IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

LEON KARELITZ, individually and as Trustee of the Leon and Lee T. Karelitz Trust,

DOCKET NO. 31,235

Plaintiffs-Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF NEW MEXICO, et al.;

Defendants-Appellees.

BRIEF IN CHIEF

IN DIRECT APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
COLFAX COUNTY, NEW MEXICO CAUSE NO. 2005-51-CV
THE HONORABLE SHERI A. RAPHAELSON, PRESIDING

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I. SUMMARY OF PROCEEDINGS

a. NATURE OF THE CASE.

This matter involves the question of whether a $3,000,000 gift from the Karelitz' to UNM was an absolute gift or a gift in trust. The district court, the Honorable Sheri Raphaelson, granted Defendants, The Regents of the University of New Mexico, Suellyn Scarnecchia (individually and as Dean) and the UNM Foundation summary judgment and dismissed Plaintiff's complaint.

References to the Record Proper are denoted RP, to the Supplemental Record Proper SRP, to the Transcripts TR followed by date with elapsed time cite (i.e., TR 2/15/11 @ 3:20:58) and to the Leon Karelitz Affidavit KA ¶___ @ RP _____.

b. COURSE OF PROCEEDINGS.

On March 8, 2005 Leon Karelitz, individually and as Trustee of the Leon and Lee T. Karelitz Trust filed a Complaint for Enforcement and Instructions on a Public Charitable Trust. (RP 1-20 Complaint; SRP 3-140 documents descried in Complaint).

Count One of the Complaint named the Attorney General as a Defendant based on the Plaintiffs' claim of creation of a public charitable trust and that the Attorney General is empowered to represent the unascertained beneficiaries and to enforce the public charitable trust. (RP-3; see also SRP 3-140).

Count Two of the Complaint describes the facts and the twenty-seven documents which Plaintiff claimed established a public charitable trust. (RP 3-10).

Count Three of the Complaint alleges the UNM Regents, Suellyn Scarnecchia, individually and as Dean, and the UNM Foundation (jointly the UNM Defendants) breached the terms and purposes of the public charitable trust, breached their fiduciary duties as trustees and seeks damages, costs and attorneys fees. (RP 10-14).

Count Four of the Complaint seeks the Court's instructions to the UNM Defendants as trustees or, in the alternative, requests relief pursuant to Cy Pres. (RP 14-20).

The UNM Defendants filed answers denying 1) the existence of a public charitable trust, 2) that they were trustees and 3) that there were trust obligations. (RP 42-48 and 49-55). They also asserted that the only applicable provisions of the agreement of the parties were set forth in four of the twenty seven documents attached to the Complaint. (RP 42-55). The UNM Foundation admitted the January 2003 receipt of a portfolio of security entitlements from the Lee and Leon Karelitz Trust to the Segregated Fund to endow, in perpetuity, a teaching chair of evidence and procedure to be known as the Lee and Leon Karelitz Chair of Evidence and Procedure. (RP-44).

The UNM Defendants filed their Motion for Summary Judgment and Memorandum in Support, without supporting affidavit, on August 22,

2007. (RP 196-231). Plaintiffs filed a Response with supporting affidavit on October 13, 2007 (RP 251-426) and a Reply, without supporting affidavit, was filed October 29, 2007. (RP 427-480).

Plaintiff had filed motions to compel discovery, enjoin spoliation of evidence, enlarge deposition and for a status conference. The Court, the Honorable Tim Garcia, heard the Plaintiffs' motions on September 14, 2007, and entered an Order Compelling Discovery and an Order Deferring Discovery on November 13, 2007. (RP 481-488, TR 4/14/07).

Defendant Scarnecchia filed a motion to dismiss for failure to state a claim on March 31, 2008 (RP 505-513), and a Motion for Protective Order on March 25, 2008 (RP 492-499).

Leon Karelitz died April 4, 2008 and Robin C. Blair, as Executor of the Estate of Leon Karelitz and Successor Trustee of the Leon and Lee T. Karelitz Trust was substituted as Plaintiff by Order of Substitution entered June 25, 2009 (RP 565-567).

Following the death of Leon Karelitz the parties entered into mediation and executed a settlement agreement which ultimately failed to become effective. (RP 568-570).

District Judge Sheri A. Raphaelson, sitting by designation (following Judge Garcia being named to the Court of Appeals), heard Dean Scarnecchia's motion for protective order, Plaintiff's motion for sanctions (failure to comply with order compelling discovery),

Dean Scarnecchia's motion to dismiss and UNM's motion for summary judgment on February 15, 2011. (RP 618, TR 2/15/11).

Judge Raphaelson denied Plaintiff's Motion for Sanctions against the Defendants for failure to comply with the Order Compelling Discovery, denied Scarnecchia's motion to dismiss (RP 740-741), granted Scarnecchia's Motion for Protective Order (RP 735-736), granted UNM's Motion for Summary Judgment and dismissed Plaintiff's complaint with prejudice (RP 737-739).

The New Mexico Attorney General filed a motion to dismiss on November 15, 2010 (RP 577-581). Judge Raphaelson determined that the Attorney General's Motion to Dismiss would be heard on May 2, 2011 in Tierra Amarilla, and even though the Notice of Appeal was filed April 5th, 2011 held the hearing wherein she granted the Attorney General's Motion to Dismiss. (RP 733 and SRP 1-2).

The Order Granting Summary Judgment was filed in the Eighth Judicial District Court on the 9th day of March, 2011 (RP 737-739). This Court issued its Calendaring Notice on July 18, 2011, assigning the matter to the General Calendar. The Transcript of Proceedings were filed with the Appellate Court Clerk on August 2, August 22, and September 7, 2011. (SRP 141-149). Finally, the clerk filed a Supplement to the Record Proper on October 17, 2011.

This brief is timely filed if received by October 24, 2011 (October 22, 2011 is a Saturday). Rule 12-210 NMRA 2011.

c. SUMMARY OF FACTS RELEVANT TO THE APPEAL

In 1986 Leon Karelitz a retired District Court Judge began talks with the UNM School of Law about the importance of teaching enhanced evidence to law students. He and his wife were willing to have their life savings go to endowing a perpetual chair of evidence and procedure to provide law students with enhanced knowledge of evidence.

In September 1987 Leon and Lee Karelitz executed their wills (SRP 4-20), which, on the death of the second to die, devised the majority of their assets to The Leon and Lee T. Karelitz Trust which was to benefit, in perpetuity, the chair and named the UNM Foundation as Trustee. The wills were delivered to Dean Ted Parnell who advised Karelitz they were acceptable to the Regents and the UNM Foundation. (KA ¶4 @ RP 289-290).

In 1991 Karelitz met with Joe McKay, UNM Foundation Director of Trusts and Bequests, and discussed conveying $25,000 per year into a Foundation lifetime savings account. Mr. McKay prepared and sent, and Karelitz signed, an agreement opening the account and making the annual conveyances "in Trust." (SRP 19-20). Karelitz delivered the first $25,000 check in 1991, and for each subsequent year thereafter until 2003. (KA ¶5 @ RP 290-291).

In 1994 Leon Karelitz met with Karen Stone, UNM Foundation President and Jan Hosea, Director of Development of the School of Law regarding a successor trustee if he should predecease Lee.

Karelitz was directed to Ken Leach, an attorney who worked with the Foundation. (KA ¶9 @ RP 298-299). On December 28, 1994, Karelitz signed the Leon and Lee T. Karelitz Trust, prepared by Mr. Leach, and prepared documents of conveyance of assets to the Trust. (SRP 21-43). He also signed an Agreement to Establish the Lee and Leon Karelitz Chair of Evidence and Procedure prepared by Mr. Leach. (SRP 44-48). Mr. Leach did not bill the Karelitz' for any of this work. (KA ¶9 @ RP 299). Lee Karelitz died April 28, 1995.

In August 1995 Karelitz met with Stone and Caroline Tinker in Raton to discuss his prospective gift to UNM. In September 1996 he again met with Stone, this time in Albuquerque to discuss the purpose of a trust. (KA ¶9 @ RP 295). Following this meeting he sent Stone a letter dated October 4, 1996 (RP 340-343), summarizing his donative intent and trust purpose and seeking assurance of UNM's compliance with the trust purpose. (KA ¶9 @ RP 297).

Stone replied October 22, 1996 acknowledging the October 4th letter and indicating that she would provide it to UNM President, Richard Peck, and the Foundation Board Chairman, Richard Morris. (RP 344). Peck wrote to Karelitz on December 5, 1996 stating that he had reviewed Karelitz' October 4, 1996 letter and promised to work to ensure compliance with Karelitz' wishes. (RP 345-346).

On July 9 and 10, 1997 Karelitz met with Dean Leo Romero and Hosea, in Raton. On July 24, 1997 he wrote a letter to Stone regarding the meeting, reiterating that the gift is to the

Foundation, as trustee encumbered by duties to manage, invest and disburse the funds in accordance with the trust; that he had gone over his letter of October 4, 1996 with Dean Romero, he disavowed a letter he had received from Hosea and Romero dated July 21, 1997; he described the documents which controlled the chair; and he referred to the Foundation as trustee. (RP 347-349).

On May 17, 1999 Karelitz wrote to D.F. Swan, President of the UNM Foundation to reiterate that the Karelitz money should not be used to replace legislative support, again referring to the Foundation as trustee and stressing its fiduciary obligation. (RP 350-351).

On June 7, 1999 Swan wrote and assured Karelitz that the Foundation would follow Karelitz' wishes. (RP 352-353). Karelitz met with Dean Desiderio, Morris and Swan on August 6, 1999 and in a follow up letter dated August 10, 1999, Swan stated "... The UNM Foundation will ... ensure that all parties comply with the intent and direction of your gifts to the Law School." (RP 354).

In August of 2002 Karelitz called Leslie Elgood, President of the UNM Foundation and was informed by Elgood that the Foundation had no file on him. (KA ¶10 @ RP 305-308). Karelitz mailed copies of the correspondence to Elgood. (KA ¶10 @ RP 307). On August 23, 2002, Elgood told Karelitz that she had found a thick file and it included the correspondence he had mailed to her. (KA ¶10 @ RP 308). On September 20, 2002 in a meeting with Elgood, John

Maes, Desiderio and Wright, Karelitz stated he would make no further contributions unless the UNM Foundation agreed his funds were to be segregated from the consolidated investment fund, with fees based upon earnings not total fund value, subject to an investment policy. He was told agreement to such terms would have to be approved by the executive committee. (KA ¶10 @ RP 308-312). Karelitz helped Desiderio with the submission of a proposal to the executive committee and on October 15, 2002, Desiderio called Karelitz and said the executive committee had met, reviewed and accepted the proposal. (KA ¶10 @ RP 314).

On November 10, 2002, Karelitz sent a letter to Desiderio explaining his various problems with the consolidated investment fund and his intent to extract his funds from the fund into a segregated account and give his money to the law school. (RP 355-356). On or about November 15, 2002 Karelitz received an agreement, prepared by Ken Leach, which called for the segregation of the fund only until the death of Karelitz. (KA ¶10 @ RP 314-315). Karelitz rejected the agreement and on or about November 17, 2002, dictated a revised agreement concerning an additional contribution of $2.2 million dollars to Desiderio's secretary. (KA ¶10 @ RP 317). Desiderio had the revised agreement typed in final form and on December 14, 2002, Karelitz signed the revised Agreement Amending in Part, the Agreement to Establish the Lee and Leon Karelitz Chair of Evidence and Procedure with an attached "Investment Policy." (KA

¶10 @ RP 317; SRP 77-84). On December 31, 2002, the day before donating $2.2 million dollars, Leon Karelitz wrote a letter to Elgood stating

> "... the Foundation likely an instrumentality of the University of New Mexico invites gifts, some of them in the form of endowments, upon representations it will safeguard and manage the endowed funds and cooperate to assure that over the long run their purposes are fulfilled.
>
> This invitation results in a relationship of trust, governed by the common law of trusts, defined largely in equitable principles ...".

(SRP 131).

On January 1, 2003, Karelitz transferred $2,187,500.87 in bonds, accrued but unpaid interest and money market balances to the UNM Foundation. (RP 3, Complaint ¶6). On January 6, 2003, Judy Jones wrote to thank Karelitz for the gift "... making it possible for the law school to provide truly outstanding training in evidence and procedure to all law students. We will steward your gift well." (RP 357).

Shortly after January 6, 2003, Karelitz was informed that $375,000 of the high yield long term bonds, which he contributed, were about to be sold in violation of the terms previously agreed to by UNM and in violation NMSA 1978 §6-5A-1(B)(a)(1992). (KA ¶10 @ RP 319-323).

At the end of January or early February 2003 the Foundation sold $370,000 par value of the bonds that Karelitz had contributed resulting in a $28,000 loss of principal. (KA ¶13 @ RP 325, KA ¶12

@ RP 318-322). Karelitz complained to Desiderio who promised to call Dean Scarnecchia (KA ¶12 @ RP 321). On February 17, 2003, Karelitz wrote Elgood pointing out the various breaches and asserting that the Foundation could not delegate its duties as trustee under statutory and common law. (RP 358-59). After many calls and inquiries, on April 16, 2003 Karelitz sent a proposed working paper to Scarnecchia. (RP 362-366). Scarnecchia canceled an April 2003 meeting with Karelitz, and informed him that due to the fact that she was very busy she was appointing Herbert Wright as her contact for Karelitz assuring Karelitz "he will convey to me what you say." (KA ¶13 @ RP 325).

In a July 6, 2003 meeting with Scarnecchia, Occhialino, and Wright, Karelitz only had time to explain the charitable trust and the Foundations' breaches of trust. Scarnecchia explained that new UNM President, Louis Caldera, had experience in Foundations and said "we'll get it all straightened out." (KA ¶13 @ RP 328).

September 19, 2003 Karelitz mailed IRS Form 8283, Non-cash Charitable Contributions, executed by Karelitz to be signed by Elgood. The signature by Elgood acknowledged to the IRS the receipt of the public charitable gift (the $2,187,500.87). Form 8283 also required the Foundation to file IRS form 8282 and provide donor a copy if it sold donated property within three years, which it failed to do when selling $370,000 worth of bonds in early 2003. (KA ¶14 @ RP 330-331).

September 30, 2003 the parties executed the working paper for the Lee and Leon Karelitz segregated account. (RP 368-371). On April 30, 2004, Karelitz wrote to President Caldera and Scarnecchia his petition and grievances. (RP 391-414). In July 2004 Scarnecchia and Wright met with Karelitz wherein he described liabilities of trustees even when acting on advice of counsel. (KA ¶13 @ RP 329).

Finally, on September 8, 2004 the parties executed and delivered a letter agreement further amending the Agreement to establish the Lee and Leon Karelitz Chair of Evidence and Procedure dated December 18, 1994, as previously amended and supplemented December 14, 2002. In that letter agreement it was agreed that the annual contribution funds, those annual gifts made since 1991 in the amount of $423,635.12 were to be turned over to the segregated fund as part of the Karelitz Chair; the segregated fund was never to be a part of the consolidated investment fund held by the Foundation; all the segregated monies were subject to the Karelitz investment policy; the Foundation agreed to depart from its investment policy with respect to the Karelitz Fund and to "administer the Lee and Leon Karelitz Fund as you intend." (RP 425-426).

The Court, at the hearing on Summary Judgment, disregarded the majority of the documents before it: stated that she could find only two or three pages of facts in the 60 page affidavit filed by

Karelitz before his death (TR 2/15/11 @ 3:24:40 - 3:25:00), ignored Karelitz' intent in making a $3,000,000 gift: described Leon Karelitz' case as nothing more than a case of "Buyer's Remorse." (TR 2/15/11 @ 3:20:58 - 3:22:05). Judge Raphaelson, in initiating her ruling, mistakenly believed that Karelitz had given the bulk of the money in 1994 (TR 2/15/11 @ 3:20:58 - 3:21:28). She gave no consideration to the negotiations and agreements that brought about the $2.2 million dollar donation on January 1, 2003, gave no consideration to Karelitz' donative intent and the negotiations between the parties ongoing even after the donation of $2.2 million in January of 2003, and gave no consideration to all of the promises by UNM that the money would be used according to Karelitz' intent and wishes. (TR 2/15/11).

II. ARGUMENT

ISSUE NO. 1. The granting of summary judgment was error. Genuine issues of material fact exist and the Defendants were not entitled to judgment as a matter of law.

The matter before the trial court, in its most basic form, was whether the gifts from Karelitz of almost $3 million dollars, beginning with annual gifts of $25,000 in 1991 and culminating in a $2,187,500.87 gift on January 1, 2003, were absolute gifts as argued by Defendants or gifts in trust as argued by Plaintiff.

Appeal from the grant of summary judgment presents a question of law; therefore, the Court of Appeals reviews the matter de novo. Bartlett v. Mirabal, 2000-NMCA-036, 128 N.M. 830, 999 P.2d 1062.

The Defendants did not support their motion for summary judgment with an affidavit. The party moving for summary judgment has the burden of making a prima facie showing that it is entitled to judgment as a matter of law. Gantt v. L & G Air Conditioning, 101 N.M. 208, 680 P.2d 348 (Ct.App. 1983); Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct.App. 1983). Rule 1-056 NMRA 2011. Defendants did attach Exhibit A-E to their motion, however, they failed to make a prima facie showing that they were entitled to judgment as a matter of law. Defendants produced no evidence sufficient in law to establish the fact in question. See, Goodman v. Brock, 83 N.M. 789, 792-793, 498 P.2d 676, 679-680. Plaintiff, in his response, challenged that the 5 documents attached to Defendants' motion established a completed gift (RP 252); showed the court that there were disputed material facts about the creation of a charitable trust (RP 252 and 263); that even if a trust was not created Defendants were bound by donor's directives (RP 275); claimed disputed material facts existed and supported his response with an affidavit and Exhibits 1-20 (RP 251-426). Although the Court suggested that it had trouble gleaning more than 2 or 3 pages worth of facts from the affidavit (TR 2/15/11 @ 3:24:40 - 3:24:50) the affidavit was not struck and it contained

facts in support of Plaintiff's position. In addition, the Court had the Complaint and the 27 documents - letters, agreements, explanations, amendments, etc., which showed the course of conduct of the parties and, Plaintiffs assert, support the argument that the property given to UNM was given in trust.

Summary judgment is foreclosed either when the record discloses the existence of a genuine controversy concerning a material issue of fact, or when the District Court granted summary judgment based upon an error of law. Vive v. Verzino, 2009-NMCA-083, 146 N.M. 673, 213 P.3d 823. On motion for summary judgment, New Mexico courts view the facts in the light most favorable to the party opposing summary judgment and by all reasonable inferences in support of the trial on the merits. In Romero @ 721 citing Bartlett v. Mirabal, 2000-NMCA-036, 128 N.M. 830, 999 P.2d 1062, the Court said:

> "We continue to refuse to loosen the reins of summary judgment, ... we do not want to grant trial courts greater authority to grant summary judgment that has been traditionally available in New Mexico." (cite omitted).

Summary judgment is not proper where there is the slightest issue to a material fact. 1-056(c) NMRA 2011; Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct.App. 1970). Bartlett v. Maribal, *supra;* Marquez vs. Gomez, 116 N.M. 626, 866 P.2d 354 (Ct.App. 1991), cert quashed 116 N.M. 801, 867 P.2d 1183.

Summary judgment is a drastic remedy to be used with great caution and never as a substitute for trial on the merits. Fidelity National Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978); Pharmaseal Laboratories, Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977); Cebolleta Land Grant, ex rel. Bd. of Trustees of Cebolleta Land Grant v. Romero, 98 N.M. 1, 644 P.2d 515 (1982); Blauwkamp v. University of New Mexico Hosp., 114 N.M. 228, 836 P.2d 1249 (Ct.App. 1992), cert denied. 114 N.M. 82, 835 P.2d 80.

Summary judgment is inappropriate where facts are reasonably susceptible to different inferences. Pollard v. Westinghouse Elec. Corp., 119 N.M. 783, 895 P.2d 683 (Ct.App. 1995); Galloway v. New Mexico Dept of Corrections, 117 N.M. 637, 875 P.2d 393 (Ct.App. 1994); Marquez v. Gomez, *supra*.

UNM's motion was basically, here are five documents that make up an agreement. (RP 196-198). Karelitz' response was, you cannot consider the five documents in a vacuum, there are another 20 documents that must be considered along with the discussions, statements, admissions and omissions of the parties. (RP 251-276).

Evidence tendered by parties opposing summary judgment is viewed in the light most favorable to support a trial on the merits. Bank of New York v. Regional Housing Authority, 2005-NMCA-116, 138 N.M. 389, 120 P.3d 471. The Karelitz affidavit may be cumbersome, it may even be difficult to read, but it is replete with

the facts surrounding the creation of the Trust and the 20 attached documents support the affidavit's statements.

As set forth herein in the Summary of Facts (Brief in Chief) the record before the trial court was replete with communications, letters, agreements, documents, etc., dating from 1987 through the filing of the Complaint in 2005, wherein Karelitz repeatedly informed the Foundation, the School of Law, and UNM that his gifts were "in Trust" and that the Defendants owed fiduciary obligations.

In light of Defendants' failure to meet its prima facie burden and in light of the evidence before the Court, the granting of summary judgment was error.

ISSUE NO. 2: Summary Judgment was improper. The trial court erred in failing to consider the facts set forth in Plaintiff's Affidavit and attached Exhibits 1-20, which clearly established Plaintiff's intention to create a public charitable trust.

The Uniform Trust Code became effective July 1, 2003 and controls the trust created by Lee and Leon Karelitz. NMSA 1978, Section 46A-11-1104 A (2003).

The requirements to create a charitable trust as set forth in NMSA 1978, Section 46A-4-402A (2003) are:

> "46A-4-402. Requirements for creation. (2003)
>
> A. A trust is created only if:
> (1) the settlor has capacity to create a trust;
> (2) the settlor indicates an intention to create the trust; (emphasis added)
> (3) the trust has a definite beneficiary or is a charitable trust;

...

(4) the trustee has duties to perform; and
(5) the same person is not the sole trustee and sole beneficiary.

Restatement (Third) of Trusts § 2 (2001) defines trust as follows:

> "A trust, ... is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee."

The settlor's intention determines whether a charitable trust is created by a transfer of property, as argued by Plaintiffs, or whether there is an absolute gift, as argued by Defendants. See Lusk v. Doherty, 61 N.M. 196 at 199, 287 P.2d 333 (1956); Restatement (Third) of Trusts §4 (2001). Comment a to §4 explains:

> "a. What is included in terms of the trust? ... It includes any manifestations of the settlor's intention at the time of creation of the trust, whether expressed by written or spoken words or by conduct...".

A trust is created only if the settlor properly manifests an intention to create a trust relationship. See Restatement (Third) of Trusts § 13 (2001). Comment b to § 13 explains the mode of manifestation as follows:

> "*b.* ... the required manifestation of intention to create a trust may be by written or spoken words or by conduct.

> No particular manner of expression is necessary to manifest the trust intention. Thus, a trust may be created without the settlor's use of words such as trust or trustee...".
>
> In interpreting the words and conduct of property owners, circumstances that shed light upon their intentions are relevant. ... Acts or communications prior to and subsequent to, as well as those contemporaneous with, the transfer or other act that is claimed to create a trust may be relevant in determining whether a property owner had the requisite intention to create a trust."

The facts concerning settlor's intention to create a public charitable trust were set forth in the affidavit of Leon Karelitz and Exhibits 1 Through 20 to said affidavit. (RP 277-475). Extrinsic evidence is admissible to determine settlor's intent. See, Restatement (Third) of Trusts §13 (2001); Cable v. Wells Fargo Bank N.M., N.A., 2008-NMCA-005, ¶8, 143 N.M. 269, 175 P.3d 937; and Anthony Co. v. Loretto Mall Partners, 112 N.M. 504, 508-509, 817 P.2d 238 (S. Ct. 1991).

In New Mexico courts are not confined to the four corners of the document in interpreting a contract, evidence of the circumstances surrounding the making of the contract and of any relevant course of dealing may be used to determine the meaning of a term or expression. Mark V, Inc. v. Mellekas, 114 N.M. 778, 781, 845 P.2d 1232 (1993), Stock v. Grantham, 1998-NMCA-081, ¶15, 125 N.M. 564, 964 P.2d 125. The courts may look to extrinsic evidence such as the circumstances surrounding the agreement, the conduct of the parties, and oral expressions of the parties' intentions.

Ponder v. State Farm Mut. Auto. Ins. Co., 2000-NMSC-033, ¶¶13-14, 129 N.M. 698, 12 P.3d 960. However, courts will not give effect to a party's undisclosed intentions. City of Sunland Park v. Harris News, Inc., 2005-NMCA-128, ¶19, 138 N.M. 588, 124 P.3d 566. Extrinsic evidence is admissible to determine the meaning one party or both parties attached to a particular term or expression at the time the parties agreed to those provisions. Sisneros v. Citadel Broadcasting Co., 2006-NMCA-102, ¶17, 140 N.M. 266, 142 P.3d 34, City of Rio Rancho, v. AMREP Southwest, Inc., 2010-NMCA-075, 148 N.M. 542, 238 P.3d 911, and Chisos, Ltd. v. JKM Energy, L.L.C., 2011-NMCA-026, ¶10, __ N.M. __, __ P.3d ____.

In this case the trial court erred in failing to consider the extrinsic evidence submitted by Plaintiff's affidavit and exhibits showing he intended to create a public charitable trust. The court did state that the Affidavit contained two or three pages of facts. (TR 2/15/11 @ 3:24:40 - 3:25:00). Even if it were the case, two or three pages of fact along with the 20 Exhibits showing the course and conduct of the parties' dealings, is enough to thwart summary judgment. Romero, *supra;* Bartlett, *supra.* Bank of New York, *supra.*

As stated in the Summary of Facts and supported by the citations to the record Plaintiff began dealing with Defendants in 1987; the first written indication of intent was in the executed wills dated September 11, 1987, providing for an express charitable trust. (SRP 4-20).

In 1991 Plaintiff and his wife entered into an agreement to provide lifetime gifts in trust that would be added to the testamentary trust set forth in the 1987 wills (KA @ ¶5, RP 290-291).

In 1994 Plaintiff was sent to attorney Ken Leach to assist Plaintiff in the creation of a trust. (KA ¶3, RP 287, 290).

In December of 1994 Plaintiff executed the revocable trust and entered into an Agreement to Establish the Lee and Leon Karelitz Chair of Evidence and Procedure dated December 14, 1994, both prepared by Mr. Leach free of charge (KA ¶09, RP 298-300).

Plaintiff met with UNM School of Law and UNM Foundation officials many times and sent letters discussing his intentions and the purpose of his trust and setting forth the trust terms describing the Foundation as trustee and setting forth the duties of the trustee. Plaintiff was told many times that UNM would establish the chair pursuant to his wishes, and that his money would be used in accordance with his wishes (See Summary of Facts, Brief In Chief Pg. 5-12).

On December 31, 2002, one day before transferring 2.2. million dollars worth of property to the Foundation Plaintiff wrote to Elgood and stated:

> "The Foundation likely an instrumentality of the University of New Mexico invites gifts, some of them in the form of endowments, upon representations it will safeguard and manage the endowed funds and cooperate to assure that over the long run their purposes are fulfilled.

> This invitation results in a relationship of trust, governed by the common law of trusts, defined largely by equitable principles." (SRP 131).

The UNM Defendants have not produced anything wherein one of them said- "Karelitz, you are mistaken in your assertions that this is a trust" or "we cannot accept your money under your terms."

Clearly, the Plaintiff intended his transfers to the Defendant UNM Foundation to create a public charitable trust, and the Defendants knew or had reason to know of his intention. See, Chisos, Ltd. v. JKM Energy, L.L.C., 2011-NMCA-026, ¶16, __ N.M. __, __ P.3d __. Even so, the Defendants never objected to Plaintiff's claims of trust, or disclosed that their intentions were to the contrary [RP 286 and 302-303, KA ¶9). See, Ponder v. State Farm Mut. Auto. Ins. Co., 2000-NMSC-033, ¶¶14, 129 N.M. 698, 12 P.3d 960.

An agreement may consist of two or more writings that are part of the same transaction. See, Espinosa V. United of Omaha Life Ins. Co.,2006-NMCA-075, ¶15, 139 N.M. 691, 137 P.3d 631. The Court's primary goal in contract interpretation is to ascertain and enforce the intent of the parties; see United Nuclear Corporation v. Allstate Insurance Company, 2011-NMAC-039, Bar Bulletin, p. 36, May 25, 2011, Vol. 50, No. 20.

A genuine issue of fact concerning Plaintiff's intention to create a public charitable trust precluded the trial court from granting Defendants' Motion for Summary Judgment, and the trial

court's Order Granting Motion For Summary Judgment and Judgment entered March 9, 2011 should be reversed.

ISSUE NO. 3: Summary Judgment was improper. There was no integration or merger of the parties' agreements into any of the documents attached to Defendants' Motion for Summary Judgment as Exhibits A through E and the parties' agreements establishing a charitable public trust.

Summary Judgment was improper. The parties' agreement was never fully integrated into a single document nor fully integrated into several documents. None of the Agreements attached by Defendants to their Motion for Summary Judgment contain any language that would suggest the parties intended to include all of their agreement in a single document. (RP 200-222). None of the documents contained a customary integration clause. (RP 200-222). See Nakashima v. State Farm Mutual Auto Ins., 2007-NMCA-027, ¶12, 141 N.M. 239, 153 P.3d 664, and Randles v. Hanson, 2011-NMCA-059,¶32, __ N.M. __, __ P.3d __.

Whether an agreement is a fully integrated contract is a question of the parties' intent. Wilburn v. Stewart, 110 N.M. 268, 794 P.2d 1197 (1990). In Wilburn at 270 the Court held:

> "We further explained that the issue is really one of intent: Did the parties intend to include the points at issue within the scope of the document?"

In Bell v. Lammon, 51 N.M. 113, 118-119, 179 P.2d 757 (1947) our Supreme Court adopted Wigmore's analysis as follows:

> " More correctly, the inquiry is whether the writing was intended to cover a certain subject of negotiation; * * * and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect parts of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing.
>
> The intent must be sought where always intent must be sought, * * * namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. * * * In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing.
>
> If it is mentioned, covered, or dealt with in the writing, then presumably the {*119} writing was meant to represent all of the transaction on that element; * * *. This test is the one used by the most careful judges, and is in contrast with the looser and incorrect inquiry * * * whether the alleged extrinsic negotiation contradicts the terms of the writing. Citing Locke v. Murdoch, 20 N.M. 522, 151 P. 298 (1915).

The documents relied upon by the Defendants in their Motion for Summary Judgment are silent on the issue of whether Plaintiff's donation was a public charitable trust. The Plaintiff repeatedly told the representatives of the Defendant UNM Foundation and Defendant UNM Regents as well as Defendant Scarnecchia that his intent was a trust, the recipient was a trustee and the Defendants had trust obligations.

In his Affidavit Plaintiff described his intent:

> But the December 28, 1994 Agreement prepared by Foundation Attorney Leach could not deprive me of the

previously arranged trust (as evidenced by all my future actions and contacts with all personnel of the University and Foundation with whom I dealt; and all my contacts subsequently, with concurrence by Dean Desiderio, D. F. Swan of the Foundation, Karen Stone (before Mr. Swan), Dean Scarnecchia and Judy Jones, the V.P. for Institutional Advancement, were about and concerning the "trust," and not one person ever raised the point that there might not be a trust... . (KA ¶19, RP 302-303).

Restatement (Second) of Contracts §210 (1) (1981) defines a completely integrated agreement as follows:

> "A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement."

The comments to §210 (a)-(c) do not support the Defendants' apparent assertion that Exhibits A-E attached to their Motion For Summary Judgment establish a completely integrated agreement.

> Comment:
>
> "*a. Complete integration.* The definition in Subsection (1) is to be read with the definition of Integrated agreement in §209, to reject the assumption sometimes made that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon... .
>
> *b. Proof of complete integration.* That a writing was or was not adopted as a completely integrated agreement may be proved by any relevant evidence... But a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties.
>
> *c. Partial integration.* It is often clear from the face of a writing that it is incomplete and cannot be more than a partially integrated agreement. Incompleteness may also be shown by other writings... Or it may be shown by any relevant evidence, oral or written, that an apparently complete writing never became fully effective, or that it was modified after initial adoption."

It is clear that the Plaintiff's affidavit and the twenty exhibits referred to therein are to be considered in determining whether the issue of charitable trust was covered within the scope of a claimed completely integrated agreement. Restatement (Second) of Contracts §210, §214 (1981) (Evidence of Prior or Contemporaneous Agreements and Negotiations).

Under §214 Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish: that the writing is or is not an integrated agreement; whether integration is complete or partial; the meaning in writing, whether or not integrated; whether the agreement is subject to an invalidating cause; and whether there are grounds for granting or denying rescission, reformation, specific performance, or other remedy. Restatement (Second) Contracts §214 *supra*.

Comment b to §214 states:

> *b. Interpretation.* Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties... .

See also Comment a to Restatement (Third) of Trusts § 21 (2001).

The Trial Court erred in granting Defendant's Motion for Summary Judgment in light of the material factual issue concerning Plaintiff's intention that the parties' agreement created a public

charitable trust, in light of the parties' prior agreements and negotiations, as well as the meaning attached to the parties' words and what each knew or had reason to know. The Plaintiff is not prevented from proving that he intended a trust. The judgment should be reversed.

ISSUE NO. 4. Summary Judgment was improper. There was no showing of novation of the parties' agreement establishing the trust as a charitable public trust set forth in Exhibits 1 through 20 attached to Plaintiff's Response to Motion for Summary Judgment and the underlying facts expressed in the Affidavit.

The Plaintiff established a public charitable trust by transferring property to Defendant UNM Foundation, as an instrumentality of Defendant UNM, subject to duties imposed upon both defendants to use a portion of the income from the principal transferred to enhance the teaching of evidence to the students at the School of Law and pursuant to Plaintiff's manifested intention to thereby create a charitable trust in perpetuity; see NMSA 1978, §46A-4-402 (2003). None of the documents attached to Defendants' Motion for Summary Judgement (Defendants' Exhibits A-E) was a novation that extinguished Plaintiff's agreement for a public charitable trust.

In Summit Properties, Inc. v. Public Service Co. of N.M., 2005-NMCA-090, ¶29, 138 N.M. 208, 118 P.3d 716 the New Mexico Court of Appeals, citing the New Mexico Supreme Court in Sims v. Craig, 96

N.M. 33 at 35, 627 P.2d 875 (S. Ct. 1981), set forth the requirements of a Novation as follows:

> 29} Novation requires "(1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one." Sims v. Craig, 96 N.M. 33, 35, 627 P.2d 875, 877 (1981). For a novation, "there must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well-settled principle that novation is never to be presumed." Id. (internal quotation marks and citation omitted).

The documents relied upon by Defendants in support of their Motion for Summary Judgment do not indicate a clear and definite intention to extinguish Plaintiff's agreement to establish a public charitable trust. In fact those documents (Defendants' Exhibits A-E) and Exhibit E in particular support Plaintiff's claim for a public charitable trust. (RP 200-222).

The question of whether the parties intended a novation is an issue of material fact that must be decided by a trial and is not a question of law. The trial court erred in granting Defendants' Motion for Summary Judgment, because the parties' intent is a material issue of fact.

ISSUE NO. 5. NMSA 1978, §46A-11-101. The agreements executed by the parties when viewed in light of all of the surrounding facts which clearly evidence Plaintiff's stated intention to create a public charitable trust creates such a trust under the New Mexico Uniform Trust Code, and common law.

Plaintiff wrote to UNM President Caldera and Defendant Suellyn Scarnecchia by letter received in the President's office May 14, 2004 (Plaintiff's Exhibit 18, RP 391-414). Exhibit E attached to Defendant's motion was a letter signed by Defendant Suellyn Scarnecchia as Dean of the UNM Law School and Donald F. Swan as President of the Defendant UNM Foundation (RP 221-222). When that letter was signed by Plaintiff an agreement effective September 10, 2004, constituted a contract establishing a public charitable trust.

Plaintiff's letter to UNM President and to Dean Scarnecchia, sometimes referred to by Plaintiff as a "Petition", consumed 21 pages of text, plus attachments. (RP 391-414). The "Petition" discusses trusts and trust law in relation to Universities and the practical need to accommodate and take a contribution from a donor, who, uncomfortable with giving under the recommended Act, is nonetheless willing to contribute under that donor's own (and different) plan. Charitable public trusts are discussed in the context of enhanced teaching and study to continue in perpetuity, and comment is made with respect to the statute of Charitable Uses enacted in Britain in 1601, and that under that statute, accepted in part as the common law in this country, including New Mexico, donations to a University for enhanced and enriched teaching at a University, to procure better education for its students was, and ever since has been deemed a public charitable trust for unascertained beneficiaries. (RP 397). See Mountain View Homes,

Inc. v. State Tax Commission, 77 N.M. 649 at 653, 427 p. 2d 13 (1967).

Plaintiff cited the October 9, 1997 Amended Memorandum of Agreement between the Defendants UNM and UNM Foundation, page 5, section 2.6:

> ... If the gift is income-producing property, the Foundation may retain the property and use the income to accomplish the donor's objective. The Foundation may also dispose of the property if the donor has allowed for the disposal in the gift instrument...". (RP 393).

Plaintiff also cited the 1999 Investment Policy of the Defendants UNM and UNM Foundation.

> "If donor funds are accepted by the Foundation or the University with specific restrictions as to investments, they shall fall outside the dictums of this policy and shall be administered by the investment committee or its designee in accordance with donor specifications." (RP 393).

Plaintiff's letter expressly referred to his earlier letter dated December 31, 2002 (Exhibit B attached to Plaintiff's Exhibit 18, RP 415) to Leslie W. Elgood in which Plaintiff specifically described his gift as a trust.

Plaintiff referred to his 1987 will and the will of his late wife which provided for express testamentary trusts. Copies of both of which had been provided to and approved by Defendant UNM. (KA ¶3 @ RP 289-290). He referred in the letter that he and his wife, in reliance upon NMSA 1978, §21-1-38 and their dealings with Defendant UNM, began making annual gifts in trust to the UNM

Foundation. [Plaintiff's Exhibit 18 at page 12, RP 402 and KA ¶5 @ RP 290-291).

Plaintiff complained that the Defendant UNM had breached its trust obligations by charging unauthorized fees. (RP 407-409).

In short, Plaintiff's Exhibit 18 declared that all the Lee and Leon Karelitz contributions to the University/Foundation/Law School had been delivered as a public charitable trust for educational purposes, specifically for the enhancement and enlargement of the teaching of Evidence in a required course within a classroom setting by a learned professor, with a minor allowance for a similar effort in the field of procedure by a learned professor, and with trust investment exclusively within the parameters of the Investment Policy. (RP 391-422).

The University Law School and UNM Foundation reply of September 8, 2004 (Plaintiff's Exhibit 20, RP 425-426), signed by Plaintiff on September 10, 2004, provided Plaintiff's annual investment fund, then in the amount of $423,635.12, was ordered turned over to Plaintiff's Segregated Fund with Piper Jaffray and Company (owned by Defendant UNM Foundation) for operation with and as a part of the Karelitz Chair. It was further agreed that such Segregated Fund (the Chair and also the Professorship Accounts) never should or could be returned to or made a part of the Foundation's Consolidated Investment Fund, and as to all assets and monies, being delivered over from the Foundation to the Karelitz

Segregated Accounts, as well as the investments and reinvestments thereof, it was declared that all such properties and monies shall be subject to all provisions of the December 14, 2002 Agreement, inclusive of the 3-page Investment Policy thereof, and to all provisions of the Working Paper for the Lee and Leon Karelitz Segregated Account implementing and refining the foregoing December 14, 2002 Agreement.

The September 8, 2004 letter from UNM (RP 425-426) recited, (with respect to Plaintiff's letter mailed May 14, 2004):

> "Please be assured that the University of New Mexico Foundation, Inc., in partnership with the University of New Mexico School of Law, is committed to administering the Lee and Leon Karelitz Fund as you intend, and in a manner consistent with the ample support of the Lee and Leon Karelitz Chair of Evidence and Procedure, and the Lee and Leon Karelitz Professorship in the field of Evidence and Procedure. We very much appreciate the opportunity to regain your confidence." (Emphasis added)

In the September 8, 2004 letter agreement (Plaintiff's Exhibit 20), signed two days later by Plaintiff, President Swan and Dean Scarnecchia (with copy thereof forwarded to then UNM President Louis Caldera) said, in essence, that they knew that Plaintiff intended a public charitable trust to result from Plaintiff's charitable contributions and further that such contributions were intended to be placed in trust-type investments to support the expenses of the Chair and Professorship. The Foundation and Law School said, "... we will commit" to administering the Karelitz Fund "as you (Leon Karelitz) intend"; ending with "Gifts such as yours further our

mutual goal of ensuring that the Law School provides a first rate legal education to individuals...". (RP 426). The Foundation and Law School clearly understood in their September 8, 2004 offer that for the trust created by Lee and Leon Karelitz there would be trust-handling and trust-type investment. They did not refuse, deny or argue with Karelitz' premise that he and Lee had created a trust. (RP 425-426).

The trial court erred in granting Defendants' Motion for Summary Judgement in light of the parties' express agreements establishing Plaintiff's donations as a charitable public trust for the benefit of the law students of the University of New Mexico School of Law and through their enhanced learning for the benefit of all of the citizens of the State of New Mexico.

CONCLUSION

The Defendants never met their initial burden under Rule 1-056 NMRA 2011. The motion for summary judgment, unsupported by affidavit, attaching five documents without context as to the negotiations, discussions and plans of the parties (seventeen years of such) fails to make a prima facie showing that Defendants are entitled to judgment as a matter of law. Even if it were found that Defendants met their burden, the Plaintiff's response shows that there are disputed, material, genuine and relevant facts and that summary judgment was improper. This matter should be remanded to the district court with instructions to reinstate the Plaintiff's

claims, allow discovery to be completed and for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned herewith certifies that a true and correct copy of the foregoing was mailed this 21st day of October, 2011, by depositing the same in the United States mail, postage pre-paid and addressed to:

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