IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

Court of Appeals No. 31,489

PONDEROSA PINES GOLF COURSE,

Plaintiff-Appellant,

vs.

PONDEROSA PINES PROPERTY OWNERS ASSOCIATION, et al,

Defendants-Appellees.

APPEAL FROM THE TWELFTH JUDICIAL DISTRICT
COUNTY OF OTERO

Twelfth Judicial District No. D-1215-CV-200901018
The Honorable James Waylon Counts, Presiding

REPLY BRIEF

ORAL ARGUMENT IS REQUESTED

John R. Hakanson
Hakanson & Associates
307 11th St.
Alamogordo, NM 88310-6916
(575) 437-2874

and

L. Helen Bennett
Attorney at Law
P.O. Box 4305
Albuquerque, NM 87196-4305
(505) 321-1461

Attorneys for Appellant

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STATEMENT OF PAGE/WORD COUNT COMPLIANCE:

This Brief contains more than the permitted 15 pages. Counsel used NeoOffice with a proportionally spaced Times New Roman typeface. The body of the document consists of 4,392 words total.

Ponderosa Pines stands by its presentation of the facts and evidence adduced before the District Court. The Association misapprehends the applicable standard of review, arguing that the "substantial evidence" standard applies. [*E.g.* AB 3; 15] "An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed *de novo*." *Montgomery v. Lomos Altos, Inc.*, 2007–NMSC–002, ¶ 16, 141 N.M. 21, 150 P.3d 971. The facts and reasonable inferences are not construed – as the Association demands - in favor of the moving party. [*Contrast* AB 3;15] Rather, the Court views "the pleadings, affidavits, and depositions presented for and against a motion for summary judgment in a light most favorable to the nonmoving party." *Deaton v. Gutierrez*, 2004–NMCA–043, ¶ 12, 135 N.M. 423, 89 P.3d 672. Summary judgment is not appropriate there is a genuine controversy concerning a material issue of fact or when summary judgment is based upon an error of law. *Id.* The standard of review is outcome determinative in this case.[1]

The Association betrays its comprehensive analytical error at AB 5, where it insists that Melkas' facts were "not disputed with any *credible evidence*" [emphasis added]. [*See also* AB 35] Summary judgment does not determine credibility issues. *Juneau v. Intel Corp.*, 2006–NMSC–002, ¶ 23, 139 N.M. 12, 127 P.3d 548

1 Rather, it is the Association who mis-presents the record below; the Association fails to cite the evidence and inferences therefrom that supported a trial on the merits.

(summary judgment is not an appropriate vehicle for courts to weigh evidence and witness credibility).

The analytical error is further revealed when the Association notes that the evidence can be construed in different ways. [AB 13] This is precisely why summary judgment was improper. *Juneau*, 2006–NMSC–002, ¶ 27.

The Association is wrong about what evidence properly supports or refutes a motion for summary judgment. In order to make a prima facie case under Rule 1-056 NMRA, the Association had to introduce admissible evidence in favor of its position. *C & H Constr. & Paving Co. v. Citizens Bank,* 93 N.M. 150, 163, 597 P.2d 1190, 1203 (Ct.App.1979) (assertion by summary judgment movant is not entitled to consideration absent support by affidavit or admissible evidence). The Association relied on Melkas' hearsay deposition testimony and representative exhibit. [RP 734-739]

Ponderosa Pines demonstrated through affidavits and admissible evidence [*e.g.* RP 770-873; 897-904] that Melkas' testimony was unreliable, that events could not have occurred as she claimed. The map she referenced did not exist at the time alleged representations were made. [RP 897-904] Disputed issues of material fact regarding reliance, representation, or inducement precluded summary judgment below.

THE EVIDENCE THE ASSOCIATION INTRODUCED IN SUPPORT OF SUMMARY JUDGMENT WAS HEARSAY, WAS PROPERLY CHALLENGED, AND DID NOT SUPPORT SUMMARY JUDGMENT.

The Association's argument that Melkas' testimony of reliance, representation, or inducement establishes the case represents the logical fallacy of "begging the question." "The fallacy of begging the question consists in taking for granted precisely what is in dispute, in passing off as an argument what is really no more than an assertion of your position." Jamie Whyte, *Crimes Against Logic* 108 (2005); *see also* Welton, et al., *Intermediate Logic* 256 (4th ed. 1962) (error "is . . . committed when a proposition which requires proof is assumed without proof").

The Association's position, restated, is: "Association members may have relied upon the continuing existence of the golf course as a golf course, so the land must remain a golf course." The point of contention is precisely whether any Association member actually relied upon the continuing existence of the golf course, and whether that reliance was reasonable under the circumstances. The evidence is disputed. A Court cannot decide a fact by assuming it.

The Absence of Use Restrictions in Recorded Documents.

The Association's meritless position is revealed in its response to Ponderosa Pine's argument regarding the absence of use restrictions in plats or maps [AB 11]. The Association concedes that "the golf course is not shown on any recorded document". The Association insists this is irrelevant because all the Association had to

do is introduce any map – whose authenticity is assumed, and which map may have been created years after the fact for a wholly other purpose than to sell land - and the Association can bind subsequent purchasers of adjacent land without notice and without recourse.

If the Association's argument is accepted as a matter for summary adjudication, any property owner whose property abuts open space or land used as a golf course can forever bind the use and development of that land, simply by creating a "map" showing the interest at the time of his purchase, and by asserting that the purchase of adjoining property was made in reliance on the land remaining undeveloped or a golf course. No notice of record is required, and the controlling interest need not appear in any deed or recorded plat or map. The hearsay testimony of any individual who claims to have knowledge of the historical facts, referencing a "type of map", is sufficient as a matter of law.

This extraordinary assertion renders notice to purchasers meaningless. It gives absolute controlling ownership interest without consideration, since reliance is presumed by proximity; the interest is established by hearsay and unauthenticated documents. The reference to a "type of map" cannot control the incidents of ownership of land as a matter of law, where the origins and authenticity of the map relied upon are challenged, along with the reliability of the witness.

The Association repeatedly alludes to arguments and testimony regarding reliance, representation, and inducement, and argues that the Association wins if it suggests that even one purchaser bought property in reliance on the existence of the golf course (*citing Cree Meadows, Inc. v. Palmer*, 68 N.M. 479, 362 P.2d 1007 (1961)), under an agreement or representation (*citing Huning v. Potts,* 90 N.M. 407, 564 P.2d 612 (1977)) or under a theory of inducement (*citing Knight v. City of Albuquerque,* 110 N.M. 265, 794 P.2d 739 (Ct.App.1990)). [AB 2] The Association conflates allegations of reliance, agreement, or inducement, with undisputed evidence.

The Absence of Admissible Evidence to Support Summary Judgment.

Melkas' testimony and exhibits are not self-authenticating; Ponderosa Pines established credibility issues and knowledge gaps in Melkas' testimony that disputed her evidence. [RP 770-873; 897-904] The Association asserts that all Melkas had to do was refer to a "type" of map; the actual map need not be adduced. [AB 6] Under the Association's theory, to control the use of adjoining property, a landowner need not adduce admissible evidence; the mere assertion of reliance upon some unsubstantiated document is sufficient.

The Association insists that Melkas' hearsay testimony was undisputed [e.g. AB 3], a demonstrably incorrect contention when Ponderosa Pines' proffered evid-

ence is viewed under the proper standard. The Association's assertions do not demonstrate the fact. *C & H Constr.*, 93 N.M. at 163, 597 P.2d at 1203.

Disputed Material Facts Precluded Summary Judgment.

The Association contends that Ponderosa Pines cannot rely upon the evidence set forth in its Complaint to refute summary judgment [AB 4]. Ponderosa Pines cited background facts from the Complaint of present ownership, size, cost, and former usage of the land, which are not material facts in dispute.

Ponderosa Pines challenged the reliability, credibility, and authenticity of the Association's evidence, as the Association tacitly concedes. [AB 5-9] Ponderosa Pines introduced evidence that Melkus was not an original owner or partner in El Dorado. [RP 756; 770] The inference from the contrary evidence - which should have been drawn in favor of Ponderosa Pines - was that the subdivision had been conceived, planned and platted before Melkus' time. [RP 756]

The Association challenges Ponderosa Pines' citation at BIC 8 to Tommie Herrell's affidavit for the proposition that the golf course was not used as the main selling point. Herrell averred: " At no time did I or anyone I knew in the real estate business ever represent to purchasers that the golf course would always be a golf course." [RP 849] Herrell also averred that:

> Mr. Manatt always indicated that he intended to reserve the right to change the use of the land where the golf course is located if it proved not to be a viable economic enterprise. Even prior to constructing the golf course, he in-

> dicated to me that he did not want El Dorado Land Corporation to be obligated to keep it as a golf course or even open land in perpetuity.

[*Id.*] A reasonable inference from this and the varying interrogatory responses of responding owners [RP 786 – 847] is that perpetual existence of the golf course was not a main selling point. The absence of reference in the plats or deeds is further evidence, to be construed in favor of Ponderosa Pines. Conversely, the absence of covenants or easement language in their own property deeds must be construed against purchaser's assertion of reliance.

The Association concedes that the golf course is not shown on any recorded documents, but insists that this is irrelevant because they are relying on representations made to a "map" (which is not of record). [AB 6; 11] The Association's alleged reliance on any "type of map" is insufficient to support summary judgment, where the existence and date of the "type of map" is contested. [RP 897-904] "Reliance" is a question of fact susceptible to proof, and Ponderosa Pines challenged the authenticity of the Association's proffered "evidence" of reliance. *See Sanchez v. Memorial General Hosp.*, 110 N.M. 683, 687, 798 P.2d 1069, 1073 (Ct.App. 1990) (holding that whether an employer relied upon the representations of an applicant is a question of fact). Even if reliance may be shown by hearsay reference to a "type of map" [AB 6], Ponderosa Pines' foundational challenge precludes summary judgment.

The relevant disputed facts are well documented. [*E.g.* RP 82, 772-777, 785, 870-873] To the extent that Ponderosa Pines had to prove a negative, the admissible evidence shows that no records exist to prove the Association's assertions, and that Melkas' hearsay testimony was unreliable. [*E.g.* RP 848-49]

Refutation of the Clute Motion for Summary Judgment.

The Association claims that Ponderosa Pines did not object to the Clute affidavit. [AB 11] In response to the Clute Motion and affidavit [RP 746-750], Ponderosa Pines noted that Bill Gayso, who allegedly made binding verbal representations to Clute, was not affiliated with El Dorado Land Corporation and never acted as an agent for El Dorado in the sale of lots. [RP 751-752] The Clutes did not purchase their lots until 2001 and 2005, nearly thirty (30) years after the subdivision was created, and long after El Dorado had divested itself of ownership. [RP 752] The Clute motion and accompanying affidavit adopted the Association's first Motion [RP 746] and was subject to the evidentiary opposition Ponderosa Pines mounted against the Association. [RP 751-52]

Discovery Responses Do Not Support Summary Judgment.

The Association baldly asserts at AB 13 that: "If the property was sold "with reference" to the golf course, the owner is estopped, regardless of representations that it will "always remain." This is an extraordinary claim. Acceptance of this contention as sufficient to support a summary judgment would mean that any "ref-

erence" to a nearby park, school, open space, or other facility – whether public or private – during a land sales pitch would make the existence of that facility – whether public or private – immutable. The implied covenant runs with the land, and subsequent purchasers for value or subsequent alternative public use would be summarily enjoined merely on the say-so of someone claiming to have "relied" upon the "reference". Such a position is insupportable under any reasoned concept of law or equity.

ARGUMENT AND AUTHORITY:

ISSUE 1:

As a matter of law, can alleged verbal representations -- nowhere contained or reflected in recorded plats, deeds, or other legal documents of record -- bind and control the perpetual use of real property, after its purchase for value by others?

Argument and Authority in Reply:

Ponderosa Pines stands by its argument and citation to the record regarding this issue, with particular reference to the applicable standard of review. The absence of use restrictions in recorded documents or deeds that would give notice to purchasers was repeatedly argued to the District Court. [*E.g.* RP 758 (noting the "golf course was never shown on any recorded document in the Otero County land records" and referencing RP 772-774); 765 (arguing that both a plat and deed reservation are required under *Huning,* 90 N.M. 407, 564 P.2d 612). Whether any

homeowner reasonably relied on the existence of a golf course in purchasing property is a question of fact, not law. *See Sprague v. City of Las Vegas*, 101 N.M. 185, 187, 679 P.2d 1283, 1285 (1984) (finding there is an issue of fact as to detrimental reliance). What notice Ponderosa Pines had, in its indisputable position as a purchaser for value, whether its inquiry was reasonable under the circumstances, and whether the lack of recorded easements, plats, deeds of record or the like should nevertheless have resulted in additional inquiry, are questions of fact, not law. *See Rio Grande Kennel Club v. City of Albuquerque*, 2008–NMCA–093, ¶ 18, 144 N.M. 636, 190 P.3d 1131 (reasonableness is question of fact). The Association's insistence that summary judgment can be entered in the absence of any recorded notification to purchasers, based on the disputed hearsay testimony of a stranger to negotiations, referencing a map that did not exist during the pertinent time period, is contrary to New Mexico law and must be reversed.[2]

ISSUES 2 and 3:

Did disputed material facts preclude summary judgment to the Association, where the parties introduced contradictory evidence regarding what representations were made, by whom, and when, as the individual Defendants were purchasing lots, and where deeds and plats made no reference to the golf course?

2 *See also Hagen v. Faherty*, 2003–NMCA–060, ¶ 21, 133 N.M. 605, 66 P.3d 974 (noting that characterizing another attorney's arguments as disingenuous is on the borderline of acceptable briefing) and note AB 20.

Argument and Authority in Reply:

The Association proposed standard of review is incorrect. [AB 22] This case was decided on summary judgment; the standard of review is *de novo*. *Montgomery,* 2007–NMSC–002, ¶ 16. The Association argued that Ponderosa Pines is barred from developing the golf course tract based upon *Huning*, 90 N.M. 407, 409, 564 P.2d 612, 614 (1977), *Ute Park*, 77 N.M. 730, 427 P.2d 249 (1967); *Cree Meadows*, 68 N.M. 479, 362 P.2d 1007 (1961); and *Knight,* 110 N.M. 265, 794 P.2d 739 (Ct.App.1990). The Association argues:

> In New Mexico, if a grantor sells neighborhood property under implied or express representations that neighboring land owned by that grantor will be used for a purpose beneficial to the neighborhood, e.g. as a golf course, the grantor and his heirs are estopped to change that use. *Huning*, 564 P.2d at 613 (summarizing New Mexico law).

[AB 23] This argument is fallacious—specifically, it falls into the logical fallacy of "begging the question." It assumes to be true the facts it is trying to prove.

> Another way of stating the Association's position is:
>
> A golf course existed at the time Association members purchased their land, implied or express representations about the golf course may have been made, a golf course is beneficial to the neighborhood, therefore the grantors are estopped to change the use.

This assumes the following facts are true: 1. a golf course existed; 2. a golf course is beneficial; and 3. implied or express representations were made. Each of these statements are disputed issues of material fact. At issue is whether a golf course existed, whether express or implied representations were made, whether the golf

course's existence is *per se* beneficial to the neighborhood, and whether Ponderosa Pines must be estopped. No Court can properly decide facts by assuming them. *See Deaton*, 2004–NMCA–043, ¶ 12 (summary judgment inappropriate "when the record discloses existence of genuine controversy concerning material issue of fact or when summary judgment is granted based upon an error of law.").

1. *Cree Meadows, Inc. v. Palmer*, 68 N.M. 479, 362 P.2d 1007 (1961).

Cree Meadows is distinguishable. The Supreme Court there "focused on the seller's use of a plat showing the golf course". [AB 23] No such plat exists in this case. The Association's argument is not saved by its reference to Ponderosa Pines' name, nor by the Association's characterization of the "overwhelming evidence" from the "maps", Melkus, Clute, or discovery. The parties disagree about the central facts; such a dispute cannot be resolved on summary judgment.

2. *Ute Park Summer Homes Association v. Maxwell Land Grant Co.*, 77 N.M. 730, 427 P.2d 249 (1967).

The Association notes that in *Ute*, "the lower court found, *inter alia*, that some of the lots were sold by use of an unrecorded plat that bore notations suggesting a certain portion of the subdivision would be used as a golf course, playground, or recreational area." [AB 24-25] There can be no corresponding finding in this case. The evidence in support of summary judgment is the disputed hearsay testimony of Melkas, "types of maps", and the self-serving hearsay evidence of some

property owners. The Association never established any reference to a golf course on a plat or map as a matter of uncontroverted fact, and certainly failed to do so as a matter of law. [RP 772-3]

The individual making the sales representations in *Ute Park* was an agent of the developer. 77 N.M. at 732, 427 P.2d at 251. The plat referenced in *Ute Park* established a well-developed, planned and platted project, which could reasonably bind the developer, and the district court's grant of summary judgment to the developer was premature. *Id.* at 733-4, 427 P.2d at 252.

In contrast, maps and plat in the instant case did not show the golf course, a park, or an open area. It showed only the lots and land still owned by El Dorado Land Corporation, not designated for any specific use. [RP 772-3] No labels appear on the Ponderosa Pines plats recorded with the Otero County Clerk's office. [RP 766, 772-3]

The Association's argument is that, by allegation and disputed reference, an adjoining landowner can bind the use of property summarily and in perpetuity, a determination not consistent with New Mexico law or equity. The representations of the original seller and its agents are disputed issues of material fact, precluding summary judgment. [*Contrast* AB 27] Whether the equities "weigh more heavily" in any particular direction cannot properly be decided on summary judgment. *See City of Carlsbad v. Grace*, 1998-NMCA-144, ¶ 27, 126 N.M. 95, 966 P.2d 1178

(due to trial court's failure to weigh countervailing equities on summary judgment, remand was necessary to allow court to consider equities evidence on various factors).

3. *Huning v. Potts*, 90 N.M. 407, 564 P.2d 612 (1977)

In *Huning*, the district court decided whether a deed cuts off prescriptive grazing rights in favor of roads and access. The facts of *Huning* established that the party seeking to enforce the prior rights relied, not merely direct verbal representations, but a recorded deed and plat that expressly showed the rights of way to the Plaintiffs' land. *Id.*, 90 N.M. at 409, 564 P.2d at 615. *Huning* held that the plat filed of record together with express reservation in the deeds, "created private easements of way to give Potts access to the lots in question". *Id.* (emphasis added). The deeds specifically referenced streets on the plat. *Id.* The plat inducing purchasers to buy gave rise to rights, not public rights existing because of a dedication to public use. *Id.*

In contrast, no reference was made in lot deeds to the golf course. The deeds referenced the recorded plat, which did not reference the golf course. [RP 772-3] Other than the hearsay testimony of Melkus, no evidence supported judgment as a matter of law that the original developers represented to purchasers that the golf course would remain a golf course. [RP 767-874; 848-9]

4. *Knight v. City of Albuquerque*, 110 N.M. 265, 794 P.2d 739 (Ct.App. 1990).

In *Knight* it was undisputed that the developer used the golf course as a selling tool and in the plat of the subdivision denominated the territory it would occupy. *Id.* at 266, 794 P.2d at 741. The disputed facts are fatal to the Association's attempt to prevail summarily. The Association cannot rely on challenged hearsay testimony [*compare* RP 848-9], and references to "types of maps" of disputed existence. [RP 785; 895-904] No recorded plats and no deeds reflect the Associations' position; the testimony is equivocal and there can be no determination on summary judgment.

The Association fails to address Ponderosa Pines' argument that any alleged prior considerations, negotiations, or stipulations were merged in the final and formal deed executed by the parties. *Birtrong v. Coronado Bldg. Corp.*, 90 N.M. 670, 568 P.2d 196 (1977). Although the terms of the deed may vary from the prior negotiations, the deed alone must be looked to in determining the rights of the parties. *Id.* In *Cox v. Hanlen*, 1998–NMCA–015, ¶ 26, 124 N.M. 529, 953 P.2d 294, this Court noted that an easement is a real property interest, and, as such, its unwritten grant "is unenforceable unless one of the exceptions to the statute of frauds applies." Regardless of whether or not an oral agreement was created in the discussions between the parties, the prior negotiations and agreements were

"merged" into the deed. *Hyder v. Brenton*, 93 N.M. 378, 382, 600 P.2d 830, 834 (Ct.App. 1979).

ISSUE 4:

Did the district court err in granting summary judgment based on the district court's determination of the credibility of testimony and evidence, where the credibility and veracity was disputed and called into question by Ponderosa Pines?

Argument and Authority in Reply:

The Association's challenge to Ponderosa Pine's preservation of this issue is meritless. Ponderosa Pines argued the lack of reliance in its motion for reconsideration [RP 916-922], which was heard at oral argument by the District Court [Tr. July 5, 2011] in advance of final judgment. [RP 981 - 985] *See In re Estate of Keeney,* 121 N.M. 58, 60-61, 908 P.2d 751, 753-54 (Ct.App.) (holding that affidavits submitted with motion to reconsider ruling on summary judgment are properly before appellate court); *see also Garcia v. La Farge*, 119 N.M. 532, 540, 893 P.2d 428, 436 (1995) (purpose of preservation requirement is to give trial judge opportunity to correct mistake and give opposing party a fair opportunity to meet objection).

The Association proposed standard of review in incorrect. The evidence adduced by Ponderosa Pines in the form of actual plats and maps, and affidavit testimony from persons with knowledge, was at least as admissible for purposes of

summary judgment as the Association's reliance upon Melkas' hearsay testimony and an unauthenticated "map". The Association's contention that Ponderosa Pines' evidence was inadmissible or incredible [AB 33-34] is the Association's legal position, not the proper standard to be applied in considering summary judgment. *See Rummel v. Lexington Ins. Co.*, 1997–NMSC–041, ¶ 18, 123 N.M. 752, 945 P.2d 970 (court is to view facts in light most favorable to party opposing summary judgment and draw all reasonable inferences in support of trial on merits).

The Association disputes Ponderosa Pines' alleged failure to adduce "evidence that purchasers did not rely on the representations". [AB 33] Ponderosa Pines was not required to prove its case-in-chief on summary judgment. Summary judgment is not a substitute for trial on the merits. *Ponce v. Butts*, 104 N.M. 280, 283, 720 P.2d 315, 318 (Ct.App.1986). When the facts are insufficiently developed or further factual resolution is essential for determination of the central legal issues involved, summary judgment is inappropriate. *National Excess Ins. Co. v. Bingham*, 106 N.M. 325, 328, 742 P.2d 537, 540 (Ct.App.1987).

A trial was required to determine the central legal issue in this case: whether one who buys property adjacent to a golf course or other open space can – *ipso facto* – control in perpetuity the use of the adjoining space, without any showing of proper and reasonable reliance, in the absence of record evidence.

ISSUE 5:

Did the district court err in taking judicial notice?

Argument and Authority in Reply:

The district court took judicial notice that the existence of a golf course, *ipso facto*, is an inducement to purchasers of lots abutting the golf course. [RP 914, 974] The Association insists this is "common sense and proper". [AB 37] The proposition that a golf course is at all times and places an inducement to property ownership is far from ineluctable. Legal precedent considers whether a golf course is a nuisance. *See, e.g.* Zitter, Jay M., *Golf Course or Driving Range as Nuisance*, 49 A.L.R.6th 477 (2009). The District Court improperly indulged inferences from disputed evidence in favor of the Association. Judicial notice cannot properly be used to relieve a party of its burden to establish that there are no material facts in dispute for purposes of summary judgment.

ISSUE 6:

Was the Association's failure to serve all Defendants with the motion for summary judgment fatal to the motion?

Argument and Authority in Reply:

The Association denotes specific individual members purportedly represented by the "Property Owners Association". [*See, e.g.* Answer Brief Cover page]. The Association's belated delineation on appeal of the specific parties it represents

does not correct the fact that the Association failed to properly serve all parties to this matter with the motion for summary judgment.

At the Association's insistence [RP 39-44], Ponderosa Pines amended its petition to name all property owners, and then undertook a lengthy and expensive service endeavor. [*E.g.* RP 85-594] The Association failed to comply with the requirements of Rule 1-005 NMRA, requiring every written motion and similar paper be served on each of the parties.

The Association now insists that service is not required upon all persons having an interest in a dispute. [AB 40] Rules 1-004 and 1-005 NMRA speak for themselves. Having demanded service by Ponderosa Pines, as a matter of procedural fairness, the Association could not disregard the requirements of due process to indispensible parties upon which it earlier insisted. What is sauce for the goose must be sauce for the gander. *Kight v. Butscher*, 90 N.M. 386, 390, 564 P.2d 189, 193 (Ct.App. 1977) (noting that what is fitting for defendant should be fitting for plaintiff). Ponderosa Pines' original Petition was dismissed. [RP] The same outcome should obtain regarding the motion.

CONCLUSION:

For the foregoing reasons, and as set forth in Ponderosa Pines' Brief in Chief, the district court's final order granting summary judgment to the Association [RP 973-977] should be reversed, and judgment directed for Ponderosa Pines.

In the alternative, the district court's final order granting summary judgment to the Association should be vacated and the matter remanded for trial on the merits.

Respectfully submitted,

John R. Hakanson
Hakanson & Associates
307 11th St.
Alamogordo, NM 88310-6916
(575) 437-2874

and

L. Helen Bennett
Attorney at Law
P.O. Box 4305
Albuquerque, NM 87196-4305
(505) 321-1461

Attorneys for Appellant

I HEREBY CERTIFY that a true copy of the foregoing was sent as follows:

W.T. Martin, Jr.
Kenneth D. Dugan
Martin, Dugan & Martin
P.O. Box 2168
Carlsbad, NM 88221-2168

Roger Yarbro
Yarbro & Assoc
P.O. Box 480
Cloudcroft, NM 88317-0480

Dick Blenden
Blenden Law Firm
P.O. Box 1446
Carlsbad, NM 88221-1446

Bryan W. Thomason
Thomason Law Firm P.C.
111 Lomas Blvd. NW, #502
Albuquerque, NM 87102-2363

David Lutz
Martin Lutz Firm
P.O. Box 1837
Las Cruces, NM 88004-1837

This 13th day of February 2011.