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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DENSIL AND MARY GILLIS,

Plaintiffs– Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF SIERRA COUNTY,

Defendant-Appellee.

No. 29,052
Sierra County
CV-08-79

APPELLANTS DENSIL AND MARY GILLIS' BRIEF IN CHIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

SUMMARY OF PROCEEDINGS

This case involves a dispute concerning a road on Appellants' property in Sierra County. Appellants filed an action for declaratory judgment, or alternatively, inverse condemnation. *See* Complaint for Declaratory Judgment and Inverse Condemnation, R. at 001 – 006. The District Court granted Defendant's Motion to Dismiss on the grounds of lack of subject matter jurisdiction and failure to state a cause of action. *See* Order Dismissing Action, R. at 53.

The summary of the facts of this action are taken from Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 26 – 29. Under the applicable standard of review, these facts must be taken as true for purposes of this appeal. *See, N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991). Appellants are the record owner of a tract of land in Sierra County. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 26 – 27. A paved road exists on this real property. *Id.* at 27. Throughout the 1990's, Sierra County utilized a County Road Map drafted Edson G. Loftus, Registered Land Surveyor, of Loftus & Company Land Surveyors. This County Road Map showed Road B-043 as being north of Caballo Dam, south of Road B-045 on the other side of

Interstate 25, but north of Road B-042 on the other side of Interstate 25. *Id.* Appellants' real property is south of Caballo Dam and South of Road B-042. *Id.*

The Sierra County annual certification of road mileage, pursuant to NMSA 1978, § 67-3-28.3(A)(1988), from at least prior to 1990 through 2003, designated County Road B-043 as Addington with a distance of roughly 2.5 miles. *Id.* at 28. Between 2003 and 2005, Sierra County changed County Road B-043 to Mountain View Road with a distance of roughly 2 miles. *Id.* The 2005 annual certification designated the road as dirt (as opposed to "dirt/paved" or "paved"). *Id.* Thus, Sierra County gave Plaintiffs no indication that their paved road would be affected by this change. *Id.*

Sierra County has never complied with the procedures related to the establishment of a county road, pursuant to NMSA 1978, § 67-5-5 (1941), as to the above-described road on Appellants' property. *Id.* Sierra County has never condemned this road or otherwise exercised its power of eminent domain as to this road. Sierra County has never purchased an easement for said road from Appellants or their predecessors-in-interest. *Id.* The road on Appellants' property has never, save for extremely isolated emergency incidents, been graded or maintained by Sierra County. *Id.*

Appellants were completely unaware that Sierra County considered the road on

their property a county road until it was conveyed to them in January 2008 that grading might take place on the road. *Id.* Appellants wrote a letter to Sierra County on January 15, 2008 regarding the matter. *Id.* at 28 – 29. On January 29, 2008, Sierra County, through counsel, took the position directly for the first time that County Road B-043 runs through Appellants' property. *Id.* On June 18, 2008 Appellants filed this action seeking declaratory judgment that the road on their property is not County Road B-043. *See* Complaint for Declaratory Judgment and Inverse Condemnation, R. at 001 – 006. Alternatively, Appellants sought damages for inverse condemnation. *Id.* Appellee filed a Motion to Dismiss. *See* Motion to Dismiss Complaint, R. at 13 – 14. The District Court granted the Motion. *See* Order of Dismissal, R. at 53. Appellants timely filed a Notice of Appeal. *See* Notice of Appeal, R. at 54 – 56.

The ultimate issue presented for review is whether the District Court erred in granting the Motion to Dismiss. This appeal, however, can be narrowed to specific sub-questions that will ultimately determine its outcome. As a preliminary matter, this Court must determine the role of the doctrine of prescriptive easement and implied dedication. Appellee primarily argued that these doctrines prevented Appellants' suit. Appellants pled no facts that would support the application of these doctrines to their claims. To the extent the District Court relied upon these doctrines, which it appears highly likely that it did, Appellants assert that the District Court committed procedural

error for failure to apply the proper standard governing consideration of a motion to dismiss. Appellants' well-pleaded complaint must be reviewed on its terms, and not the revisionist terms in which Appellee sought to cast it.

With this context in mind, this Court must first determine whether title to the road in some form passed when it was designated, without the proper procedures being followed, County Road B-043. If this Court determines that no title passed under these facts, the question the Court must address is whether declaratory judgment is a proper action to challenge whether Sierra County had authority to designate the road on Appellants' property as County Road B-043. If this Court determines that declaratory judgment is proper, then the District Court erred in dismissing Appellants' cause of action for declaratory judgment and must be reversed.

In such a case, this Court need not review further Appellants' action for inverse condemnation. If this Court determines that no title passed upon the designation of the road as County Road B-043, then obviously no taking has occurred since no property has been taken. This Court may thus affirm the dismissal of the cause of action for inverse condemnation, although certainly not for the reasons set forth by Appellee in its Motion to Dismiss. *See Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 13, 134 N.M. 308, 313, 76 P.3d 626, 631 ("an appellate court will affirm the district court if it is right for any reason and if affirmance is not unfair to the

appellant.").

On the other hand, if this Court determines that title did pass upon the designation of the road as County Road B-043, the question this Court must address is whether Appellants may pursue a claim for inverse condemnation. If this Court determines that inverse condemnation is proper, then the District Court erred in dismissing Appellants' cause of action for inverse condemnation.

ARGUMENT

A motion to dismiss tests the legal sufficiency of the complaint. *Healthsource, Inc. v. X-Ray Associates of New Mexico*, 2005-NMCA-097, ¶ 16, 138 N.M. 70, 76, 116 P.3d. 861, 867. The Court must accept all well-pleaded facts as true and evaluate whether claimant could prevail under any state of facts which might be proven in accordance with the allegations of the complaint. *See, N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991). A complaint should not be dismissed unless there is a total failure to allege some matter essential to the relief sought. *Las Luminarias of the N.M. Council of the Blind v. Isengard*, 92 N.M. 297, 300, 587 P.2d 444, 447 (Ct. App. 1978). A motion to dismiss for failure to state a cause of action is granted infrequently. *Id.* The standard of review for a grant or denial of a motion to dismiss is *de novo*. *Sam v. Sam*, 2006-NMSC-022, ¶ 9, 139 N.M. 474, 477, 134 P.3d 761, 764. This includes whether a governmental entity has

immunity. *Id.*

I. APPELLANTS DID NOT PLEAD ANY FACTS THAT WOULD SUPPORT A CLAIM FOR PRESCRIPTIVE EASEMENT OR IMPLIED DEDICATION.

As an initial matter, Appellants contend that this Court must consider the role of the doctrines of prescriptive easement and implied dedication. Appellants' First Amended Complaint was limited in nature. It sought a declaratory judgment that Sierra County had exceeded its authority when it suddenly designated Appellants' road County Road B-043 without following any of the required statutory procedures. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 29 – 30. Appellants pled that they had no idea that Sierra County ever considered the road to be a county road. *Id.* at 28 – 29. Appellants pled that upon learning of this fact, they immediately protested this designation and shortly thereafter filed suit. *Id.*

It is upon these facts that the District Court should have judged the question of jurisdiction. The "paramount policies embodied in the well-pleaded complaint rule [are] that the plaintiff is the master of the complaint." *See Self v. United Parcel Service, Inc.*, 1998-NMSC-046, ¶ 17, 126 N.M. 396, 403, 970 P.2d 582, 589. Nevertheless, Appellee sought to inject facts outside of the complaint in its effort to obtain dismissal.

Appellee's Motion to Dismiss states as follows:

> Plaintiffs state that "Sierra County has never complied with the procedures related to the establishment of a county road, pursuant to NMSA § 67-5-5 (1941), as to the above-described road on Plaintiffs' property. Sierra County has never condemned said road or otherwise exercised their power of eminent domain as to said road. Sierra County has never purchased an easement for said road from Plaintiffs or their predecessors-in-interest. Plaintiffs and/or their predecessors-in-interest have never received compensation related to said land."
> Assuming without conceding the validity of Plaintiffs' assertions, the only additional mechanisms by which this road may have become a County Road, absent evidence of the establishment of the road pursuant to 43 U.S.C. § 932, are by implied dedication and the creation of a prescriptive easement.
>
> Accordingly, Plaintiffs have named the Board of County Commissioners of the County of Sierra, a political subdivision of the State, a Defendant in a suit, action, case or legal proceeding involving a claim of title to or interest in real property, in contravention of NMSA 1978, section 42-11-1 (1979).

See Board of County Commissioners of the County of Sierra' Memorandum in Support of its Motion to Dismiss Complaint, R. at 17 – 18 (citations omitted).

Appellee's analysis improperly invited the District Court to assume that Sierra County employed proper "mechanisms," by way of an established prescriptive easement or implied dedication, to designate Appellants' road County Road B-043. Appellants, on the other hand, pled in their Complaint the exact opposite – that Sierra County did not follow any proper mechanisms to establish the road. Appellants

disputed Appellee's attempt to re-characterize their claims as involving title, prescriptive easements, or implied dedication. *See* Plaintiffs' Response to Defendant's Motion to Dismiss, R. at 37 ("Plaintiff's complaint does not present the question of a whether a taking has occurred under a public prescriptive easement because they do not allege that such an easement exists. . . . It's equally obvious that Plaintiffs do not allege in any way shape, or form that they committed acts that induced the belief that they intended to dedicate the road to public use."). Appellants specifically highlighted how Appellee's approach violated the governing standard of review. *Id.* at 38 ("In essence, Defendant asks this Court to assume their waiver defenses are true and dismiss this case. For purposes of this Motion, this Court is required to assume Plaintiffs' facts as true.").

Appellants believe Appellee will attempt the same strategy in this appeal. As will be shown below, the concepts of prescriptive easement and implied dedication often arise in road cases and could serve to confuse the issues if improperly considered on a motion to dismiss. Appellants would re-emphasize that the standard of review required the District Court to assume the facts as pled by Appellants. Appellants contend the District Court committed procedural error to the extent it accepted in any way Appellee's discussion of the concepts of prescriptive easements and implied dedication. If Appellee wishes to raise the claim that Sierra County's action was

proper based upon the existence of a prescriptive easement or implied dedication, this should be done by affirmative defense or counterclaim and proven at trial. It is not a proper subject to raise by virtue of a motion to dismiss. Appellants request that this Court review this appeal based upon the allegations they raise in keeping with New Mexico law. *See, N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991)(all allegations in the complaint must be accepted as true for purposes of review of a motion to dismiss); *See Self v. United Parcel Service, Inc.*, 1998-NMSC-046, ¶ 17, 126 N.M. 396, 403, 970 P.2d 582, 589 (discussing the well-pleaded complaint rule in New Mexico).

II. THE DISTRICT COURT ERRED WHEN IT GRANTED APPELLEE'S MOTION TO DISMISS APPELLANTS' CAUSE OF ACTION FOR DECLARATORY JUDGMENT.

Appellee argued that sovereign immunity barred Appellants' claim. Appellee argued further that the Declaratory Judgment Act did not apply to Appellants' claim. The District Court erred in dismissing this claim. The designation of Appellants' road as County Road B-043 did not pass title or any other property interest in the road. Therefore, NMSA 1978, § 42-11-1 (1979) does not apply. New Mexico courts as well as other jurisdictions agree that declaratory judgment is a proper vehicle to determine whether a governmental entity had authority to act. As a result, Appellants' claim for declaratory judgment is proper. This Court should reverse the District Court

accordingly.

A. The Mere Designation of the Road as County Road B-043 Did Not Pass Title to the Road.

The designation of a County road for maintenance obligations does not pass title to the road to the public. Title questions only arise when there is an issue over whether the road is a public road by way of prescriptive easement or otherwise. As noted above, Appellants' Complaint does not present such an issue. Nevertheless, New Mexico courts, as well as other jurisdictions, have long recognized the distinction between designation of a road and title to the road as a public highway.

The New Mexico Supreme Court most recently emphasized this critical distinction in *McGarry v. Scott*, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608. In *McGarry*, the Plaintiff sought to require McKinley and Cibola counties to provide road maintenance in the Timberlake subdivision. *Id.* at ¶ 2, 134 N.M. at 33, 72 P.3d at 609. The Plaintiff argued that even if the subject counties had not accepted the roads for maintenance, an obligation to do so could be established through public use of the roads alone. *Id.* at ¶ 3, 134 N.M. at 34, 72 P.3d at 610.

The Supreme Court disagreed. *Id.* at ¶ 14, 134 N.M. at 38, 72 P.3d at 614 ("We also disagree with reliance on common law principles to render the roads at issue public highways for purposes of governmental maintenance responsibilities"). As

reasoning, the Court highlighted the distinction between statutory process of declaration of a County road for maintenance obligation, in that case by virtue of the Subdivision Act, from the common law concepts of prescriptive easement and implied obligation. *Id.* at ¶ 25, 134 N.M. at 42, 72 P.3d at 618 ("Most importantly, however, we need not resort to the novel use of common law principles of prescription or implied dedication, which have previously applied only for right of way issues, when the Legislature has directed the proper method of determining county road maintenance obligations in the Subdivision Act").

The principle to be taken from the *McGarry* decision is that the question of the designation of a road by the governmental entity as a county road for maintenance obligations is distinct and not governed by whether a public easement exists. Other courts have come to similar conclusions.

For example, in *Village of Bellaire v. Pankop*, 194 N.W.2d 379 (Mich.App. 1972), the Michigan Court of Appeals examined a case where the municipality sought to enjoin the land owners from blocking their road. As in this case, the Board of County Road Commissioners of Antrim County, Michigan, had certified the road as a County Road in its map to the State highway commissioner. *Id.* at 381. The Court upheld the trial court's determination that the road was not public. *Id.* at 382. The trial court had reasoned that "[i]f the Dyer lake road was a private road of the plaintiff,

its character could not have been changed to a public highway by said action for the county road commission." *Id.* The Defendant property owner argued persuasively that title had thus never rested with the municipality in spite of its designation of the road as a county road to the State highway commission. *Id.* ("Defendants counter this by arguing that the lower court decision was based on title never resting in plaintiffs rather than abandonment.").

The issues of designation and maintenance as a county road and the common law concept of a public highway by virtue of a prescriptive easement or implied dedication often arise in the same case. This is because when parties raise the question of whether a road is a public highway by virtue of a prescriptive easement or implied dedication, the question of a county or state designation and government maintenance of the road are often used as evidence to establish this point. *See e.g., Luevano v. Maestas*, 117 N.M. 580, 584, 874 P.2d 788, 792 (Ct. App. 1994). As noted above, Appellee used this seemingly to great effect to obtain dismissal. However, as also noted above, this Court must examine this case from the perspective of Appellants' complaint which only concerns whether the designation of the road as a county road was appropriate. Title in such cases does not pass upon the county designation. Indeed, a closer look at these cases actually shows that they support Appellants' position.

To establish a public highway by prescription, the use necessary must be open, uninterrupted, peacable, notorious, adverse, under a claim of right, and continue, at least in New Mexico, for a period of ten years. *Id.* Oftentimes, county designation and maintenance serves as evidence of open, notorious, and adverse use to establish a public road by common law prescription. However, this is so only because maintenance and designation serves to trigger the time period to obtain property by prescription. Title does not pass until the time period actually elapses. Only then does a prescriptive easement exists.

For example, in *Luevano*, one of the major factual disputes concerned when the plaintiff first protested county maintenance in an effort to cut off the ten-year period of alleged adverse possession. *Id.* at 584 – 85. The obvious implication is that title did not pass when the maintenance began but rather when the ten-year period for adverse possession expired after maintenance had begun.

Some state legislatures have even set forth the distinction by statute. For example, the Florida Implied Dedication Statute states as follows:

> When a road, constructed by a county, a municipality, or the Department of Transportation, has been maintained or repaired continuously and uninterruptedly for 4 years by the county, municipality, or the Department of Transportation, jointly or severally, the road shall be deemed to be dedicated to the public. . . . The dedication shall vest all right, title, easement, and appertunances in and to the road in the county, if it is a county

road.

F.S.A. § 95.361(1)(a)(2004).

Appellants in this case pled a set of facts, which must be accepted as true, that contravene any attempt to show that title passed by virtue of prescriptive easement or that title to the road is at issue in the case. Appellants immediately protested Sierra County's efforts to maintain the road upon learning of Sierra County's position. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 28 – 29. Therefore, the period for title by adverse possession could not have passed under the facts pled by Appellants. Since title is thus not at issue by virtue of Appellants' well-pleaded complaint, NMSA 1978, § 42-11-1 (1979) does not apply to bar this suit. To the extent the District Court determined otherwise, it did so in error.

B. Declaratory Judgment is a Proper Method By Which to Challenge a Governmental Entity's Authority to Act.

To establish a county road, New Mexico law requires a petition by ten freeholders residing within two miles of the road that sets forth the points where it is to terminate. *See* NMSA 1978, § 67-5-5 (1905). This case involves the question of whether Appellee properly followed the statutory procedures to declare a road on Appellants' property as County Road B-043. Appellants allege that between 2003 and

2005, Appellee changed the distance of County Road B-043 without indication that it had changed location. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 28. Appellants allege that the first notice they received in any way that Defendant considered the road a formally declared County Road was in January 2008. *Id.* This Court must accept these facts as true. *See N.M. Life Ins. Guar. Ass'n*, 111 N.M. at 753, 809 P.2d at 1281 (1991). Appellants seek a declaration that road on their property is not a County Road because Defendant acted outside of its statutory authority in declaring it as such.

New Mexico courts have long recognized declaratory judgment as a proper action to challenge whether a governmental entity had authority to act. In *Harriet v. Lusk*, 63 N.M. 383, 320 P.2d 738 (1958), the Supreme Court of New Mexico examined the plaintiffs' challenge to the State Board of Education's plan to consolidate schools. More specifically, plaintiffs challenged whether the Defendant governmental actors and entities had the statutory authority to consolidate the schools based upon whether the statute relied upon had expired. *Id.* at 387 – 88. The Court held that declaratory judgment was a proper vehicle to determine the government's authority to act. *Id.* at 387.

Most recently, In *Smith v. County of Santa Fe*, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300, the New Mexico Supreme Court held that a declaratory judgment

action was a proper method to challenge the City of Santa Fe's authority to regulate the permitting of domestic water wells. The Court reasoned that "Plaintiffs simply challenge the City's authority to act, not the merit of the City's decision. In other words, Plaintiffs do not argue that the City made the wrong decision; they argue that the City had no right to even make a decision. And as noted above, such a challenge a precisely the type of question appropriately considered by a declaratory judgment action." *Id.* at ¶ 17, 142 N.M. at 792, 171 P.3d at 306.

Other courts around the nation have long held similarly. In *Cobb v. Harrington*, 190 S.W.2d 709 (1945), the Texas Supreme Court examined a case where a Texas company brought a declaratory judgment action against the Texas State Comptroller arguing that it was not subject to taxation as a motor carrier. In rejecting the sovereign immunity defense, the Texas Supreme Court explained that declaratory judgment did not "impose liability upon the State or compel the performance of its contracts" nor was it an action "for the recovery of money from the State" that would be paid out of the State Treasury. *Id.* at 712. The Texas Supreme Court concluded that when state officials perform acts that are in excess of their statutory authority, they are not "acts of the State" within the rule of immunity. *Id.* Therefore, the Court allowed the suit to go forward. *Id.*

The Supreme Court of Wisconsin has described the right of Appellants to assert

this cause of action as follows:

> It is generally held by the courts, both state and federal, that where the action taken or threatened by an officer, is alleged to be in violation of the complainant's rights, either because of a misconstruction or misapplication by the officer of a statute, or on account of the alleged unconstitutionality of the statute, the action is not in fact one against the state [for purposes of sovereign immunity] but is rather against the individual because of his lack of power and authority to do the thing complained of.

Berlowitz v. Roach, 30 N.W.2d 256, 258 (1947).

In this case, Appellants assert that Appellee misapplied the statutory requirements for establishing a county road by failing to apply them at all. The New Mexico Declaratory Judgment Act provides that:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

See NMSA 1978, § 44-6-4 (1975). Appellants' legal rights are affected by a statute. NMSA 1978, § 67-5-5 (1905) has certain procedural requirements by which Appellants could receive notice and participate in the process of declaration of the road on their property as a county road. The failure of Appellee to follow the statute affected Appellants' rights.

This case falls squarely within the Declaratory Judgment Act and, by virtue of the authorities cited above, is not subject to dismissal under sovereign immunity. It does little good for Appellants to pursue some kind of writ of mandamus or prohibition to compel Appellee to follow the proper statutory procedure if a declaratory judgment cannot be had that the prior designation was improper. *See, Harriet*, 63 N.M. at 387, 320 P.2d at 742 ("The only point in the above analysis is to point out that where other remedies as mandamus or prohibition will lie that declaratory judgment should also issue and would not be an enlargement of actions against the state."). The common sense holding of the New Mexico Supreme Court in *Harriet* allows this suit to go forward. Furthermore, this case does not involve review of an administrative action that would implicate the substantial limitations set forth by the New Mexico Supreme Court in *Smith.* Rather, the limited nature of this case related to Appellee's authority to act falls squarely within the holding of *Smith* that such a case may go forward. *Smith v. County of Santa Fe*, 2007-NMSC-055, ¶ 15, 142 N.M. at 791, 171 P.3d at 305 ("In light of the foregoing, Plaintiffs' decision to use a declaratory judgment action as their method for challenging the City's authority to regulate the permitting of domestic water wells appears to fall well within the perimeters of what the Declaratory Judgment Act was intended to encompass.").

Finally, Appellants suspect that Appellee may assert a line of argument set forth

in its reply brief at the District Court level. In said brief, Appellee argued that Appellants "failed to plead other elements essential to its claim . . . namely that the road was not established by prescription, that the road was not established by implied dedication." *See* Board of County Commissioners of the County of Sierra' Reply Brief in Support of its Motion to Dismiss Complaint, R. at 49. Appellee further stated that "[e]ven were this Court to determine that a Declaratory Judgment action is the appropriate mechanism to bring an action . . . , Plaintiffs further improperly seek to displace the burden of proof in relation to the matters of prescriptive easement and implied dedication on the taxpayers to prove as defenses in Plaintiffs' Declaratory Judgment action." *Id.*

This line of argument runs directly contrary to New Mexico law. It has long been the law that, absent certain limited presumptions related to adversity, a party seeking to establish adverse rights by prescription bears the burden of proof. *See, Ward v. Rodriguez*, 43 N.M. 191, 88 P.2d 277, 281 (1939)("The burden of proving title by adverse possession is on him who asserts it and all presumptions are in favor of the holder of legal title."); *Vigil v. Baltzley*, 79 N.M. 659, 660, 448 P.2d 171, 172 (1968)("The burden of proving the existence of a prescriptive right is placed upon the one who is benefited thereby"). In fact, Appellee, should it seek to prove a prescriptive easement, must do so by clear and convincing evidence. *Algermissen v.*

Sutin, 2003-NMSC-001, ¶ 27, 133 N.M. 50, 59, 61 P.3d 176, 185. Appellee cited no authority for its completely novel theory that the burden for its defense should somehow be shifted. Furthermore, Appellants certainly pled that the road was not established by prescription when they pled that they immediately protested Sierra County's designation of the road upon notice that Sierra County planned to perform maintenance upon it. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 28 – 29; *see also*, *Toulouse v. Armendariz*, 74 N.M. 507, 510, 395 P.2d 231, 233 (1964)(discussing the liberality with which pleadings are construed to defeat summary judgment).

Regardless, Appellants were under no obligation to attempt to anticipate what counterclaims or affirmative defenses Appellee might bring in a responsive pleading, which has never been filed, and preemptively plead that they are without merit. The weakness of Appellee's argument in this respect should be self-evident.

In conclusion, declaratory judgment is proper in this action. Appellee's sovereign immunity defenses, both as to title to the property and to the nature of the action asserted, are unavailing. The District Court erred in granting Appellee's Motion to Dismiss. This Court should reverse the District Court and remand for further proceedings.

III. ALTERNATIVELY, THE DISTRICT COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS APPELLANTS' CLAIM FOR INVERSE CONDEMNATION.

If this Court determines that title passed upon the designation of the road at issue as County Road B-043, then it was error to dismiss Appellants' claim for inverse condemnation. Appellee's primary argument for dismissal was its request that the District Court accept its unpled, unproven position that it acquired the road by prescriptive easement or implied dedication. Appellants have already set forth the reasons why acceptance of such an argument was error, both procedurally and substantively. These prior arguments are incorporated as if fully set forth herein.

More specifically, at the District Court level, Appellee argue that Appellants do not bring a proper takings claim because "[b]oth the New Mexico Supreme Court and the New Mexico Court of Appeals have had occasion to intimate whether a public entity's acquisition of an easement by prescription or an easement by implied dedication would constitute a compensable taking, and have had occasion to decide that neither constitute a compensable taking." *See* Board of County Commissioners of the County of Sierra's Memorandum in Support of Its Motion to Dismiss Complaint, R. at 24. Under Appellants' allegations, however, Appellee has not considered the road a county road for a period of ten years, the necessary time to establish prescription, and any use has not been adverse since Appellants filed suit

shortly after notice the use of the road as a county road. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 28 – 29. Therefore, Appellants' complaint does not present the question of a whether a taking has occurred under a public prescriptive easement because they do not allege that such an easement exists.

The doctrine of implied dedication is similarly inapplicable. The essential elements of implied dedication are acts by the landowner that induced the belief the landowner intended to dedicate the road to public use, the landowner was competent, the public relied on the acts and will be served by the dedication, and there was an offer and acceptance of the dedication. *Luevano*, 117 N.M. at 586, 874 P.2d at 794. Appellants do not allege an implied dedication occurred. An implied dedication clearly requires consent from the landowner. Obviously, that's not a taking. It's equally obvious that Appellants have not alleged in any way, shape, or form that they committed acts that induced the belief that they intended to dedicate the road to public use. The entire point of this lawsuit, filed shortly after being notified for the first time of Appellee's position, is to show the exact opposite.

The case of *Hayden v. Board of County Commissioners of the County of Jefferson*, 580 P.2d 830 (Colo.App. 1978) illustrates the distinction. In *Hayden*, the plaintiffs offered a permanent easement for a road if the county build a proposed

extension of another road. The county built the road for the permanent easement, but the proposed extension of the other road was never completed. *Id.* at 832 – 33. The plaintiffs brought an inverse condemnation action. The County argued that plaintiffs impliedly dedicated the land to public use. *Id.* at 833. The Court ultimately disagreed because of the conditional nature of the grant of the permanent easement. *Id.* "These facts are inconsistent with a waiver and do not constitute an express or implied intent to dedicate." *Id.*

Appellants' actions in this case are also inconsistent with a waiver claim. Appellants filed this lawsuit less than six months after learning that Defendant considered the road on their property to be Sierra County Road B-043. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 28 – 29. Appellants do not allege facts that implicate the doctrines of prescriptive easement and implied dedication. In essence, Appellee asks this Court to assume their waiver defenses are true and dismiss the case. For purposes of this Motion, this Court is required to assume Appellants' facts as true. *See N.M. Life Ins. Guar. Ass'n*, 111 N.M. at 753, 809 P.2d at 1281. As such, Appellants have properly pled an inverse condemnation claim.

Appellants acknowledge that most of the above analysis is taken directly from their Response at the District Court level and may seem somewhat redundant. *See*

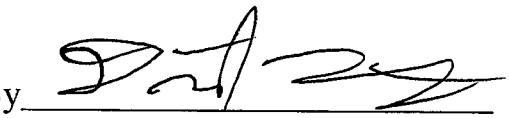
Appellants' Response to Defendant's Motion to Dismiss Complaint, R. at 36 – 38. Nevertheless, the appeal on this point turns on a simple question – whether it was proper for the District Court to accept Appellee's unpled, unproven allegation that a prescriptive easement existed or an implied dedication had occurred. Appellants have argued exhaustively and conclusively above that such a determination by the District Court was clear error. Appellants need supply little more than what was provided below to establish this point. The District Court erred in granting Appellee's Motion to Dismiss Appellants' Claim for Inverse Condemnation. This Court should reverse the District Court and remand for further proceedings.

PRAYER FOR RELIEF

WHEREFORE, For the above-stated reasons, Apellants respectfully request that this Court reverse the District Court, remand for further proceedings, and for such other and further relief as to the Court may deem just and equitable.

RESPECTFULLY SUBMITTED BY:-

MARTIN, LUTZ, ROGGOW, & EUBANKS, P.C.

By 

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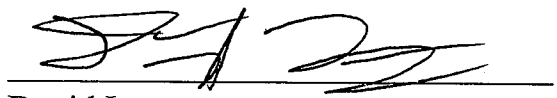
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he did cause to be sent by first-class mail, a true and correct copy of the foregoing instrument to the following opposing counsel of record on this 21st day of February 2009.

David M. Pato
Nance, Pato & Stout, LLC
P.O. Box 772
Socorro, NM 87801



David Lutz