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

2 **PHILLIP ORTEGA,**

3 Plaintiff-Appellant,

4 v.

NO. 35,437

5 **GERALDINE C. JOHNSON, FIELD**
6 **CLAIMS REPRESENTATIVE, FARMERS**
7 **INSURANCE COMPANY OF ARIZONA,**

8 Defendants-Appellees.

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

10 **David K. Thomson, District Judge**

11 Phillip Ortega

12 Santa Fe, NM

13 Pro Se Appellant

14 O'Brien & Ulibarri, PC

15 Daniel O'Brien

16 Albuquerque, NM

17 for Appellees

18 **MEMORANDUM OPINION**

19 **WECHSLER, Judge.**

1 {1} Appellant, Phillip Ortega, appeals the dismissal of his complaint with prejudice.
2 We issued a notice of proposed summary disposition proposing to affirm. Appellant
3 has responded with a timely memorandum in opposition, which we have duly
4 considered. We remain unpersuaded that our initial proposed disposition was
5 incorrect, and we therefore affirm.

6 **DISCUSSION**

7 {2} Appellant continues to argue that the district court erred in dismissing his
8 complaint for failing to include the alleged tortfeasor as a party in the lawsuit. [MIO
9 2-3] *See* Rule 1-019(A) NMRA (discussing joinder of indispensable parties). We
10 review the district court’s decision under Rule 1-019(A) for abuse of discretion. *See*
11 *Little v. Gill*, 2003-NMCA-103, ¶ 4, 134 N.M. 321, 76 P.3d 639 (stating that review
12 of a Rule 1-019 dismissal is for abuse of discretion). “An abuse of discretion occurs
13 when a ruling is clearly contrary to the logical conclusions demanded by the facts and
14 circumstances of the case.” *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930
15 P.2d 153.

16 {3} We briefly reiterate the relevant facts. Appellant filed a civil complaint on
17 August 29, 2014, in which he alleged that he was injured as a result of an automobile
18 accident caused by Farmers’ insured and that Farmers was liable for various damages.
19 [RP 1-3] In the complaint, Appellant named only Farmers and Geraldine Johnson, the

1 field claims representative, as defendants. Appellant did not include the alleged
2 tortfeasor, Carla Kountoupes, as a party. [RP 1-2] On March 18, 2015, the district
3 court entered an order granting a defense motion to dismiss without prejudice, stating
4 that, pursuant to *Little*, Appellant did not have a direct cause of action against Farmers
5 and that the case could not proceed without including the alleged tortfeasor as a
6 defendant. [RP 37, 39] The district court ordered that Appellant had thirty days in
7 which to file an amended complaint naming the alleged tortfeasor. [RP 40] Thereafter,
8 Appellant did not file an amended complaint in district court, and, on February 23,
9 2016, the district court entered an order dismissing the case with prejudice. [RP 97]

10 {4} We agree with the district court that dismissal was proper under these
11 circumstances. In *Little*, this Court held that, in the absence of a direct right to sue the
12 insurance company, an injured third-party cannot maintain an action against a
13 tortfeasor's insurer without the presence of the tortfeasor or the tortfeasor's successor
14 or representative in the litigation. *See Little*, 2003-NMCA-103, ¶ 21; *see also Raskob*
15 *v. Sanchez*, 1998-NMSC-045, ¶ 3, 126 N.M. 394, 970 P.2d 580 (stating the general
16 rule that an injured third party ordinarily has no claim directly against the liability
17 insurer of a negligent defendant in the absence of a contractual provision or statute to
18 the contrary).

1 {5} In his memorandum in opposition, Appellant attempts to distinguish this case
2 from *Little* on the basis that, in *Little*, there was no dispute that the insurance contract
3 did not provide a direct cause of action against insurance company. [MIO 2] Appellant
4 argues that unlike *Little*, in this case, the insurance contract was not in evidence, and
5 Farmers had the burden to prove that Appellant did not have a direct cause of action
6 against it by introducing the insurance contract into evidence to settle the issue. [MIO
7 2-3] However, as we stated in our notice of proposed summary disposition, a party
8 asserting a claim, in this case Appellant, has the burden to allege facts to establish that
9 a claim exists upon which relief can be granted. *See* Rule 1-008 (A)(2) NMRA
10 (requiring a pleading which sets forth a claim for relief to contain a short and plain
11 statement of the claim showing that the pleader is entitled to relief); Rule 1-012(B)(6)
12 NMRA (allowing motion for dismissal of a complaint for a plaintiff's failure to state
13 a claim upon which relief can be granted). *Little* does not stand for the proposition that
14 the insurer has the burden to prove that a third-party has no direct cause of action by
15 introducing its contract with its insured into evidence. To the extent that Appellant
16 sought to assert a direct claim against Farmers, it was his burden to allege the facts
17 that established a direct claim. It was not Farmers' burden to prove that a direct claim
18 did not exist. *See It's Burger Time v. N.M. Dep't of Labor*, 1989-NMSC-008, ¶ 11,
19 108 N.M. 175, 769 P.2d 88 (“[I]t is well established in New Mexico that the party

1 seeking to establish the existence of a fact bears the burden of proof.”); *Wallace v.*
2 *Wanek*, 1970-NMCA-049, ¶ 9, 81 N.M. 478, 468 P.2d 879 (stating that the burden of
3 proof is on the party seeking to establish a fact).

4 {6} Appellant also argues that he could not sue the alleged tortfeasor because “the
5 person who caused the crash is not the policyholder and she was allowed to plead no
6 contest and a person who gets to plead no contest can’t be sued.” [MIO 2] However,
7 Appellant’s complaint alleges that the person who caused the crash was Farmers’
8 insured. [RP 2] We therefore reject this assertion. *See Udall v. Townsend*,
9 1998-NMCA-162, ¶ 3, 126 N.M. 251, 968 P.2d 341(stating that we will reject an
10 appellant’s statement of the facts where the record shows otherwise). Additionally,
11 Appellant cites no authority for this proposition. *See ITT Educ. Servs., Inc. v. N.M.*
12 *Taxation & Revenue Dep’t*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969
13 (stating that this Court will not consider propositions that are unsupported by citation
14 to authority); *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d
15 1329 (stating that where a party cites no authority to support an argument, we may
16 assume no such authority exists).

17 {7} Appellant also continues to argue that he had a direct cause of action because
18 Farmers paid for the repairs to his motorcycle. [DS 3] Appellant states that by paying
19 for the repairs to his motorcycle, Farmers was “admitting and accepting liability if

1 they were not liable then why pay.” [DS 3; RP 2; MIO 2] Again, Appellant has cited
2 no authority either for the proposition that Farmers admitted and accepted liability for
3 the crash by paying for repairs or that its paying for the repairs created a direct cause
4 of action against it. Appellant also states in his memorandum in opposition that he was
5 unable to find any authority to support this position after searching. [MIO 2] We
6 therefore reject this argument. *See ITT Educ. Servs., Inc.*, 1998-NMCA-078, ¶ 10
7 (stating that this Court will not consider propositions that are unsupported by citation
8 to authority); *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2 (stating that where a party
9 cites no authority to support an argument, we may assume no such authority exists).

10 {8} In his docketing statement, Appellant also raised an issue arguing that he made
11 direct claims against Farmers pursuant to the Trade Practices Fraud Article (TPFA)
12 of the Insurance Code, NMSA 1978, § 59A-16-1 to -30 (1984, as amended through
13 2016). *See Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 23, 135 N.M. 397, 89 P.3d
14 69 (holding that the TPFA provides a direct cause of action against an insurer for
15 third-party claimants who are injured by an insurance company’s violation of Section
16 59A-16-20(E)). In our notice of proposed summary disposition, we proposed to hold
17 that Appellant could not bring a claim against Farmers for violation of the TPFA
18 because there has been no judicial determination of negligence in favor of Appellant
19 against the insured, as Appellant did not sue the insured for negligence. *See Hovet*,

1 2004-NMSC-010, ¶ 26 (holding that a third-party claimant's statutory cause of action
2 against the insurer for unfair settlement practices must await the conclusion of the
3 underlying negligence action between the claimant and the insured, and the third-party
4 claimant will not even have an action under Section 59A-16-20(E), unless and until
5 there has been a judicial determination of the insured's fault and the amount of
6 damages awarded in the underlying negligence action). In his memorandum in
7 opposition, Appellant states that he does not oppose our proposed disposition of this
8 issue, and we therefore affirm the district court's dismissal of Appellant's claims
9 under the TPFA.

10 {8} For these reasons, we affirm the district court.

11 {9} **IT IS SO ORDERED.**

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13

JAMES J. WECHSLER, Judge

14 **WE CONCUR:**

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JONATHAN B. SUTIN, Judge

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LINDA M. VANZI, Judge