IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

27802

HIGH MESA GENERAL PARTNERSHIP,
a New Mexico general partnership,
JON McCALLISTER, DAVID W. HARPER,
and PLACITAS, INC., a New Mexico corporation,

Appellants/Plaintiffs,

vs.

WILLIAM J. PATTERSON III, JAMES LAWRENCE SANCHEZ, and JAMES LAWRENCE SANCHEZ, TRIAL LAWYER, P.C., a New Mexico professional corporation,

Appellees/Defendants.



No. D1329 CV 08 231

# ANSWER BRIEF OF APPELLEES JAMES LAWRENCE SANCHEZ AND JAMES LAWRENCE SANCHEZ, TRIAL LAWYER, P.C.

Thirteenth Judicial District Court
County of Sandoval Cause No. D-1329-CV-2008-231
Honorable Louis E. DePauli, Jr.

Attorney for Appellees James Lawrence Sanchez
and James Lawrence Sanchez, Trial Lawyer, P.C.:

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**I. Summary of the Proceedings:**

The underlying Complaint for Damages For Malicious Abuse Of Process and Slander Of Title was filed on February 6, 2008 (R.P. 1-8) and was served on Appellee Sanchez on February 7, 2008 (R.P. 14) Appellee Sanchez represented Appellee Patterson in a challenge to the Sandoval County Commission's approval of a Preliminary Plat for Appellants' proposed subdivision, and in the course of that proceeding Appellee Sanchez filed a notice of lis pendens with the County Clerk of Sandoval County, acting as an attorney at law, on behalf of his client Patterson. (R.P. 59) The underlying Complaint was entirely based on Appellants' claim that the filing of a notice of lis pendens was not permitted under Rule 1-074(S) NMRA which is the Rule of Civil Procedure related to Appeals from decisions by a County Commission. Appellants failed to accept that an Appeal from a County Commission is also regulated by NMSA 47-6-15 (B) and NMSA Section 39-3-1.1.

On November 6, 2006 the Sandoval County Commission approved the Appellants' Application for approval of the Preliminary Plat for the Wild Horse Mesa Subdivision. Appellee William J. Patterson, III through his attorney at law, Appellee James Lawrence Sanchez, timely filed a Notice of Appeal of this decision to the District Court for the Thirteenth Judicial District. The Court handling Patterson's Appeal entered a Final Order On Appeal on November 20, 2007 reversing the Sandoval County Commission on its approval of the Preliminary Plat of the Wild Horse Mesa Subdivision. The Notice of Lis Pendens was filed in relation to Defendant Patterson's Appeal. (Compare R.P. 59 with R.P. 60) Appellants never asked the District Court handling the Pattersons' Appeal from the Sandoval County Commission to cancel the Notice of Lis

Pendens at any time from the date the Notice of Lis Pendens was filed until the date the Final Order On Appeal was entered, On November 20, 2007.(See R.P. 1-8 and R.P. 59-61) Appellants had the opportunity to ask the District Court to cancel the lis pendens pursuant to NMSA Section 38-1-15, but failed to do so at any time.

Appellants challenged the Trial Court's Summary Judgment on their Slander Of Title Claim in their docketing statement, but have voluntarily abandoned this issue.(Brief in Chief, Page 4) The Slander of Title Claim should be deemed abandoned. State v. Carrasco, 124 NM 320, 321 (Ct. App. 1997) Therefore, Appellees do not specifically address this claim in this brief other than to point out that this Court should consider that the factual basis for the Slander of Title Claim duplicated the factual basis for the other claims briefed by Appellants.

**II. Argument**:

**A. Standard of Review**:

An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo. Tafoya v. Rael, 2008 NMSC 57, 193 P.3d 551, 553-554; Garcia v. Underwriters at Lloyd's, London, 143 NM 732, 735 (2008). The District Court should be affirmed if it was right for any reason. Meiboom v. Watson, 128 N.M. 536, 541 (2000).

**B. The Filing Of A Notice of Lis Pendens Is Absolutely Privileged**:

A notice of lis pendens is merely a republication of the Appeal from the Sandoval County Commission proceedings and therefore, it is accorded the same absolute privilege as any other publication incident to that Appeal. Superior Construction v. Linnerooth, 103 N.M. 716, 718 (1986) The notice of lis pendens merely provides notice to the world

of the pendency of the Appeal proceedings, and the notice of lis pendens does not prevent any sale of property. Id. at 718-719.

Pursuant to NMSA Section 38-1-14 a notice of lis pendens is permitted "in all actions in the district courts of this state ..... affecting the title to real estate in this state." Rule 1-074 NMRA does not prohibit the filing of a notice of lis pendens; this rule does not state anything regarding the filing of a lis pendens. If the New Mexico Supreme Court had intended to prohibit the filing of a notice of lis pendens in actions brought under Rule 1-074, the rule would have to state such prohibition. It does not. If the New Mexico legislature had intended that NMSA Section 38-1-14 should not apply to actions under Rule 1-074, such prohibition would have to be stated within the statute. There is no such prohibition.

An appeal of a preliminary plat approval affects the title to real estate. NMSA Sections 47-6-8, 47-6-11, 47-6-11.3. The filing of a lis pendens is authorized in any action affecting the title to real estate in this state. Resolution Trust Corp. v. Binford, 114 NM 560, 567-68 (1992). The notice of lis pendens merely acts as constructive notice to third persons of facts already open to the public in the Subdivision Appeal action.

Pursuant to NMSA Section 38-1-14 a notice of lis pendens is permitted "in all actions in the district courts of this state ..... affecting the title to real estate in this state." All of the claims fail as a matter of law if the underlying action upon which the notice of lis pendens is based does in fact affect the title to real property in New Mexico.

Appellants argued below that the underlying Appeal of the approval of Appellants' preliminary plat does not affect title to real property in New Mexico. (R.P. 86-87) Appellants ignored the express language of NMSA Section 38-1-14 by arguing that the

underlying action must relate to the question of ownership. In New Mexico, the term "affect the title" is not limited to questions of ownership or vesting. "[A] notice of lis pendens may be properly filed only if plaintiff pleads a cause of action which involves or **affects the title to, or any interest** in or a lien upon, specifically described real property." Superior Construction v. Linnerooth, 103 N.M. 716, 719 (1986) *quoting* Rehnberg v. Minnesota Homes, Inc., 236 Minn. 230, 233-234, 52 N.W.2d 454, 456 (1952) (Emphasis added)

The New Mexico lis pendens statute must be interpreted and followed as it is written. Gardiner v. Galles Chevrolet, Co., 142 N.M. 544, 547 (2007) (Each part of a statute must be given the same effect.); Regents of The University of New Mexico v. New Mexico Fed'n of Teachers, 125 N.M. 401, 410 (1998) (Ordinarily a Court will not depart from the plain wording of a statute.); State v. Jade G., 141 N.M. 284, 292 (2007) (It is a normal rule of statutory construction to interpret identical words used in different parts of the same act as having the same meaning.) Pursuant to NMSA Section 38-1-14 a notice of lis pendens is permitted "in all actions in the district courts of this state ..... affecting the title to real estate in this state."

Many actions can affect the title to real estate without changing ownership to the underlying real property. For example, the subdivision plat provides for numerous access easements, drainage and public utility easements and fire protection easements, all of which affect the title to the property if the plat is valid. An easement is a real property interest that affects the title. Cox v. Hanlen, 124 N.M. 529, 536 9Ct. App. 1997). "title to an easement passes like title to any other real estate..." Ritter-Walker Co. v. Bell, 46

N.M. 125, 128 (1942) The appeal of a preliminary plat approval clearly affects the title to real estate. *See* NMSA Sections 47-6-8, 47-6-11, 47-6-11.3.

Additionally, the Appeal did in fact affect the title or ownership of all of the property. The only purpose of a subdivision plat is to affect the title to real estate, to permit the title to be severed into smaller titles for subsequent sale. NMSA Section 47-6-8. In granting the right to subdivide the law requires that the dedication of any of the property for public use automatically vests the ownership of this property in the public. McGarry v. Scott, 134 N.M. 32, 36 (2003)

The Appellants clearly intended to "affect" their land by seeking an approved subdivision, and dedicating all of the easements for public use. Appellees succeeded in proving that the subdivision was not valid. The public thereby did not acquire any interest in the real estate. The lis pendens merely provided notice that the underlying action did affect the title to the real estate.

This effect on the title would have dramatically been displayed if anyone purchased a lot from Appellants before the District Court ruled on the appeal. Such purchaser would clearly have different "title" and rights to the real estate depending on how the court ruled on the Appeal. After the Appellees prevailed on the Appeal, the subdivision was invalid, and such purchaser would find himself owning a piece of property without access or the right to obtain any utilities as the private and public easements would no longer exist.

Appellants had no basis in fact or under the law to claim that in accordance with the New Mexico lis pendens statute, the Appeal did not affect the title to the real estate. All

of Appellants' claims failed as a matter of law as the Appeal affected the "title" to property in numerous ways.

Appellants fail to cite any New Mexico case law to support their claim that the underlying action did not affect the title to their real property. Appellants rely on the Massachusetts case of McCarthy v. Hurley, 510 N.E. 2d 779 (Mass. App. Ct. 1987), but fail to provide this Court with the underlying Massachusetts' statutes which were followed by that Court, specifically Chapter 185 Section 86 and Chapter 184 Section 15, MGLA. The Massachusetts lis pendens statutes clearly state: "a proceeding arising under a statute, ordinance or by-law regulating land use... is not a proceeding that affects title to real property." MGLA Chapter 184, Section 15 (f). Unlike the State of Massachusetts, which has clearly removed its lis pendens statute from land use regulatory statutes, the New Mexico Legislature has not so limited the New Mexico lis pendens statute. The McCarthy case therefore is not valid authority.

Appellants also rely on the California case of Moseley v. Super. Court In and For Orange County, 223 Cal. Rep. 116 (Ct. App. 1986). The Moseley Court recognized that under the applicable California statute, the Plaintiff was not required to claim a present interest in the developer's property in order to be permitted to file a notice of lis pendens. The Plaintiff could file a lis pendens under California law so as long as the action directly affected the developer's present possessory interest in that property, and the developer was a party to the action. Id. at 118-119. The developers were not joined in the action before the Moseley Court. Unlike Moseley, here the claimed owners of the real property were named in the suit which was identified in the lis pendens. The Moseley decision

supports the filing of a lis pendens in the appeal from the Sandoval County Commission action.

Moreover, in both the McCarthy and Moseley cases, the property owners in both cases sought to cancel the lis pendens which had been filed on their property pursuant to the applicable statutes. It is significant that the Appellants could have similarly asked the Court handling the Appeal from the Sandoval County Commission to cancel the lis pendens pursuant to NMSA Section 38-1-15. **The Appellants took no such action**. The Appellants should not now be heard to complain that the lis pendens was filed improperly when they never challenged the filing of the lis pendens in the lower Appeal action.

**C. An Attorney's Conduct Is Absolutely Privileged**:

The Complaint is barred as against Appellees James Lawrence Sanchez and his law firm, because at all times material he was acting as a licensed attorney at law during the course of and as a part of a judicial proceeding, and therefore his conduct therein is absolutely privileged. Penny v. Sherman, 101 N.M. 517, 519-520 (Ct. App. 1984), following the Restatement (2d) of Torts, Section 586: "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communication....during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding."

Moreover, Appellants did not have standing to sue James Lawrence Sanchez or his law office, as he was acting at all times as the agent for his client, within the course and scope of his agency. Guest v. Berardinelli, 2008 NMCA 144. In the Guest case this Court recently stated:

> In [Durham v. Guest, 2007-NMCA-144], we relied on the notions that attorneys have some measure of freedom in representing their clients, and we did not want to chill an attorney's vigorous representation of the client; accordingly, except in unusual circumstances, an attorney should not have to worry about asserted duties to non-clients. *Durham*, 2007-NMCA-144..... 'Only those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution suit.' *Zamos v. Stroud*, 87 P.3d 802, 810 (Cal. 2004)."

Guest 2008 NMCA at 146.

**D. Appellees Suffered No Damage As The Subdivision Was Void:**

All of Appellees' claims were barred because all of their claims relied on proof of a valid subdivision. Because Appellees did not have a valid subdivision when they filed their lawsuit, any purported sales of lots within the claimed subdivision would have been unlawful and contrary to the requirements of the New Mexico Subdivision Act, NMSA Section 47-6-8. The underlying lawsuit was not filed until months after a District Court had already ruled that the Appellees' Application and the published notices for their subdivision were incomplete and misleading to the public. (Compare R.P. 1-8 with R.P. 60-61) Therefore, under New Mexico law, all action taken by Sandoval County with respect to the Wild Horse Mesa Application, was void as a matter of law when the underlying lawsuit was filed. Nesbit v. City of Albuquerque, 91 N.M. 455, 457-458 (1977); Eldorado at Santa Fe, Inc. v. Cook, 113 N.M. 33, 36 (1991). In Nesbit, the Court stated that "Lack of statutory notice is generally held to be a jurisdictional defect which renders the action taken by the zoning authority void." Id. at 457. In Nesbit the Court determined that a published notice regarding a zoning change was "inadequate to describe the location of the property and was inadequate to put a reasonable person on notice of the fundamental and substantial change in the use of the property.....By failing

to follow statutory procedures, due process of law was violated and no subsequent act could correct the defect." Id. at 457-458.

This same principle was applied in the Eldorado case, *supra*, involving an error in the publication notice involving a petition related to water rights. Following the Nesbit decision the Eldorado Court ruled that the inadequate notice rendered all subsequent acts of the State Engineer void. The Court ruled: "...the failure to follow statutory procedures is a due process violation and renders void all subsequent acts of the state engineer....Therefore the state engineer was without jurisdiction to grant Eldorado's application for change of location." 113 N.M. at 37.

This same rule of law regarding the effect of a misleading notice was again followed by the Court in Martinez v. Maggiore, 133 N.M. 472, 476 (Ct. App. 2002) involving an appeal from an administrative proceeding regarding an application for a landfill permit. The Martinez Court ruled: "We once again follow *Nesbit* and hold that the administrative proceedings conducted subsequent to Landfill's defective notice are invalid. We vacate the order granting Landfill's application and remand to the Secretary for de novo review of Landfill's application after publication of notice substantially complying with" the applicable law. Id.

Appellants did not have a valid subdivision when they filed their suit and any purported sales of lots would have been illegal in violation of the New Mexico Subdivision Act. NMSA Section 47-6-27 and NMSA Section 47-6-26 (A)(3) and (4). All of Appellants' claims, including the prima facie tort claims, failed as a matter of law.

**E. The Favorable Appeal From The Sandoval County Commission Was Conclusive Evidence Of The Existence Of Probable Cause Which Defeated The Claim For Malicious Abuse Of Process As A Matter Of Law:**

Appellees were required to prove that some legal action or process was taken against them without "probable cause" in order to present a prima facie case for Malicious Abuse of Process. The Appellees favorable result in the Appeal from the Sandoval County Commission , as proven by the District Court's Final Order On Appeal on November 20, 2007, was conclusive evidence of the existence of probable cause for the filing of the notice of lis pendens. The malicious prosecution claim failed as a matter of law, and the District Court properly entered summary judgment. Devaney v. Thriftway Marketing Corp., 124 N.M. 512, 521 (1997); Fleetwood Retail Corporation of New Mexico v. Ledoux, 2007 NMSC 47; Southern Farm Bureau Casualty Company v. Hiner, 138 N.M. 154, 158 (Ct. App. 2005); and Weststar Mortgage Corp. v. Jackson, 133 N.M. 114, 123 (2002). The existence of probable cause in the underlying proceeding was a question of law for the Court to decide. Id.

**F. A SLAPP Suit Should Be Promptly Dismissed:**

Appellees argued below that the Complaint constituted a strategic lawsuit against public participation or "SLAPP", the Complaint was filed in violation of NMSA Sections 38-2-9.1 and 38-2- 9.2, and the Complaint should be promptly dismissed to prevent the further abuse of the legal process. (R.P. 57) The Court acted properly in dismissing all of the causes of action filed by Appellants, pursuant to this statutory policy. The Appellants never attempted to have the lis pendens cancelled before November 20, 2007 when their subdivision was declared void. Their decision to file this

lawsuit was clearly in violation of the New Mexico anti SLAPP statutes. The immediate dismissal of all claims in the Complaint was proper.

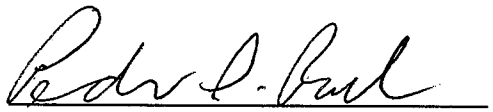
**G. There Is Not A Separate Factual Basis To Support The Prima Facie Tort Claim:**

The factual basis for the Slander of Title claim (which has been abandoned) and for the Malicious Abuse of Process claim, is identical in all respects to the factual basis for the Prima Facie Tort Claim. The Court therefore was proper in granting summary judgment on the Prima Facie tort claim. Healthsource, Inc. v. X-Ray Associates of NM, 138 NM 70, 81 (Ct. App. 2005) (A Prima Facie Tort claim may not be used as a means of avoiding the more stringent requirements of other torts.) The factual basis for the Prima Facie Tort cause of action duplicates all of the other claims made by Appellants including the Slander of Title claim which has been abandoned on appeal. Absent a separate factual basis, the Prima Facie Tort claim was properly dismissed.

**III. Conclusion:**

The District Court should be Affirmed.

**PEDRO G. RAEL,**
**Trial Lawyer, PC**



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was mailed this 27th day of January, 2009 to:

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