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Property Law

Berta E. Hernandez

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BERTA E. HERNANDEZ*

This section of the Survey of New Mexico law reviews decisions of the state courts in the area of property law. The article discusses case law holdings in four parts: Private and Public Land Use Controls; Actions and Proceedings; Deeds and Titles; and Contracts. The cases this year present significant developments in the law, particularly in the private nuisance area and in the New Mexico view of real estate contracts.

I. PRIVATE AND PUBLIC LAND USE CONTROLS

Four cases decided this year concerned private and public controls on the use of land. Three cases focused on private controls—one easement case[1] and two restrictive covenant cases.[2] The case on public land use control addressed issues on zoning.[3]

A. Private Land Use Controls

1. Easements

In *Brooks v. Tanner,*[4] the New Mexico Supreme Court invalidated a transfer of an easement appurtenant.[5] Tanner owned "[six] lots in the Monticello Subdivision of Tijeras Canyon, east of Albuquerque."[6] In 1953, Tanner conveyed two lots, together with a 12-foot easement to one

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*Professor Hernandez is an Assistant Professor of Law at the University of New Mexico, School of Law. The author would like to give special thanks to Neil Candelaria and Shari Weinstein for their research assistance in connection with the Article.

1. Brooks v. Tanner, 101 N.M. 203, 680 P.2d 343 (1984).

2. Lockwood v. Steiner, 101 N.M. 783, 689 P.2d 932 (1984); Whorton v. Mr. C's, 101 N.M. 651, 687 P.2d 86 (1984).

3. City of Las Cruces v. Huerta, 102 N.M. 182, 692 P.2d 1331 (Ct. App. 1984).

4. 101 N.M. 203, 680 P.2d 343 (1984). The Brooks are the plaintiffs-buyers of the property in question.

5. The court provided a definition of an appurtenant easement as follows:

> If it appears from such a construction of the grant on reservation that the parties intended to create a right in the nature of an easement in the property retained for the benefit of the property granted, or to reserve such a right in the property granted for the benefit of the property retained, as the case may be, such right will be deemed an easement appurtenant, and not in gross, regardless of the form in which such intention is expressed.

Brooks, 101 N.M. at 205, 680 P.2d at 345 (quoting 28 C.J.S. *Easements* § 4 (1941)).

6. *Brooks,* 101 N.M. at 204, 680 P.2d at 344.

Calverley.[7] The easement allowed Calverley access to a main road of the subdivision.[8]

In 1969, Tanner sold Brooks two lots and portions of two other lots.[9] Tanner retained a 12-foot easement in the land sold in order to have access from his property to a main road.[10] In 1972, Tanner sought to convey a right to use the easement across the Brooks' property in order to provide access to the main road to the Oliver property[11] located to the east of Tanner's lots.[12]

In 1972, the Herreras succeeded in ownership to the Oliver property.[13] In 1980 they graded a road, as successors in interest to the 1972 easement, to have access to their property from the main road.[14] This new road ran across the portion of the Brooks' land on which Tanner had reserved an easement.[15] Because of the improved condition of the road, traffic on the Brooks' property substantially increased.[16]

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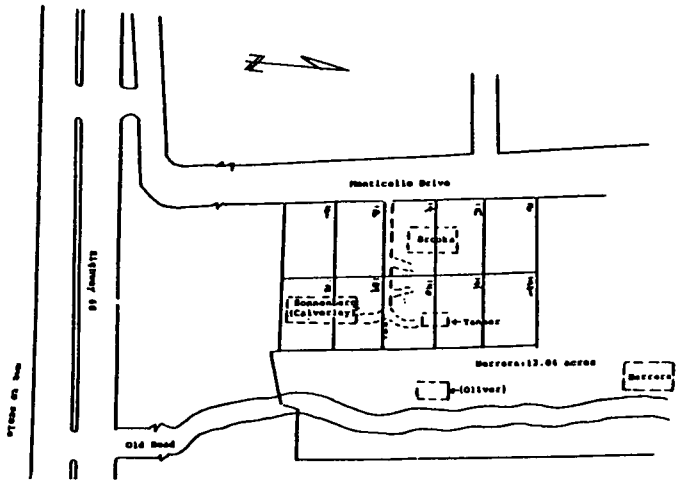
7. *Id.* The lots Calverley purchased were numbered 138 and 139. The 12 foot easement granted was over lot 14 and a portion of lot 140. The following sketch, which appears in the supreme court opinion, is helpful for the analysis of the facts in this case. *Id.*



8. *Id.* The main road is Monticello Drive. *Id.*

9. *Id.* Brooks purchased lots numbered 14 and 15 and the westerly 40 feet of lots 140 and 141. Tanner retained the easterly portion of lots 140 and 141. *Id.*

10. *Id.* at 204-05, 680 P.2d at 344-45. The main road to which the easement provided access is Monticello Drive. *Id.*

11. *Id.* at 205, 680 P.2d at 345. This easement was purportedly created by an instrument entitled "Deed of Right of Way and Easement." *Id.*

12. *Id.*

13. *Id.*

14. *Id.* Prior to building the new road they accessed their property via an "old road" that intersected with the public highway. *Id.*

15. *Id.*

16. *Id.* The increased traffic was due, in part, to the fact that the Herrera tract now contained a number of mobile homes. *Id.*

The Brooks sought a preliminary injunction to stop the Herreras' use of their property.[17] The Brooks asserted that the grant of the easement from Tanner to the Herreras' predecessor-in-title, Oliver, had no legal effect.[18]

The district court held that Tanner's reservation of an easement for use as a road over the Brooks' property had been conveyed properly.[19] Thus, the Herreras, as successors-in-interest, could use the road.[20] The Brooks appealed the district court decision.

The supreme court focused on the type of easement Tanner expressly reserved in his conveyance to the Brooks. The court analyzed whether the easement granted was appurtenant[21] or in gross,[22] and concentrated its analysis on the provisions of the contract between the parties.[23]

The supreme court found that the seller had reserved an appurtenant easement,[24] the use of which he had no power to expand or convey in connection with the Oliver tract now owned by the Herreras.[25] The court based its finding on the definitions of the types of easements in the context of the contract. The contract created a benefit of ingress and egress to the main road from Tanner's property.[26] The easement was appurtenant, with Tanner's retained property as the dominant estate and the Brooks'

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* In addition, the court concluded that Herrera had an easement by prescription as well as by necessity. *Id.*

21. *Id. See supra* note 5 for the court's definition of an appurtenant easement.

22. The definition of an easement in gross used by the court is "[i]f it appears . . . that the parties intended to create a right to be attached to the person to whom it was granted or by whom it was reserved, it will be deemed to be an easement in gross." *Id.* (quoting 28 C.J.S. *Easements* § 4 (1941)).

23. The court studied the following contractual provision in the real estate contract entered into between Tanner and Brooks:

> SUBJECT TO restrictions, reservations and easements of record and easements as shown upon the plat of the above described property prepared by Ronald E. Tyree, Registered Professional Land Surveyor No. 3516, in accordance with survey made March 29, 1969, a copy of which plat is hereto attached, marked Exhibit 'A' and made a part hereof; and to taxes for the year 1969 and subsequent years, and SUBJECT also to a road easement granted to Hazel Calverley along and over the Southerly twelve (12') feet of the above described property, recorded in Book D-598, page 80, Records of Bernalillo County, New Mexico; and Owner hereby reserves an easement for road purposes over the Southerly twelve (12') feet of the above described property for use in connection with that portion of Lots 140 and 141 of Monticello and not included in this sale and for ingress and egress from his property to Monticello Drive, which easement shall be left open,. . . .

Id. at 206, 680 P.2d at 346.

24. *Id.*

25. *Id.* at 207, 680 P.2d at 347. The court also held that there was no evidence to support the creation of an easement by prescription or by necessity. *Id.* at 207-08, 680 P.2d at 347-48.

26. *Id.* at 206-07, 680 P.2d at 346-47.

property as the servient estate.[27] Here, no personal right was created in favor of any individual because the easement was created for a limited purpose and Tanner's interest in the easement could not be conveyed freely. The instrument did not create a right to use plaintiffs' property for access from the Herrera tract to the main road,[28] and the defendant could not convey a right he did not have.

Thus, in *Brooks,* the court protected a servient estate from increased use by invalidating a conveyance that was not limited to the scope originally envisioned by the servient tenants. In addition, the court protected the scope of the easement retained by strictly construing the language granting the right of use.

2. Restrictive Covenants

The first of the two covenants cases this article addresses is *Whorton v. Mr. C's & Western Palace Restaurant.*[29] *Whorton* concerned the enforceability of a covenant that prohibited the sale of alcoholic beverages in public places.[30]

Whorton sought an injunction from the district court to keep defendants from selling wine and beer in their restaurants, located in the original townsite of Alamogordo.[31] All the parties to the litigation held land titles that contained covenants which prohibited the sale of alcoholic beverages in public places.[32]

The district court refused to issue an injunction because it found that the character of the property had changed materially since the covenants were first put into force. Such changes would render enforcement of the covenants inequitable.[33]

On appeal, Whorton challenged the ruling on the grounds that the findings were not supported by substantial evidence.[34] The supreme court considered whether the trial court had correctly used the doctrine of changed circumstances[35] to find that it would be inequitable and oppressive

27. The court in its opinion referred to rules of construction and noted the preference for appurtenant easements over easements in gross. *Id.* at 206, 680 P.2d at 346 (citing 3 R. POWELL, THE LAW OF REAL PROPERTY § 405, at 34-20 (1981) [sic]; 28 C.J.S. *Easements* § 4 (1941)).

28. *See supra* note 23.

29. 101 N.M. 651, 687 P.2d 86 (1984).

30. *Id.* at 652, 687 P.2d at 87.

31. *Id.*

32. *Id.*

33. *Id.* at 652-53, 687 P.2d at 87-88. The court used the "changed circumstances" doctrine. *See* 5 R. POWELL, THE LAW OF REAL PROPERTY § 679[2] (1985). *See also infra* note 35.

34. *Whorton,* 101 N.M. at 653, 687 P.2d at 88.

35. The court stated that for the "changed circumstances" standard to be satisfied, the changes must render it impossible to obtain the benefits that were intended by the creation of the covenant. It cited the RESTATEMENT OF PROPERTY § 564 (1944). It is expected that some changes that occur are normal; and changes that merely reduce the benefits to be derived from enforcement of the covenant do not suffice for a court to refuse to enjoin a violation. Even a substantial change that does not destroy the benefit is not sufficient for a court to refuse to grant equitable relief. *Id.*

to enforce the covenants because the changes that occurred were of such importance that they defeated the purpose of the covenant.

The supreme court reversed the trial court and remanded the case. It concluded that although the trial court had applied the correct legal doctrine, its findings were not supported by substantial evidence.[36] The changed circumstances doctrine prohibits courts from enjoining violations of covenants in instances when the changes in an area "are so radical as to frustrate the original purposes and intention of the parties to such restrictions."[37] The court's role, therefore, is to determine whether the changes are of such magnitude so as to defeat the purpose of the covenant.

In *Whorton,* the purpose of the covenant in the original deeds was to preserve the desirability of the residential and business areas to the inhabitants.[38] The court concluded that the evidence did not show that the changes the area underwent defeated the purpose for which the restrictions were established.[39] Although the restrictions rendered the restaurants less competitive, the court found that this was an insufficient reason to deny the equitable relief sought.[40]

The majority of the court read the restriction strictly and interpreted the "changed circumstances" doctrine narrowly. In a strong dissent, Justice Stowers stated that to decide whether the standard of enforceability of a covenant, based on the changed circumstances, is met, the court must look at the totality of the circumstances.[41] He noted that the record supported the trial court's finding that the use, character and enjoyment of the property covered by the covenant had materially changed.[42] The original purpose was to facilitate the development of Alamogordo, which development had been completed.[43] "When conditions change, as in the present case, restrictive covenants should not be allowed as a barrier to progress and change."[44] Thus, according to Justice Stowers there was no valid purpose for enforcement of the covenant.

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36. *Id.* at 654-55, 687 P.2d at 89-90. The court stated the rule of law that "[t]he judgment of a trial court will not be disturbed on appeal if the findings of fact entered by the trial court are supported by substantial evidence . . ." *Id.* at 653, 687 P.2d at 88 (citing Flinchum Constr. Co. v. Central Glass & Mirror Co., 94 N.M. 398, 611 P.2d 221 (1980)). The supreme court continued stating, "[h]owever, findings not supported by substantial evidence which have been properly attacked cannot be sustained on appeal, and we must reverse any judgment dependent upon such findings." *Id.* (citing Getz v. Equitable Life Assurance Soc'y of the United States, 90 N.M. 195, 561 P.2d 468, *cert. denied,* 434 U.S. 834 (1977)).

37. *Whorton,* 101 N.M. at 653, 687 P.2d at 88 (quoting Chuba v. Glasgow, 61 N.M. 302, 305, 299 P.2d 774, 776 (1956)).

38. *Id.* at 654, 687 P.2d at 89.

39. *Id.* at 89.

40. *Id.*

41. *Id.* at 655, 687 P.2d at 90 (Stowers, J., dissenting).

42. *Id.*

43. *Id.*

44. *Id.*

Lockwood, Abrams & Brown v. Steiner & Barker[45] is the second restrictive covenant case considered by the court. In *Lockwood,* the court interpreted an existing covenant in order to ascertain its scope[46] and decided whether adjacent homeowners could enforce the covenant.[47]

The property was part of a subdivision that came into existence in 1930. All the deeds from the development company contained a covenant that restricted each lot to one private residence.[48]

Lockwood sought a declaratory judgment.[49] He claimed the restrictive covenant prohibited the Steiners from splitting their lot into two parcels and conveying one of the parcels to the Barkers.[50] The trial court rendered judgment for Lockwood and held that adjacent owners had a right to enforce the covenant.[51]

On appeal, the appellants proposed that applying the rules of construction to the covenant would result in a residential use restriction rather than a one-dwelling per lot restriction.[52] The supreme court disagreed and affirmed the judgment of the trial court.[53]

The court said that the first step in construing a covenant is to ascertain the intention of the parties by reading the language of the covenant "in the light of the whole instrument and the circumstances under which it was executed."[54] After looking at the language of the covenant and the circumstances under which it was executed, the court rejected the Steiners' suggestion that the restriction merely addressed the nature of the use. The court concluded that because most lots have a covenant restricting use to one residence, the trial court's construction of the covenant was reasonable.[55] The court refused to lift the restriction from individual lots within the subdivision because it would hinder reliance on such restrictions. The original purpose of the covenant had not changed, and it still provided a benefit to the lots. The covenant, therefore, would be enforced.[56]

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45. 101 N.M. 783, 689 P.2d 932 (1984).
46. *Id.*
47. *Id.*
48. *Id.* at 784, 689 P.2d at 933. The covenant provides "[t]hat no building whatever except a private dwelling house with the necessary outbuildings, including a private garage, shall be erected, placed or permitted on said premises or any part thereof, and said dwelling house permitted on said premises shall be used as a private residence only. . . ." The covenant appeared in appellants' and appellees' deeds.
49. *Lockwood,* 101 N.M. at 783, 689 P.2d at 932. Hereinafter plaintiffs-appellees will be referred to as "Lockwood." It is noteworthy that the zoning in the area allows a single family dwelling per half acre. The Steiners' lot, the one in question in this case, is 2.53 acres. *Id.* at 784, 689 P.2d at 933.
50. *Id.* at 783, 689 P.2d at 932.
51. *Id.*
52. *Id.* at 784, 689 P.2d at 933.
53. *Id.* at 783, 689 P.2d at 932.
54. *Id.* at 784, 689 P.2d at 933 (citing Rowe v. May, 44 N.M. 264, 101 P.2d 391 (1940)).
55. *Id.*
56. *Id.* at 785, 689 P.2d at 934.

Thus, as in *Whorton,* the supreme court read and construed the *Lockwood* covenant strictly, according to its terms. It is apparent that so long as the benefit of a covenant still exists, according to its creation and purpose, the courts will uphold it. Exceptions such as changed circumstances will be read narrowly.

B. Public Land Use Controls—Zoning

The last case in this section concerns zoning restrictions. In *City of Las Cruces v. Huerta & Apostolic Tabernacle de Las Cruces,*[57] the court of appeals considered whether certain restrictions were inapplicable to the operation of a religious school because it was a pre-existing[58] or incidental use[59] to a permitted use. It also considered whether disallowing the operation of the school would violate the free exercise clause of the first amendments to the United States and New Mexico Constitutions.[60]

The church owned a building in Las Cruces where it had conducted religious services for several years. In 1979 when the church building was erected, the area was zoned R-1 residential. This classification allowed construction of single family homes, churches and "incidental church facilities."[61]

A new zoning scheme enacted by the city became effective on August 3, 1981. Although the area remained zoned residential, the new scheme required that private, public or parochial schools could only be established pursuant to the issuance of a special use permit by the planning and zoning commission after holding a public hearing.[62]

Without applying for a special use permit, the church erected a school building in early 1981 and began holding classes in September.[63] The city petitioned the district court for an order to enjoin operation of the school because it was in violation of the new code. After a hearing, the court granted plaintiff the requested relief. The trial court found that the

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57. 102 N.M. 182, 692 P.2d 1331 (Ct. App. 1984).

58. *Id.* at 183, 692 P.2d at 1332. *See* HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 146-47 (1975): Nearly all zoning ordinances provide that a use may continue if it lawfully preexists the adoption of a zoning ordinance, though it would be unlawful if the use was established after the passage of the ordinance.

In *City of Las Cruces,* the court noted that "a non-conforming use existing at the time of the effective date of a zoning ordinance may be continued . . ." 102 N.M. at 185, 692 P.2d at 1334.

59. *Id.* at 184, 692 P.2d at 1333. The court defined "incidental use" as "[a]n accessory, incidental or auxiliary use is one which is dependent on or pertains to the principal or main use, and which may be considered an integral part of the primary use." *Id.* at 184, 692 P.2d at 1333 (citing 8 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.125, at 377 (3d. ed. 1983) (footnotes omitted)).

60. U.S. CONST. amend. I. provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for redress of grievances." The free exercise claim is also made under N.M. CONST. art. II, § 11.

61. *City of Las Cruces,* 102 N.M. at 183, 692 P.2d at 1332.

62. *Id.* Hereinafter the new zoning scheme will be referred to as the new scheme, new plan or new code.

63. *Id.* The school use was not limited to religious instruction. *Id.*

school use was a more intensive use than the church use, that the operation of a school disturbed the peace and quiet of the neighborhood and created a safety hazard, and that commencing to run a school after the effective date of the new zoning scheme was illegal because a special use permit had not been issued.[64]

The defendants appealed the trial court ruling on the following grounds: (1) the operation of the school was an incidental/accessory use of the church premises; (2) operation of the school was a pre-existing use;[65] and (3) operation of the school was protected by the United States and New Mexico Constitutions.[66] The court of appeals affirmed the decision of the trial court and addressed the defendant's three arguments.

First, the court rejected the church's argument that operation of the school was an incidental use to the use of church premises.[67] Although the court did not dispute that the right to a religious use included a right to conduct incidental or accessory uses, it ruled that operation of a parochial school was not an incidental use and, therefore, impermissible without a special use permit.[68]

The church's second argument was that operation of the school was permissible as a prior non-conforming use. However, the court ruled that in order for a use to be considered pre-existing, actual use must have commenced prior to the effective date of the zoning ordinance. A mere intention to commence use does not suffice for a non-conforming use to qualify.[69] The court adopted a rule of use in fact. Because the school here was not in fact in use prior to the effective date of the new code, there was no pre-existing use. Consequently, such use by the church was illegal.[70]

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64. *Id.* at 183-84, 692 P.2d at 1332-33.

65. *Id.* at 184, 692 P.2d at 1333.

66. *Id.* at 185-86, 692 P.2d at 1334-35. *See supra* note 60.

67. *City of Las Cruces*, 102 N.M. at 185, 692 P.2d at 1334. The unchallenged non-conforming use is the church's right to continue operating as a church and any incidental or accessory uses. *See supra* note 59 for definition of incidental/accessory use.

68. *City of Las Cruces*, 102 N.M. at 185, 692 P.2d at 1334 (quoting Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1071, 610 P.2d 273, 276 (1980), *appeal dismissed*, 450 U.S. 902 (1981)).

69. *Id.* at 184-85, 692 P.2d at 1333-34. In support of this rule the court quoted extensively from 8A E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.188, at 34 (3d ed. 1976):

> The general rule is that actual use as distinguished from merely contemplated use when a zoning restriction opposed to it becomes effective is essential to its protection as a lawful nonconforming use. . . . [I]t is not the present intention to put property to a future use but the present use of the property which must be the criterion. . . . [M]ere intentions or plans at the time a zoning ordinance becomes effective to use particular land or dwellings for a certain use does not entitle one to that use in contravention of the ordinance. . . .
>
> A purchase of property with an intention to use it for a particular purpose does not in itself give a right to use it for that purpose as against a subsequent zoning ordinance or restriction.

City of Las Cruces, 102 N.M. at 184-85, 692 P.2d at 1333-34.

70. *Id.* at 185, 692 P.2d at 1334.

Third, the court rejected the church's argument that the United States and the New Mexico Constitutions protected the operation of the school. It recognized the constitutional protection, but noted that the right is not immune from governmental regulations. Municipalities may impose rational and reasonable zoning ordinances upon religious institutions. The city did not prohibit school use—it merely required the church to obtain a special use permit. The court concluded that the regulation was a reasonable exercise of the city's police power.[71]

City of Las Cruces supports the promulgation of reasonable zoning regulations by governmental bodies and ensures the procedural steps in their enforcement. In addition, the case articulates the standards for establishing the scope of incidental and pre-existing uses.

II. ACTIONS AND PROCEEDINGS

This section presents two cases decided during the last year. One case concerned a tax sale.[72] The other, a case of first impression in New Mexico, created a private nuisance action in favor of surface rights holders against mineral rights holders.[73]

A. Tax Sale

In *Tabet v. Campbell*,[74] the Tabets purchased real property in 1963 and in 1971 failed to pay property taxes.[75] In 1973, the county treasurer issued a tax deed to the State of New Mexico for the Tabets' property.[76] The deed was recorded in 1975.

On April 27, 1982, the state notified the Tabets[77] that a tax deed had been issued to the state and if they did not "repurchase the property within 30 days of notice, the property would be sold at public auction."[78] In response, the Tabets made timely payment to the county treasurer. The county treasurer's affidavit was used as evidence that she believed the payment to be for the current tax year. Therefore, she placed it in the pending file. The state, receiving neither payment nor notice of payment from the county treasurer, sold the property to Campbell on June 3, 1982.[79]

Two weeks after the sale, the Tabets sued to invalidate the deed to Campbell and have the property deeded back to the Tabets. The trial

71. *Id.* at 186, 692 P.2d at 1335.
72. Tabet v. Campbell, 101 N.M. 334, 681 P.2d 1111 (1984).
73. Carter Farms Co. v. Amoco Pro. Co., 23 N.M. St. B. Bull. 1173 (Ct. App. Nov. 15, 1984), *rev'd*, Amoco Prod. Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894 (1985).
74. 101 N.M. 334, 681 P.2d 1111 (1984).
75. *Id.* at 335, 681 P.2d at 1112. The amount of unpaid taxes was $42.35.
76. This was done pursuant to N.M. STAT. ANN. § 72-8-15 (1953 & Repl. Pamp. 1961).
77. The notification was pursuant to N.M. STAT. ANN. §§ 72-8-29, 72-8-30 (1953 & Repl. Pamp. 1961).
78. *Tabet*, 101 N.M. at 335, 681 P.2d at 1112.
79. *Id.*

court granted summary judgment for the Tabets. The supreme court affirmed the trial court and held that the Tabets had satisfied the statutory requirements by making timely payment to the county treasurer.[80]

The court considered Campbell's argument[81] that the applicable law is the law at the time the tax is imposed. In 1971, the law provided that the state tax commission,[82] since abolished, was the appropriate government agency to receive tax payments. Therefore, Campbell argued that payment to the county treasurer did not satisfy the statutory requirements.

The supreme court agreed that the *Worman*[83] standard applied.[84] However, it noted that under *Worman,* Campbell's title would be defeated if, *inter alia,* the property was redeemed from the sale.[85] Citing to precedent,[86] the court held that "to redeem" was synonymous with "to repurchase," and held that the Tabets' payment to the county treasurer constituted a repurchase. Consequently, Campbell's title failed.[87]

The supreme court considered the relationship between the State Tax Commission—the government agency designated to collect taxes in 1971—and the county treasurer to determine that the Tabets had "repurchased" the property in 1982. The plaintiffs submitted affidavits[88] which established that the county treasurer was authorized by statute[89] to accept payment of delinquent taxes and was an agent of the state for purposes of tax collection.[90] It, therefore, found that the state was bound by the county treasurer's acceptance of plaintiffs' payment, and declared the defendant's deed to be void.[91]

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80. Two issues were raised on appeal: (1) whether timely payment to the county treasurer satisfied statutory requirements to effect repurchase of property by a delinquent taxpayer; (2) whether the inaction of the county treasurer upon receipt of the payment was sufficient to defeat the defendants' title. Because of its decision on the first issue the supreme court did not address the second issue. *See infra* note 82, for the statutory requirements.

81. The defendant based his argument on Worman v. Echo Ridge Homes Coop., Inc., 98 N.M. 237, 647 P.2d 870 (1982), which he argued had precedential value.

82. In 1971, the law providing for sale of realty for delinquent taxes was N.M. STAT. ANN. §§ 72-8-1—72-8-52 (1953 & Repl. Pamp. 1961). Specifically, section 72-8-32 provided for payment to be made to the state tax commission. The state tax commission was abolished in 1970; its modern equivalent is the New Mexico Taxation and Revenue Department, Property Tax Division. N.M. STAT. ANN. § 9-11-4 (1978). *See Tabet,* 101 N.M. at 335, 681 P.2d at 1112.

83. Worman v. Echo Ridge Homes Coop., Inc., 98 N.M. 237, 647 P.2d 870 (1982).

84. *Tabet,* 101 N.M. at 336, 681 P.2d at 1113. It is noteworthy that, against this argument, the plaintiffs cited Buescher v. Jaquez, 101 N.M. 2, 677 P.2d 615 (1984), where the supreme court held that the applicable law was the law in effect at the time of the tax sale. Here, the court limits its holding in *Buescher* to instances where the tax was imposed in 1975 or later.

85. *Worman,* 98 N.M. at 239, 647 P.2d at 872.

86. *Tabet,* 101 N.M. at 336, 681 P.2d at 1113 (citing Sanchez v. New Mexico State Tax Comm., 51 N.M. 154, 180 P.2d 246 (1947)).

87. *Id.*

88. *Id.*

89. N.M. STAT. ANN. § 7-38-62 (Repl. Pamp. 1983).

90. N.M. STAT. ANN. § 7-38-42 (Repl. Pamp. 1983).

91. *Tabet,* 101 N.M. at 337, 681 P.2d at 1114.

B. Private Nuisance

Carter Farms Co. v. Amoco Production Co.[92] presented a matter of first impression in the New Mexico courts. *Carter Farms* was a private nuisance action based on the failure of the mineral rights owner to restore land to a condition satisfactory to the surface rights owner.[93] Plaintiff, Carter Farms, owned the surface rights to the property in question. Amoco was a lessee of the mineral rights to the same property.[94]

Defendant had drilled two wells on the property. At one of the wells, Amoco drilled four pits—two of which were lined with plastic, one was unlined, and one into which brine water was discharged. After the drilling stopped, Carter Farms wanted Amoco to remove the waste material from the pits instead of merely leveling the pits. Carter Farms alleged that spreading out the waste and building materials would make the land unusable to the company as owner of the property.[95] Carter Farms instituted this action as a private nuisance action based on the defendant's failure (1) to remove the materials brought onto the land to build the pits, and (2) to restore the land to a condition that was acceptable to the plaintiff.[96]

The jury found for Carter Farms; but the court, on its own, granted Amoco a judgment notwithstanding the verdict because the action had no basis in New Mexico law. On appeal, the court of appeals considered whether a lessee has a duty to restore the surface as closely as possible to its original condition, and, if so, whether a breach of this duty supports a private nuisance theory.[97] The court answered the question in the affirmative.[98]

The appeals court strongly argued that "this right of invasion of the

92. 23 N.M. St. B. Bull. 1173 (Ct. App. Nov. 15, 1984), Amoco Prod. Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894 (1985).

93. *Id.*

94. *Carter Farms*, 23 N.M. St. B. Bull. at 1175. The appeals court, quoting Bummer, *The Rancher's Subservient Surface Estate*, 5 LAND & WATER L. REV. 49 (1970), defined the surface owner's rights and the mineral owner's rights as follows:

> The lessee is considered to have the dominant estate and the surface owner the subservient estate. The lessee of the mineral estate has a fundamentally superior position, which entitles him to the free and uninhibited use of the surface estate to such an extent as is reasonably necessary to explore for and develop mineral production. Thus, by the very act of executing the oil and gas lease, the lessor has created a severance of the mineral estate which will entitle his lessee to go upon the land and do all things 'necessary or incidental' to his operations 'to the exclusion of the lessor.' The only qualification made by the courts is that the lessee must exercise his rights 'with due regard' to the rights of the owners of the surface. That quantum of 'due regard' means only that the rancher-lessor may use his surface in any manner not inconsistent with the lessee's rights.

95. *Carter Farms*, 23 N.M. St. B. Bull. at 1174-75.

96. *Id.* at 1174.

97. *Id.* The defendant cross appealed the measure of damages.

98. *Id.*

surface must carry with it certain corresponding duties and obligations."[99] Although the mineral estate is the dominant estate, the holder of that estate has an implied duty to the owner of the surface rights—the dominant estate owner must exercise his or her rights with due regard to the rights of the owners of the surface.[100]

The court of appeals concluded[101] that the theory of recovery most consistent with New Mexico law was a private nuisance theory.[102] Under such a theory the consideration is whether the lessee's use of the surface was reasonable. If the surface owner established that the lessee's use was not reasonable and constituted an interference with the surface owner's use and enjoyment of the property, then the lessee's actions would constitute a private nuisance.[103]

In the present case, the court of appeals ordered the jury verdict reinstated. It found that the jury had been instructed properly regarding the elements of a private nuisance and that there was sufficient evidence to support its verdict.[104]

The supreme court reversed the court of appeals and affirmed the trial court's grant of Amoco's motion for a judgment notwithstanding the verdict.[105] The supreme court reviewed two issues:

> 1. whether the Court of Appeals erred in imposing on a mineral lessee an implied contractual duty to completely restore the surface estate following the cessation of drilling operations, in addition to the remedies available under existing law, and
> 2. whether the Court of Appeals applied the proper measure of damages for injury to real property.[106]

With respect to the first issue, the court noted that Amoco "constructed a reserve pit, as required by the regulations of the New Mexico Oil Conservation Division, which was necessary to its operation at the drilling site. . . ."[107] The supreme court also noted that the trial court had concluded "that Amoco's proposed method of leveling the reserve pit and cleaning the debris was reasonable."[108] The court recognized that several states have statutorily imposed a duty on mineral rights owners to restore

99. *Id.* at 1175.
100. *Id.*
101. *Id.* The court of appeals considered various theories of recovery.
102. *Id.* at 1175-76.
103. *Id.* at 1176.
104. *Id.* The court also found concerning defendant's cross-appeal on the question of damages that the proper measure of damages was cost of restoration and not, as the defendant argued, diminution in value.
105. Amoco Prod. Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894 (Ct. App. 1985).
106. *Carter Farms*, 23 N.M. St. B. Bull. at 1176.
107. *Id.* at 1177.
108. *Amoco*, 103 N.M. at 118, 703 P.2d at 895.

the surface on public nuisance theories,[109] but the court refused "to adopt private nuisance as a theory of recovery for diminution in value [of land]."[110] The supreme court added that a reason for not adopting a private nuisance theory is that usually recovery can be based on negligence.[111] Because the trial court found that Amoco's proposed way of cleaning up was reasonable the court did not remand the case on this question.

With respect to the second issue, the court disagreed with the court of appeals' measure of damages. The supreme court reiterated that the measure of damages under a negligence theory for permanent damage to real property is "the difference between the fair market value of the land prior to the injury and the fair market value of the land after the full extent of injury has been determined."[112] The supreme court held that the court of appeals was incorrect in holding "that the owner of the mineral estate must either restore the surface area to its original condition . . . or pay the costs of restoring even where the use of the surface area is reasonably necessary and the operator has exercised due regard for the rights of the surface owner."[113]

Thus, the supreme court in *Carter Farms* appears to have limited the theory of recovery of surface rights owners to a negligence theory. The basis of a claim will depend upon a showing of an "unreasonably, excessive or negligent use of the surface estate."[114] A private nuisance action will not stand.

III. DEEDS AND TITLES

The court during this time decided four cases on deeds and titles. Two dealt with adverse possession,[115] one with fixtures[116] and one concerned a boundary dispute.[117]

A. Adverse Possession

In *Slemmons v. Massie & Harless*[118] the supreme court considered whether a mortgage constitutes color of title which can support a claim for adverse possession. Slemmons and her late husband purchased the

109. *Id.; See, e.g.*, KAN. STAT. ANN. §§ 55-132a (1983); ILL. REV. STAT. ch. 100-12 § 26 (1983).

110. *Amoco*, 103 N.M. at 119, 703 P.2d at 896.

111. *Id.* The court noted that Carter Farms did not suggest the adoption of a theory that implied responsibility for a contractual provision or an implied duty to restore the land.

112. *Id.* at 913.

113. *Id.*

114. *Id.*

115. Slemmons v. Massie, 102 N.M. 33, 690 P.2d 1027 (1984); Blumenthal v. Concrete Constr. Co., 102 N.M. 125, 692 P.2d 50 (Ct. App. 1984).

116. Kerman v. Swafford, 101 N.M. 241, 680 P.2d 622 (1984).

117. Vigil v. Arguello, 23 N.M. St. B. Bull. 717 (Ct. App. 1984), *aff'd*, 102 N.M. 327, 695 P.2d 477 (1985).

118. 102 N.M. 33, 690 P.2d 1027 (1984).

property in question in 1945 and gave a note and mortgage, in the amount of $3,000, to a bank. In 1950, defendant Massie, plaintiff's sister-in-law, paid off the note and the bank assigned the mortgage to her. Massie never received any payment on the mortgage from Slemmons.[119]

Massie claimed that pursuant to her payment of the note, her brother orally agreed that title in the property vested in her. Massie also alleged that she paid property taxes from 1960 to 1978.[120] Slemmons made contrary claims. She suggested that she and her husband only intended to convey to Massie a one-half interest in the property. Further, she claimed that she and her husband paid at least half of the taxes until 1960 and continued to pay their share until 1978 by virtue of waiving their right to one-half the rental income. It was undisputed that Slemmons placed the property in the USDA Soil Bank program between 1958 and 1963, during which time the proceeds were divided equally between Slemmons and Massie.[121]

In 1978, Massie deeded the property to her daughter and son-in-law, the Harlesses, also defendants in this action. Slemmons brought a quiet title and ejectment action. Massie and the Harlesses maintained that they acquired title to the property by adverse possession and that they satisfied the color of title requirement with the mortgage that the bank assigned to Massie.[122]

On cross-motions for summary judgment, the district court held that Slemmons and Massie were tenants in common, each holding an undivided one-half interest in the property.[123] The supreme court affirmed the district court's decision and held that a mortgage does not constitute color of title pursuant to which ownership may be obtained by adverse possession.[124]

The supreme court reasoned that in order to give color of title, an instrument must attempt to convey title to the adverse party. In New Mexico a mortgage is merely a lien on property and passes no title to the mortgaged property; it gives only a right to enforce the lien.[125] Thus, because title by adverse possession cannot be proven if one of the elements is lacking and here the color of title requirement was missing, color of title cannot pass by adverse possession.[126]

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119. *Id.* at 34, 690 P.2d at 1028.

120. *Id.*

121. *Id.*

122. *Id.* The requirements for establishing title by adverse possession are set forth in N.M. STAT. ANN. § 37-1-21 (1978).

123. *Slemmons,* 102 N.M. at 34, 690 P.2d at 1028.

124. *Id.*

125. *Id.*

126. *Id.* The court noted that the element of hostility also seemed to be lacking. However, the court did not address the issue because the absence of color of title defeated the possibility of establishing title by adverse possession.

In the second adverse possession case, *Blumenthal v. Concrete Constructors Co.*,[127] the court of appeals looked at the necessary elements to establish title by adverse possession. In addition, it examined issues of the adequacy of descriptions in deeds and of equitable defenses.

In June of 1955 the C de Bacas, owners of the real estate in question, executed a note and mortgage in favor of the Toulouses who had guaranteed a bank mortgage for them. In March of 1956 the C de Bacas, by quit claim deed, conveyed the property to the Toulouses, in satisfaction of the mortgage. This deed had a metes and bounds description. In July 1956, the Toulouses conveyed the property by quit claim deed to the Blumenthals using the same description as in the C de Bacas' conveyance. The Blumenthals recorded the deed in August 1956.[128]

Mrs. C de Baca died in 1959. When Mr. C de Baca died in 1965, his heirs never probated his estate. Between April and August of 1973, one of the C de Baca's daughters obtained quitclaim deeds to the property from her siblings. In 1980, she entered into a real estate contract with defendant Concrete to sell her interest in the property. Concrete then recorded a subdivision plat of the property which divided the land into three lots. Defendant Dale and intervenor Denison were involved in conveyances concerning Lot 1. Defendants Houghtons entered into a real estate contract with Concrete for Lot 2. Concrete claimed ownership to Lot 3.[129]

The Blumenthals instituted an action to quiet title to the 16.922 acres which comprised the entire property. The court ruled in favor of the plaintiffs on all but three acres. With respect to those three acres it ruled in favor of intervenor Denison. Both the Blumenthals and Concrete appealed the decision. The court of appeals considered whether: (1) the description of the property in the C de Baca to Toulouse deed was adequate to convey any interest; (2) the instrument from C de Baca to Toulouse was intended to be a mortgage; (3) plaintiffs were affected by laches or estoppel regarding Denison's claim; and (4) Denison had established a claim by adverse possession.[130] These claims are discussed separately below.

1. Adequacy of Deed Description

The court of appeals held that the deed description sufficed to convey the property. The established rule is that to make a valid conveyance, the

127. 102 N.M. 125, 692 P.2d 50 (1984).

128. *Id.* at 128, 692 P.2d at 53. It is noteworthy that during the early sixties plaintiffs had brought two quiet title actions involving the property in question. Neither suit was pursued to completion. The district court, however, did not consider that the dismissal without prejudice of these two actions adversely affected the plaintiffs' title in any way.

129. *Id.*

130. *Id.* at 127-28, 692 P.2d at 52-53.

land must be identifiable and ascertainable.[131] C de Baca personally had escorted the Toulouses and the Blumenthals to the property and pointed to all the boundaries and corner monuments. All parties were satisfied with the boundaries.[132]

The defendant relied on *Komadina v. Edmondson*[133] to point to the requirement of an accurate description and for the statement of the rule that if extrinsic evidence is used for the description, the deed itself must point to such evidence. The court disagreed with the defendant on the applicability of *Komadina* to resolve the dispute. The court noted that New Mexico courts do not limit the admissibility of extrinsic evidence.[134] In addition, the difference between *Komadina* and the present dispute was that in *Komadina,* the court found the evidence regarding the property description insufficient, whereas in *Blumenthal* the court determined the property to be identifiable. Unlike *Komadina,* the court did not question the adequacy of the property description and, therefore, the conveyance was upheld.[135]

2. Is Instrument a Deed or a Mortgage?

The court of appeals found no evidence to support the argument that the parties intended the conveyance to be a mortgage. Because the deed was given to extinguish a debt, the court found substantial evidence to support the trial court's finding that the instrument was a deed.[136]

3. Equitable Defenses

The trial court concluded that the Blumenthals were guilty of laches and estoppel as to the Denison lot only. The Blumenthals contended that the trial court erred in its conclusion. In addition, Concrete disagreed with the trial court's holding and claimed that the Blumenthals were guilty of laches and estoppel with respect to the whole tract. The basis for their claim was that the defenses of laches and estoppel were proper because of plaintiff's absence from the property between 1974 and 1981.[137] The court of appeals disagreed with Concrete's argument, emphasizing that although the plaintiffs did not visit the property for seven years, delay or lapse of time alone did not constitute laches or work an estoppel.[138]

131. *Id.* at 129-30, 692 P.2d at 54-55 (citing Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967), quoting Armijo v. New Mexico Town Co., 3 N.M. (Gild., E.W.S. ed.) 427, 5 P. 709 (1885).

132. *Id.* at 129, 692 P.2d at 54.

133. 81 N.M. 467, 468 P.2d 632 (1970).

134. *Blumenthal,* 102 N.M. at 130, 692 P.2d at 55. The court noted that *Komadina* in fact permits the use of extrinsic evidence.

135. *Id.* at 129-31, 692 P.2d at 54-56.

136. *Id.* at 131, 692 P.2d at 56.

137. *Id.* Also, there had been improvements on the property and conveyance had been made.

138. *Id.* at 131-32, 692 P.2d at 56-57.

4. Adverse Possession

The Blumenthals questioned whether the evidence was sufficient to support a finding that Denison acquired title by adverse possession. The court listed the elements necessary to establish ownership by adverse possession: (1) color of title and (2) actual, visible, exclusive, hostile and continuous possession.[139] The court of appeals concluded that although the evidence supported Denison's color of title for a period of ten years, she could not claim continuous and exclusive possession. The record offered no evidence to establish Denison's predecessors as being in actual, continuous, exclusive possession before 1980. Consequently, there was no support for Denison's claim, and the court of appeals reversed the trial court's decision that awarded Denison ownership of the property.[140]

B. Fixtures

In *Kerman v. Swafford*[141] the court of appeals reviewed whether certain fixtures were part of the realty that was conveyed. The court elaborated on the legal test used to determine whether certain objects are fixtures.

In 1971, defendant Swafford purchased the pre-fabricated buildings in question while he was in possession of the ranch where the buildings were installed.[142] In 1973, a separate federal court action between Kerman and Swafford resulted in a judgment for Kerman, and Kerman settled when Swafford delivered to him two promissory notes and a deed of trust on the ranch. When Swafford defaulted on the notes Kerman started foreclosure proceedings. On September 12, 1978, a judgment entered in favor of Kerman "'forever barred' Swafford from claiming any interest in the property aside from his statutory right of redemption, which Swafford never exercised."[143] The judgment, however, was silent as to the buildings themselves and as to whether they passed with the title to the ranch.

Kerman subsequently purchased the ranch at the foreclosure sale but allowed Swafford to live there, rent-free, until Kerman found a tenant or a buyer. In 1980, upon learning that Kerman found a buyer, Swafford filed a claim of lien on the ranch "alleging that he had an implied contract

139. *Id.* at 132, 692 P.2d at 57 (citing N.M. STAT. ANN. § 37-1-21 (1978)).

140. *Id.* at 132-33, 692 P.2d at 57-58.

141. 101 N.M. 241, 680 P.2d 622 (Ct. App. 1984), *cert. denied*, 101 N.M. 189, 679 P.2d 1287 (1984).

142. *Id.* at 243, 680 P.2d at 624. There were three buildings the ownership of which was in question. All three buildings were metal and prefabricated. They were assembled at the ranch and attached to the realty with bolts screwed onto concrete slabs. The buildings have not been moved since their installation.

143. *Id.*

for services rendered to protect the land and buildings from 1978–82."[144] This led Kerman to institute the instant action to recover possession and quiet title to the ranch property.

One day after Kerman moved for a default judgment, Swafford answered the complaint and raised several counterclaims. The trial court granted the default judgment but refused to strike the counterclaims. Then, on Kerman's motion, the trial court granted summary judgment with respect to the counterclaim that concerned ownership of the buildings.[145] Swafford appealed.[146]

The court of appeals considered whether the buildings on the land were fixtures so that entitlement to the land was tantamount to entitlement to the buildings. The appeals court referred to *Southwestern Public Service Co. v. Chaves County*[147] and noted three relevant factors to be used in determining whether an item is a fixture that must be treated as part of the realty: (1) intent, (2) adaptation and (3) annexation. Further, intent is "the controlling consideration and the chief fixture test," while adaptation and annexation are mainly indicators of intent.[148] Although intent must "affirmatively and plainly appear,"[149] a court may infer or presume a fixture from the circumstances in instances where it "finds sufficient objectively manifested intent."[150]

The court concluded that "the nature of the property, the manner of its construction, and its intended use" indicated that the defendant in-

144. *Id.*

145. *Id.* at 242, 680 P.2d at 623. The other claims were settled by stipulated judgment.

146. The grounds for the appeal were that the plaintiff failed to meet N.M. R. Civ.P. 56 which requires that the moving party establish there exist no genuine issues of material fact; thus, he is entitled to a judgment as a matter of law. The relevant section of N.M. R. Civ. P. 56 provides as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. N.M. R. Civ. P. 56(c).

The defendant also alleged that the trial court abused its discretion in granting a protective order limiting defendant to deposing plaintiff in plaintiff's place of residence. On this issue the court of appeals concluded that the trial court had not abused its discretion.

147. 85 N.M. 313, 512 P.2d 73 (1973).

148. *Kerman*, 101 N.M. at 243, 680 P.2d at 624 (citing Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968)).

149. *Id.* at 244, 680 P.2d at 625.

150. *Id.* (citing Patterson v. Chaney, 24 N.M. 156, 173 P. 859 (1918)). The court further quoted from *Patterson* to establish specific matters that are to be taken into consideration:

> The nature of the property, the manner of its construction, and its intended use all go to show that it was the intention of the party who made the improvements that they should be permanent additions to the land. There is no evidence tending to show a contrary intent. *Under such circumstances the articles, so attached, are presumed to have become a part of the realty.* . . .

24 N.M. at 160, 173 P. at 860 (emphasis added).

tended "to make permanent additions to the land."[151] The court considered two additional factors in support of its holding. First, because the buildings were substantial, they were presumptively part of the realty when Swafford installed them.[152] In addition, the buildings were part of the realty because they were attached to the land when Swafford gave Kerman an interest in the land by way of a mortgage.[153] The court noted that "objects which are attached to the realty at the time a mortgage is granted and which are, from all outward manifestations, intended for permanent use and enjoyment in connection with the realty pass under the mortgage."[154] It is important to note that the court, in determining whether an item is a fixture, used an objective test—circumstances—not a subjective test of the state of mind of the annexor at the time of attachment.[155]

The procedural aspects of the court's affirmance are noteworthy. Because Kerman made a *prima facie* showing of entitlement, Swafford bore the burden of setting forth specific facts to demonstrate a genuine issue of material fact.[156] The court emphasized that when circumstances show a clear intent to affix an article to the realty, the party who asserts the article is a fixture does not have to address every subfactor, i.e., annexation and adaptation.[157] The portable nature of the buildings was not conclusive of lack of intent or annexation. There is no requirement of permanent annexation, and capability of the structures to be disassembled is not tantamount to lack of annexation.[158] Finally, an intent to install portable structures does not create an issue of material fact with respect to an intent to install fixtures. The parties agreed that the buildings were portable. Only the legal effect of the annexation was at issue. The intent to affix fixtures was clear from the facts and circumstances.[159] Thus, Swafford failed to show a genuine issue of material fact that would preclude a grant of summary judgment.

C. Boundary Disputes

Vigil v. Arguello[160] was a quiet title suit in which the parties sought to establish the boundaries between their property. The court, in reaching

151. *Kerman*, 101 N.M. at 244, 680 P.2d at 625.
152. *Id.*
153. *Id.*
154. *Id.* (citing Metropolitan Life Insurance Co. v. Jensen, 69 S.D. 225, 9 N.W.2d 140 (1943)). The court was not persuaded by the defendant's focus on the portability of the buildings. It found that the buildings need not be "permanently" attached to the land to be a fixture.
155. *Id.* at 245, 680 P.2d at 626.
156. *See supra* note 140.
157. *Kerman*, 101 N.M. at 245, 680 P.2d at 626.
158. *Id.*
159. *Id. See also supra* notes 141-49 and accompanying text.
160. 23 N.M. St. B. Bull. 717 (Ct. App. May 15, 1984), *aff'd*, 102 N.M. 327, 695 P.2d 477 (1985).

its decision, discussed respective burdens of proof and the best evidence to resolve the controversy.

Plaintiffs, the Vigils, and defendant, Arguello, each traced their titles to deeds, containing metes and bounds descriptions, given in 1917 by the Trustees of the Community of Los Hueros.[161] The basis of the boundary line proposed by the Vigils was a resurvey of the property that the trial court found conformed with a 1912 map produced pursuant to a survey by a Mr. Fraker. However, the resurvey included calls that differed from those shown on the Fraker map and which appeared on their deed.[162]

The defendant, on the other hand, relied on a 1978 survey which was inconsistent with his deed and the Fraker map. The 1978 survey had calls to establish the common boundary that differed from the calls in the Fraker map used to establish a common boundary.[163]

In their quiet title action, the plaintiffs sued not only to establish the boundary but also to have the court enjoin defendant from maintaining a fence which they claimed encroached on their property. The district court entered judgment for the plaintiff quieting title to all six tracts. It concluded that the parties had acquiesced to the fence line as their common boundary.[164]

The defendant appealed the decision that set the location of the boundary based on plaintiffs' resurvey. The court of appeals agreed with defendant that the trial court erred when it used a resurvey to determine the common boundary.[165] The court explained that neither the plaintiffs' nor the defendant's surveyor followed proper methods in conducting a resurvey. The resurvey should have been based on accurately established points in the original survey.[166] Instead, the resurvey on which the trial court relied established a boundary that differed from that in the deeds and the Fraker map. Thus, the surveyor did not rely on the best available evidence in establishing a corner and did not follow the Fraker calls and distances. Therefore, the boundary established by the resurvey was not supported by substantial evidence. Once there existed an agreed-upon corner, the accepted corner was the best available evidence of a corner

161. *Id.* at 718. Deeds given subsequent to 1917 also contain metes and bounds descriptions. In 1912, one Fraker had surveyed the area and produced a map. Neither the deeds nor the Fraker map made any reference to any monuments along the parties' boundaries.

162. *Id.*

163. *Id.* It is thus noteworthy that both plaintiffs and defendant relied on surveys that were inconsistent with their deeds.

164. *Id.* at 720.

165. The supreme court affirmed the court of appeals' ruling. *Vigil*, 102 N.M. 327, 695 P.2d 477 (1985). It clarified the court of appeals' holding by stating that the ruling was "to direct that the judgment to be entered by the district court be a judgment quieting title in plaintiff to all lands other than the disputed boundary area and dismissing that portion of plaintiffs' claim."

166. The court noted that a subsequent surveyor must try to ascertain where the original surveyor placed the boundaries rather than try to determine where new and modern surveys would place them.

established by the Fraker survey.[167] Subsequent surveyors should have determined the boundaries by using the accepted corner and then followed the Fraker calls and distances.[168]

IV. CONTRACTS

This portion of the article covers three cases. One case is on real estate contracts[169] and two are on real estate brokers' liabilities.[170]

A. Real Estate Contracts

Manzano Industries Inc. v. Mathis[171] is a noteworthy case decided on real estate contracts in which the supreme court held that forfeiture clauses are not unconscionable *per se* even in instances where there has been a substantial down payment. *Manzano Industries* settles the question of the viability of real estate contracts as a means of financing real property in New Mexico.[172]

Purchaser Manzano Industries entered into a real estate contract with seller Mathis for the purchase of land in Las Cruces. On several occasions Manzano failed to make payments when due. However, there was a contractually established 60–day period to cure. In those instances when it had failed to make timely payment, Manzano managed to make payment before the expiration of the 60-day period. This litigation revolved around Manzano's failure to cure a delinquent July 1982 payment within sixty days once Mathis made written demand.[173]

After Manzano's failure to cure, Mathis declared a forfeiture and terminated Manzano's interest in the property. Manzano sued to set aside the forfeiture. The trial court denied the requested relief, and Manzano appealed the decision alleging that the forfeiture clause was unconscionable.[174]

The supreme court affirmed the trial court's decision and concluded that the forfeiture clause was not unconscionable. It noted it "repeatedly" has held real estate contracts with forfeiture clauses to be enforceable.[175]

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167. *Vigil*, 23 N.M. St. B. Bull. at 720; *See supra* note 158 and accompanying text.

168. The court noted that the burden of proof on one who brings an action to quiet title is to establish the strength of his or her own title rather than to establish the weakness of the defendant's title. *Vigil*, 23 N.M. St. B. Bull. at 718.

169. Manzano Indus., Inc., v. Mathis, 101 N.M. 104, 678 P.2d 1179 (1984).

170. Swallows v. Laney, 102 N.M. 81, 691 P.2d 874 (1984); Gouveia v. Citicorp Person-to-Person Financial Center, Inc., 101 N.M. 572, 686 P.2d 262 (Ct. App. 1984).

171. 101 N.M. 104, 678 P.2d 1179 (1984).

172. *See* Huckins v. Ritter, 99 N.M. 560, 661 P.2d 52 (1983). The argument was that if forfeiture clauses will not be enforced by the courts then one has to question whether real estate contracts would continue to exist as an alternative means to finance realty.

173. *Manzano Indus.*, 101 N.M. at 104, 678 P.2d at 1179.

174. *Id.*

175. *Id.* (citing First National Bank v. Cape, 100 N.M. 525, 673 P.2d 502 (1983); Albuquerque National Bank v. Albuquerque Ranch Estates, Inc., 99 N.M. 95, 654 P.2d 548 (1982)).

The court also reiterated that there are strong public policy considerations that favor enforcement of real estate contracts.[176]

The supreme court recognized that real estate contracts will not be enforced in equity when such enforcement "shocks the conscience of the court."[177] However, a substantial down payment is only one of the factors to be considered. Considering other factors of the case, the court concluded that equitable relief was not warranted.[178] With respect to procedural considerations, the court reiterated that the determination of whether a provision shocks the conscience of the court is within the discretion of the trial court. Here, substantial evidence existed to support the trial court's decision to enforce the forfeiture provision.[179]

Manzano Industries established that real estate contracts remain a viable source of financing in New Mexico. The equitable standard—that which "shocks the conscience of the court"—is not a catch-all that will invalidate all real estate contracts. It merely provides equitable protection in instances of forfeiture clauses that are repugnant to notions of fairness.

B. Real Estate Brokers' Liabilities

Swallows v. Laney[180] decided a question of first impression in New Mexico. The supreme court held that the fiduciary relationship between a real estate broker and his or her client may continue after the expiration of the written listing agreement, depending on the transactions and relationships existing between the parties.[181]

The Laneys entered into two exclusive right-to-sell agreements with a real estate brokerage company for the sale of three tracts of land. One

176. *Manzano Indus.*, 101 N.M. at 104, 678 P.2d at 1179. (citing Bishop v. Beecher, 67 N.M. 339, 355 P.2d 227 (1960)).

177. *Id.* at 105, 678 P.2d at 1180 (citing Huckins v. Ritter, 99 N.M. 560, 661 P.2d 52 (1983); Eiferle v. Toppino, 90 N.M. 469, 565 P.2d 340 (1977)). *See also* Hernandez, *Property Law*, 15 N.M.L. REV. 345 (1985); Note, *Vendor and Purchaser-Increased Risks of Forfeiture and Malpractice Resulting From the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.*, 15 N.M.L. REV. 99 (1985); Note, *The Future of the Real Estate Contract in New Mexico: Huckins v. Ritter*, 14 N.M.L. REV. 531 (1984); Note, *The Real Estate Contract in New Mexico: Eiferle v. Toppino*, 8 N.M.L. REV. 247 (1977-78).

178. *Manzano Industries*, 101 N.M. at 105, 678 P.2d at 1180. In this case the purchaser had breached other conditions of the contract. The court stated as follows:

> Substantial evidence existed in this case to support the trial court's decision to enforce the forfeiture provision of the real estate contract. The trial court found that appellant had basically four obligations under the contract: to make timely monthly payments; to keep the premises in good repair; to keep the premises insured; and to pay the taxes on the property. Appellant failed to meet its obligations in all four areas.

179. *Id.* The "other" factors are set forth in text accompanying note 161 *supra*. The court also noted that forfeiture was obtained only after written demand and the expiration of a 60-day period to cure.

180. 102 N.M. 81, 691 P.2d 874 (1984).

181. *Id.* at 84, 691 P.2d at 877.

of the parcels was the subject of the litigation.[182] Swallows was the real estate salesperson who arranged the listing. He was unable to sell any of the tracts prior to the expiration of the agreement on October 15, 1980.[183]

In February of 1981, Swallows and the Laneys began negotiations for Swallows to purchase the tract of land in question. On April 1, 1981, Swallows prepared, signed and mailed a purchase agreement to the Laneys who executed the agreement. A closing date was set for April 30, 1981 and subsequently orally postponed until May 26, 1981.[184]

The Laneys, who were living in Missouri, arrived in New Mexico on May 23, 1981. They were, however, unable to meet with Swallows until the evening of May 26th at which time they found out that he was not ready to close. The Laneys, unwilling to postpone the sale further, refunded Swallows his earnest money deposit and returned to Missouri. They rejected all subsequent attempts by Swallows to perform under the contract. Swallows sued for breach of contract.[185]

The trial court ruled for the Laneys, concluding that Swallows had breached his fiduciary duty and that "the purchase agreement was null and void as a matter of public policy."[186] In addition the court found that Swallows had failed to close in a timely manner, causing the agreement to expire by its own terms. Thus, Swallows could not seek performance of an expired contract.[187]

Swallows appealed and claimed that no fiduciary duty existed[188] and that the court had erred in finding he was not prepared to close the transaction on May 26, 1981.[189] The supreme court affirmed the decision of the trial court.

The supreme court held that, under certain circumstances, a fiduciary relationship between a real estate broker and his or her principal may continue to exist after the expiration of a listing agreement. The court concluded that the facts indicated that a fiduciary relationship continued to exist between the parties.[190] Swallows continued to act as the Laneys'

182. *Id.* at 82, 691 P.2d at 875.
183. *Id.*
184. *Id.* at 83, 691 P.2d at 876.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 86, 691 P.2d at 879.
190. *Id.* at 83-87, 691 P.2d at 876-80. The court noted the established rule that a fiduciary relationship exists during the term of the listing agreement. During such time a broker must adhere to the duties and obligations set forth in the trade's Code of Ethics to disclose all facts within his or her knowledge which may affect his or her principal, *especially* when the broker or salesperson buys the listed property for himself or herself. It takes this a step further here by holding that merely because the listing agreement has expired the broker or salesperson is not absolved from his or her

real estate agent, Swallows continued to give them advice on real estate matters, and the Laneys continued to rely upon his aid.[191]

In order to ascertain if the agent had breached his or her fiduciary duty, the court considered the fairness of the price paid for the property by Swallows and the actual disclosures he made to the Laneys. Although Swallows disclosed that he was buying the property for himself, he failed to disclose all the facts regarding the value of the water rights and the value of the property if sold in parcels rather than as a whole. Those facts might have been material to the Laneys' decision to sell to him. Thus, a breach of the fiduciary duties existed. For policy reasons the transaction was declared void, and Swallows could not specifically enforce the contract.[192] Thus, in Swallows, the court extended the potential fiduciary liability of a real estate broker or salesperson beyond the period of the listing agreement.

In *Gouveia v. Citicorp Person-to-Person Financial Center, Inc.*,[193] the court of appeals concluded that a real estate statement in a listing describing property to be in "All Top Shape" may lead to liability.

A broker showed the Gouveias a townhouse, and a few days later they signed an agreement with defendant Citicorp to purchase the townhouse. The defendant gave the Gouveias an inspection report when they signed the agreement. Gouveias saw the townhouse, but before purchasing it, asked the broker for a copy of the listing. That listing described the property[194] as being in "All Top Shape."[195]

Because of various defects in the townhouse, portions of it were unusable. The Gouveias moved out and sued the various defendants for rescission of the purchase contract or, in the alternative, for damages

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obligations and duties. The court then provides the following (nonexhaustive) list of factors that are relevant to ascertain whether a fiduciary relationship exists:

> 1. The course of conduct between the real estate broker or salesperson and the principal.
> 2. The extent to which the broker or salesperson holds himself out to the principal as a real estate advisor and confidant.
> 3. The degree of the principal's dependence on the broker or salesperson for advice.
> 4. The sophistication of the principal in real estate matters.
> 5. The familiarity of the principal with the value of the subject property.

Id. at 84, 691 P.2d at 877.

191. *Id.*

192. *Id.* at 85-86, 691 P.2d at 878-79. In addition the supreme court held that plaintiff's unpreparedness to close on the date agreed prevents his enforcement of the contract. It found that the trial court's finding with respect to the expiration date was supported by substantial evidence and would stand notwithstanding the plaintiff's contention.

193. 101 N.M. 572, 686 P.2d 262 (Ct. App. 1984).

194. *Id.* at 575, 686 P.2d at 265. The listing and description had been prepared by defendant Weagley on behalf of defendant Citicorp.

195. *Id.*

suffered because of alleged misrepresentations. The trial court granted defendant Weagley's motion for summary judgment.[196] Weagley had contended that "because there was no direct contact with the Gouveias until after they purchased the house, Weagley was not a fiduciary or agent and that New Mexico law imposed no duty on him to discover or disclose the defects."[197]

The court of appeals disagreed with the trial court and concluded that the broker had a legal obligation to the purchasers regarding known or discoverable defects.[198] The court noted that "a listing broker preparing a property description for a multiple listing service knows, or should know, that that description will be relied upon, both by other brokers and by prospective buyers."[199] Therefore, "listing brokers assume a duty to all those who subsequently rely on their characterizations of property by virtue of making those representations."[200] Consequently, if a broker, using reasonable care should have or could have acquired knowledge of defects in property, he or she may be held liable for negligent failure to discover and/or to disclose those defects.[201]

The duties the court imposed were based "on the broker's status as fiduciary."[202] Thus, there is no requirement for direct contact between broker and purchaser in order for the duties to arise.[203] "The source of liability lies in tort for negligent misrepresentation."[204]

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196. *Id.* at 574, 686 P.2d at 264. Weagley refers both to the listing broker agency and the individual broker acting on behalf of the agency.

197. *Id.* at 575, 686 P.2d at 265.

198. *Id.* at 575-76, 686 P.2d at 265-66.

199. *Id.* (citing generally Oates v. Eastern Bergen County Multiple Listing Service, Inc., 113 N.J. Super. 317, 273 A.2d 795 (N.J. Super. Ct. Ch. Div. 1971)).

200. *Id.* at 576, 686 P.2d at 266 (citing First Church of the Open Bible v. Cline J. Dunton Realty, Inc., 19 Wash. App. 275, 574 P.2d 1211 (1978)).

201. *Id.* (citing Amato v. Rathbun Realty, Inc., 98 N.M. 231, 647 P.2d 433 (Ct. App. 1982)).

202. *Id.*

203. *Id.* (citing Stotlar v. Hester, 92 N.M. 26, 582 P.2d 403 (Ct. App. 1978)).

204. *Id.* The court refers to the RESTATEMENT (SECOND) OF TORTS § 552 comment h (1977) for the following description of the tort of negligent misrepresentation:

> [I]t is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. It is enough, likewise, that the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given.

Defendant Weagley failed to make a *prima facie* case showing his lack of actual knowledge of the defects.[205] Consequently, he was not entitled to summary judgment. The court found that there existed "at best" an issue of material fact as to the plaintiffs' reliance on the "All Top Shape" representation.[206] It, therefore, concluded that "because Weagley had a duty to prospective buyers, and because genuine issues of material fact exist[ed] as to whether Weagley breached its duty,"[207] it would reverse the district court's order granting summary judgment and remand it for further proceedings. This case, like *Swallows,* strictly reads and interprets fiduciary duties owed by brokers to laypersons with whom they deal in real estate transactions.

205. *Gouveia,* 101 N.M. at 577-78, 686 P.2d at 267-68. Procedurally, Weagley, being the party who asked for summary judgment, bore the burden of showing there were no genuine issues of material fact. *See* Amato v. Rathbun Realty, Inc., 98 N.M. 231, 647 P.2d 433 (Ct. App. 1982); Stotlar v. Hester, 92 N.M. 26, 582 P.2d 403 (Ct. App. 1978).

206. *Gouveia,* 101 N.M. at 578, 686 P.2d at 268.

207. *Id.*