “Kaushal’s interest is limited to the 50% he was assigned.” **[RP 697]** Similarly, paragraph 17, again describing the priority redemption rights,

noted that Kaushal “holds only a fifty-percent redemption interest in the property.” **[RP 698]** The Trust argued that these two sentences meant that Kaushal was only entitled to redeem 50% of the property. But they simply described that Kaushal had received assignments from two of the four heirs.

Second, the Trust relied on (and overstated) the court’s disposition of the third issue: whether the Trust had met the petition and deposit requirements. In rejecting Kaushal’s argument that the Trust had not met the deposit requirement, the court stated in paragraph 7 that “the Trust substantially complied with the statutory requirements applicable to its own right of redemption.” **[RP 698]** Similarly, in paragraph 22, the court noted that the Trust had substantially complied with the deposit requirement. **[RP 698]** The Trust appeared to believe that these statements meant not only that it had met the filing and deposit requirements of § 39-5-18(A)(2), but also that its petition to redeem its junior lienholder rights had been or should be granted. But it simply meant that the Trust had met the prerequisites to have its petition heard on the merits.

The district court expressed some difficulty in understanding *Kaushal I*. For example, the court specifically noted its confusion with language in paragraph 17 that Kaushal “holds only a fifty percent redemption interest in the property.” [6-1-21 Tr. 10:30:57] The court believed this language suggested that the *Kaushal I* court had declared that each party had a “fractional interest” and that both sides had probably exercised redemption rights. [Id. at 10:31:35-10:32:43] The court explained that it had previously understood a redemption interest to mean “a right to have 100% if you comply with the statute have priority or are first in time.” [Id. at 10:29:36 - 10:31:28] Nevertheless, despite its reservations about the Trust’s arguments, the district court granted the Trust’s motion. [RP 708] Kaushal appealed.

C. *Kaushal II* clarified that *Kaushal I* had not held that the Trust and Kaushal were tenants in common

In its second opinion, the Court of Appeals again reversed the district court. First, the court held that the redemption statute did not allow a junior lienholder to redeem when a former defendant owner also redeemed. *Kaushal II*, No. A-1-CA-39814, mem. op. ¶ 7. The right to redeem, the court reasoned, was the right “to reassert complete fee simple ownership of the land” *Id.* (quoting 55 Am. Jur. 2d Mortgages

§ 743 (2023)). As a result, the “district court [had] erred in determining the Trust to be a cotenant with Kaushal in possession of a fifty percent interest in the property.” *Id.* ¶ 12.

The court then explained exactly what it had meant in *Kaushal I*:

In a nutshell: Kaushal was entitled to redeem, but our remarks on his fifty percent interest and the Trust’s compliance with the redemption statute did not mean to declare—as seems to have been perceived on remand—that Kaushal’s right to redeem was limited to half the property and the Trust, despite being a junior lienholder, was entitled to redeem, the other half of the property.

Kaushal II, ¶ 2. The court characterized the Trust’s perception that it had been awarded half the property as a “misunderstanding [that] pervaded the proceeding on remand.” *Id.* ¶ 3.

Undeterred, the Trust now argues that *Kaushal II* incorrectly interpreted *Kaushal I*. It contends that its own view of *Kaushal I* is the only plausible view of the opinion and was binding on the district court and the Court of Appeals as the law of the case. For the reasons below, the Trust is mistaken.

III. ARGUMENT

The gist of the Trust’s cross-petition is simple. According to the Trust, *Kaushal I* held that the Trust was a tenant in common with Kaushal, and under the law of the case doctrine no subsequent court may

deviate from that purported holding. [XBIC 9-10] But the *Kaushal I* court was not asked to determine ownership and, notwithstanding the ambiguous language the Trust relies on, it did not do so. It simply reversed the erroneous summary judgment that Kaushal was not entitled to redeem and remanded so that the district court could apply the correct law to the facts in the first instance.

A. Standard of Review / Law of the Case

There are no factual disputes in this cross appeal. After remand, the parties introduced no new evidence and disputed only the meaning of the Court of Appeals' *Kaushal I* opinion. *Kaushal I*, having reversed the first district court decision, became the law of this case, binding on the district court on remand and on the Court of Appeals in the second appeal. *See State ex rel. King v. UU Bar Ranch, L.P.*, 2009-NMSC-010, 145 N.M. 769. As this Court has explained,

The mandate binds the district court and subsequent appeals courts ... which are bound by the law of the case established by the earlier appeals court It is not merely the mandate, but the entire opinion of the Court of Appeals which constitutes the law of the case. If there is any doubt or ambiguity regarding the mandate, the meaning of the Court of Appeals opinion governs. In fact, the opinion itself so predominates that even the mandate must give way to the opinion as to the law of the case, if there is any conflict between them.

Id. (citations omitted). Ultimately, the opinion and mandate “set forth the full extent of the jurisdiction of the district court on remand.” *Hughes v. Hughes*, 1984-NMSC-035, ¶ 4, 101 N.M. 74.

“Whether law of the case applies, as well as how it applies, are questions of law subject to de novo review.” *UU Bar Ranch*, 2009-NMSC-010, ¶ 20. The doctrine “leaves considerable discretion to appellate courts to interpret what, precisely, the law of the case is[.]” *Id.* ¶ 27. It is that question—the meaning of *Kaushal I*—that is at issue in the cross appeal.

B. *Kaushal I* only reversed summary judgment; it did not hold that the Trust and Kaushal were tenants in common

After remand from *Kaushal I*, the Trust argued vigorously and at every level that *Kaushal I* could only be read to mean that the Trust owns 50% of the Property as a cotenant. Its reading of *Kaushal I* is implausible; indeed, the author of *Kaushal I* called the Trust’s view of the opinion a “misunderstanding.” *Kaushal II*, No. A-1-CA-39814, mem. op. ¶ 3. As explained below, the *Kaushal I* court was not asked to determine the merits of the competing redemption petitions and it did not do so.

1. **The *Kaushal I* court was not asked to decide who owned the Property and did not do so**

The main reason that *Kaushal I* did not determine that the Trust was a tenant in common with Kaushal is simple: the issue was not before it. In *Kaushal I*, Kaushal appealed the district court's grant of summary judgment that he was not entitled to redeem. The Trust did not cross appeal. Instead, it argued only for affirmance—that the summary judgment in its favor was correct.

Kaushal I decided the three things Kaushal—the appellant—asked it to decide. First, it held that a redeemer need not possess 100% of the existing redemption rights. 2021-NMCA-010, ¶¶ 9-17. Second, it held that the heirs of a former defendant owner did not need to possess title in order to assign their redemption rights. *Id.* ¶¶ 18-22. And third, it held that the Trust and Kaushal had both substantially complied with the statutory requirements—that they had to timely file their petitions and deposited the redemption amounts into the court registry. *Id.* ¶¶ 23-27. In light of those holdings, *Kaushal I* reversed the district court's grant of summary judgment in the Trust's favor and remanded for further proceedings. *See id.* ¶ 28.

The *Kaushal I* court was not asked to decide and did not decide who was entitled to redeem the Property. See *Fernandez v. Farmers Ins.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622 (“[C]ases are not authority for propositions not considered.”). Kaushal asked the court to reverse summary judgment and to hold that the Trust deposited its funds too late; the Trust responded that the district court’s ruling was correct. See *Kaushal I*, 2021-NMCA-010, ¶ 7. The Court of Appeals, concluding that a redeemer need not own the rights of every heir, reversed the grant of summary judgment. See *id.* ¶¶ 1, 28. Kaushal did not ask it to determine ownership, and it did not do so.

Because *Kaushal I* did not determine in the first instance who was entitled to redeem the Property, the district court was not only free to apply the redemption statute to make that determination, it was required to. As explained next, the effect of *Kaushal I* was to clarify the law and to remand for the district court to apply the correct law to the facts in the first instance.

2. The effect of *Kaushal I* was to reverse a summary judgment ruling that was based on a misapprehension of the law

Kaushal I held only that (1) the district court had erred in denying Kaushal’s petition to redeem and (2) both parties had satisfied the

petition and deposit requirements of the redemption statute. It reversed summary judgment and remanded for further proceedings. As a result, the parties were nearly in the same position after *Kaushal I* that they had been in after the petitions were filed.

Further proceedings were limited by *Kaushal I* in two ways. First, *Kaushal I* decided that both petitions had met the statutory filing requirements. *See Kaushal I*, 2021-NMCA-010, ¶ 27 (concluding that “both Kaushal and the Trust substantially complied with the statutory redemption requirements and therefore [their] redemption petitions were valid”). This meant that Kaushal’s petition could not be dismissed for failure to serve the Trust, and the Trust’s petition could not be dismissed for the untimely deposit of the redemption amount. Second, *Kaushal I* held that the district court had erred in concluding that Kaushal needed to obtain assignments from all of the heirs and that the heirs must first have had title to the Property. *See id.* ¶¶ 17, 22. This meant that, contrary to the district court’s original ruling, Kaushal was not prohibited from redeeming. Both parties, in other words, had timely filed petitions that alleged facts that could entitle them to redeem—

Kaushal's as an assignee of two of the heirs, and the Trust's as a junior lienholder.

Apart from those two things, everything else was left for the district court to determine in the first instance on remand. For the first time, the district court would have to decide which of the two petitioners had priority to redeem. And that should have caused the district court to apply the language of the redemption statute, which allowed junior lienholders to redeem only if no former defendant owner redeemed.

As the prevailing party, that was Kaushal's argument to make on remand. *See* Rule 1-085 NMRA. But the Trust short-circuited that procedure, filing its own motion claiming that *Kaushal I* had given half of the Property to the Trust and perpetuating the misunderstanding that pervaded the proceedings on remand. As explained next, however, *Kaushal I* cannot support the Trust's reading of it.

C. **On remand, the Trust advanced an implausible reading of *Kaushal I* to try to avoid losing its entire interest in the Property**

The Trust has argued at every level since the mandate that the only reasonable way to interpret *Kaushal I* is that the Court of Appeals had ordered the Property to be split between the Trust and Kaushal. [E.g.,

XBIC 7 (claiming that its view is “[t]he only plausible interpretation” of *Kaushal D*) To make this argument, the Trust misreads *Kaushal I* in two ways. First, it extends ambiguous language in the opinion about “fractional interests” far beyond what can be supported. And second, it reads *Kaushal I*’s rejection of Kaushal’s argument that the Trust had not met the statutory prerequisites as a holding that the Trust was entitled to redeem.

1. *Kaushal I* did not give the Trust a 50% tenancy in common with Kaushal

The Trust’s main argument since remand has been that *Kaushal I* awarded it a 50% interest in the Property. **[XBIC 2]** It misstates *Kaushal I* as having held that “the Trust had successfully exercised its redemption rights,” **[XBIC 8]** and that “one only redeems that percentage ownership interest in the foreclosed property represented by the assigned redemption interests.” **[XBIC 9]** It refuses to consider that any reading of *Kaushal I* other than its own is possible.

The opinion itself provides no direct support for the Trust’s argument. The Trust identifies no language from the opinion expressly stating that the Trust is a 50% tenant in common with Kaushal. None exists. The closest the court comes is to note that the Trust had made

that argument in its brief. *See Kaushal I*, 2021-NMCA-010, ¶ 19. Because the Trust cannot point to any part of *Kaushal I* that gives it an interest in the Property, it must craft its argument by stringing together a few ambiguous portions of the opinion unrelated to whether the Trust was entitled to redeem.

The portions of *Kaushal I* the Trust relies on cannot be read as a determination of which parties were entitled to redeem. Both below and here, the Trust stretches a handful of phrases far beyond what they can support. **[RP 698, NMCA AB 6-7, XBIC 5-6]** As Kaushal explained below, the Trust’s argument ignores what these phrases meant in the full context of *Kaushal I*. **[NMCA BIC 22-26]**

In its *Reply in Support of its Motion for Judgment on the Mandate*, the Trust identified for the first time the six quotes that it believed showed Kaushal and the Trust were “involuntary tenants in common, each holding a 50% tenancy in common interest in the property.” **[RP 696-97]** Many of these quotes involved the “fractional interest” language that the district court struggled to understand. Viewed in context, that language does not show that the Court of Appeals had determined that the Trust was a tenant in common with Kaushal.

The Trust first relied on footnote 1 of *Kaushal I*, which states:

Kaushal additionally asserts that the assigned right of redemption from Urioste is invalid because it occurred following the expiration of the redemption period. However, we need not resolve that issue given our conclusion that Kaushal’s interest is limited to the fifty percent he was assigned, which did not include the interest purportedly assigned by Urioste to the Trust.

Id. ¶ 7 n.1. This footnote simply states that Kaushal owns 50% of the redemption interests—that is, he is the assignee of the redemption rights of two of the four heirs.² The court declined to decide whether the Urioste assignment was valid because neither Kaushal nor the Trust relied on it. Thus, this footnote does not show that the Trust had any interest in the Property.

Second, the Trust points to language that “the Trust substantially complied with the statutory requirements applicable to its own right of redemption.” *Id.* ¶ 7. This language appears in an introductory paragraph signposting the three holdings of the opinion. It refers to the third holding, which rejects Kaushal’s argument that the Trust’s petition

² An implicit assumption below was that the heirs were Lenora’s four sons, who were alive when the foreclosure began. A different result would obtain if the heirs were determined later in the case. The district court never determined who the heirs are, though they undoubtedly include Lenora’s surviving sons. *See* NMSA 1978, § 45-2-103 (2017) (defining who the heirs of an intestate decedent are).

was invalid because it had failed to timely deposit money into the district court's registry. *Id.* ¶¶ 23-26. Whether the Trust complied with the requirements is a different question than whether the Trust's petition had merit or whether it should prevail over Kaushal's. The court was not asked whether the Trust's petition had merit and did not decide those questions. *See Fernandez*, 1993-NMSC-035, ¶ 15 (stating that cases are not authority for issues not decided).

Third, the Trust pointed to paragraph 17, which contains a sentence that Kaushal “holds only a fifty-percent redemption interest in the property.” Here, the Court specifically refers to “redemption” interest—the percentage of the statutory redemption rights held by Kaushal, not including the rights of the personal representative, any assignees of Linora, or any junior lienholders. It does so to set up the conclusion of the paragraph: that there is “no basis to conclude that Kaushal was required to possess one-hundred percent of the possible redemption interests.” *Id.* Paragraph 17 concludes the first section of *Kaushal I*, expressing its holding that a single heir can redeem without obtaining assignments from all the other heirs. Its discussion “redemption interests” refers to the percentage of the statutory right of

redemption owned by the petitioner, and concludes that a petitioner may redeem with less than all of the redemption rights. It does not limit the amount of property that can be redeemed.

Fourth, the Trust points to discussion in paragraphs 22 and 26 that it had substantially complied with the statutory requirements for redemption, arguing that “there would have been no reason to discuss this issue if Kaushal had redeemed the entirety of the property.” **[RP 698]** As explained in Part III.C.2b below, the reason the court included this is that Kaushal had raised it as an issue in his appeal. Those paragraphs simply rejected Kaushal’s argument that the Trust had failed to timely deposit funds in the court registry.

Fifth, the Trust relied on the court’s statement that “both Kaushal and the Trust substantially complied with the statutory redemption requirements and therefore the parties’ redemption petitions were valid.” *Id.* ¶ 27. According to the Trust, this sentence would have been unnecessary if Mr. Kaushal had redeemed the entire property. **[RP 698]** This is essentially the same as the fourth issue, and is also addressed by Part III.C.2 below.

Finally, the Trust looked to *Kaushal I*'s last paragraph, which remanded with instructions to “allow for the exercise of Kaushal’s, along with the Trust’s, rights to redemption *consistent with this opinion.*” ¶ 28 (emphasis added). The Trust appears to believe that this sentence means it was entitled to redeem. It does not. First, the fact that the Trust’s petition is valid—i.e., that the Trust complied with the statutory requirements—is different from whether the petition should be granted. Second, *Kaushal I* confirms what is clear from the statute: that the statute “prioritizes the rights of former-defendant owners over the rights of junior lienholders.” *Id.* ¶ 10. Ultimately, the language remanding for proceedings consistent with the opinion is nothing more than a routine expression of the law of the case, confirming that the district court’s jurisdiction on remand is defined by the appellate court’s opinion. *See, e.g., Hughes*, 1984-NMSC-035, ¶ 4 (“[The] mandate and opinion in the prior appeal set forth the full extent of the jurisdiction of the district court on remand.”). And it would have been entirely consistent with the opinion—as well as correct—for the district court to conclude that Kaushal’s petition, based as it was on priority rights of the heirs, extinguished the Trust’s subordinate right as a junior lienholder.

The simple fact is that, on remand, the Trust seized on a few small ambiguities in *Kaushal I* to try rescue its case. But even if the opinion is ambiguous, it cannot be stretched far enough to decide an issue that was not raised in the appeal, let alone to decide it contrary to the plain language of the redemption statute and the case law. *Kaushal I* did not award the Trust any interest in the Property, and the district court's decision to the contrary was, as *Kaushal II* concluded, error.

2. *Kaushal I* did not hold that the Trust was entitled to redeem

The Trust's second mistake is in asserting that *Kaushal I*'s holding that it had substantially complied with the statutory requirements meant that it was entitled to redeem. The trust argued this more forcefully below. [NMCA AB 6] Here, it mentions it only in passing.

[XAB 6]

The Trust's argument is based on Part III of *Kaushal I*. In that part, the court rejected Kaushal's argument that the Trust should not be allowed to redeem because it had failed to substantially comply with the service and deposit requirements of the redemption statute. See 2021-NMCA-010, ¶¶ 23-27. The Trust responded that it had substantially

complied and argued that it was Kaushal whose petition failed to meet the statutory requirements. *See id.* ¶ 23.

Addressing these arguments, the court concluded that the parties “substantially complied with the statutory redemption requirements and therefore the parties’ redemption *petitions* were valid.” *Id.* ¶ 27 (emphasis added). As to the Trust, it held only that its petition was timely and that its timely tender of funds to the district court substantially complied with the statute. *See id.* ¶ 26. Though it noted that Kaushal had argued that a junior lienholder had no redemption rights when a former defendant owner redeemed, *see id.* ¶ 23, it did not examine the merits of that argument, *see id.* ¶¶ 23-27. Instead, it remanded to the district court to allow the parties to “exercise” their rights, *id.* ¶ 28, presumably by obtaining a decision on the merits of their competing petitions.

Both below and here, the Trust cited *Santa Fe S. Ry. v. Baucis LLC*, 1998-NMCA-002, 124 N.M. 430, as support for the proposition that *Kaushal I* would not have addressed the validity of the Trust’s petition had it determined that the Trust had no rights. **[XBIC 6]** But what *Baucis* actually says is that the courts should not issue advisory opinions or decide issues that are not yet ripe. *See id.* ¶ 24. And until the *Kaushal*

I court (1) held that Kaushal possessed valid rights and (2) rejected his argument that the Trust's petition was untimely, the question of which parties were entitled to redeem was not ripe for decision. *Kaushal I* quite properly did not take the additional step of making that decision in the first instance. See, e.g., *Arias v. Phoenix Indem. Ins.*, 2009-NMCA-100, ¶¶ 19-20, 147 N.M. 14 (declining to address issues raised in the summary judgment motion and on appeal when the district court had not ruled on those arguments in the first instance); see also *Rummel v. Lexington Ins.*, 1997-NMSC-041, ¶ 16, 123 N.M. 752 (“[O]n appeal, when the trial court’s grant of summary judgment is grounded upon an error of law, the case may be remanded so that the issues may be determined under the correct principles of law.”).

As *Kaushal II* correctly observed, all of the Trust’s arguments since remand have been based on its misunderstanding of *Kaushal I*. *Kaushal I* did not decide the ownership of the Property. As a result, the district court was required to do so in the first instance on remand. It was free to apply the law to the facts in the first instance, consistent with *Kaushal I*. Whether it did so or whether it agreed with the Trust that the issue

had already been decided by *Kaushal I* is unclear but, in either case, the decision awarding a 50% interest to the Trust was error.

D. Even if *Kaushal I* had given the Trust 50% of the Property, this Court would not be bound by that clearly erroneous result

Even if the Trust is correct that *Kaushal I* gave it 50% of the Property—a conclusion that its author expressly rejected as a “misunderstanding” in *Kaushal II*—this Court would not be bound to uphold that conclusion. The doctrine of the law of the case “is discretionary and flexible, not a doctrine of inflexible law.” *Garcia v. Garcia*, 2010-NMCA-014, ¶ 70, 147 N.M. 652 (citing *UU Bar Ranch*, 2009-NMSC-010, ¶ 21). As this Court has noted, the doctrine should not be applied when the former appellate decision was “clearly, palpably, or manifestly erroneous or unjust.” *Reese v. State*, 1987-NMSC-110, ¶ 5, 106 N.M. 505 (citing 5 Am. Jur. Appeal and Error § 750, at 194 (1962)).

Had *Kaushal I* held that a junior lienholder could partially redeem when less than all of the heirs of a former defendant owner had also redeemed, that holding would have been clear error. As Kaushal argued below, [NMCA BIC 18-22] the 2007 amendments to the redemption statute were adopted to foreclose that result. Prior to their amendment

in 2007, the statutes “did not prioritize the redemption rights of the former defendant owner or his heirs and assignees or junior lienholders.” *Kaushal I*, 2021-NMCA-010, ¶ 12. Instead, the first person to redeem took everything, resulting in a race to the courts. *See Bankers Tr. Co. v. Woodall*, 2006-NMCA-129, ¶ 15, 140 N.M. 567. This changed with the 2007 amendment. *See id.* ¶ 13. After the amendment, the statute provided:

[T]he former defendant owner *shall have the first priority* to redeem the real estate. *If the former defendant owner does not redeem the real estate* as provided in this subsection, each junior mortgagee or junior lienholder shall have a right to redeem the real estate. The order of priority of such redemption rights shall be the same priority as the underlying mortgages or liens, as set forth in the court order, judgment or decree of foreclosure or as otherwise determined by the court.

Section 39-5-18(A)(3) (emphases added). By the express terms of the statute, a junior lienholder only has a right to redeem “[i]f the former defendant owner does not redeem” *Id.*

As a result, the current statute “prioritizes the rights of former-defendant owners *over the rights of junior lien holders.*” *Kaushal I*, 2021-NMCA-010, ¶ 10 (citing § 39-5-18(A)(3)) (emphasis added). Where a former defendant owner redeems, the rights of any junior lienholders are

extinguished. See Section 39-5-18(A)(3); accord *Nationstar Mortg. LLC v. Chenoweth*, No. A-1-CA-35696, mem. op. ¶ 4 (N.M. Ct. App. Apr. 2, 2018) (nonprecedential) (explaining that under § 39-5-18(A)(3), “junior lienholders hold a right of redemption *only if the former owner defendant does not exercise their first priority right of redemption.*” (emphasis added)). Though no precedential opinion has yet stated this holding, it is clear from both the statute itself and from *Chenoweth* that after the 2007 amendments, a junior lienholder may redeem only if no former defendant owners redeem.

Kaushal I did not hold that the Trust owned 50% of the Property as a tenant in common with Kaushal. Had it done so, however, this Court would be free to overturn that ruling, even in the current procedural posture, because the law of the case doctrine does not bind this Court to follow a holding that is clearly erroneous.

IV. CONCLUSION

Because the *Kaushal I* court was not asked to decide and did not decide the ownership of the Property, the law of the case doctrine did not require the district court to award any of Property to the Trust. *Kaushal I* merely reversed an erroneous summary judgment, leaving the task of

applying the redemption statute under the correct standard to the district court on remand. *Kaushal II* correctly held that the Trust, as a junior lienholder, could not redeem when a former defendant owner redeemed, and this Court should affirm that part of the opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 26, 2024, a true copy of this Answer Brief was delivered via the Court's electronic filing and service system to opposing counsel of record.

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