IN THE COURT OF APPEALS
FOR THE
STATE OF NEW MEXICO

COPY

PONDEROSA PINES GOLF COURSE,

Plaintiff-Appellant,

v.

PONDEROSA PINES PROPERTY OWNERS Association, et al.,

Defendants-Appellees.

Otero County Dist. Ct.
No. CV-2009-1018

Court of Appeals
No. 31,489

COURT OF APPEALS OF NEW MEXICO
FILED
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Wendy F. Jones

APPELLEE'S ANSWER BRIEF FILED BY: PONDEROSA PINES PROPERTY OWNER'S ASSOCIATION, SKIP PRIDEMORE, CARYN PRIDEMORE, DRAPER BRANTLEY, BETTIE-ANNE BRANTLEY, DAVID CHAMPION, GAIL CHAMPION, ROBERT HOWELL, CONNIE HOWELL, WALTER THAYER, LINDA THAYER, JOHN WENZEL, ROSE MARIE WENZEL, LYNN CURRIN, LILA J. CURRIN, MARGARET ANN CAMMACK, SAMUEL J. SIMONS, MARGARET M. SIMONS, WILLIAM M. GRADY, BARBARA D. GRADY, MICHAEL LAROSE, AND KAREN LAROSE, MARK STREANDER, LISA STREANDER, JIM LOCASTE, CAROLYN LOCASTE, VICTOR KRIECHBAUM, MONIKA KRIECHBAUM, JOSE R. CASTANEDA, GLENDA CASTANEDA, SCOTT WALLIS, CHERRI WALLIS, AND JOSEFINE K. FERNSTROM

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I. INTRODUCTION

Appellant - **"Ponderosa Pines Golf Course, L.L.C."**: Appellant is an L.L.C. with a name including the very golf course it seeks to discontinue.

Appellees – **"Property Owners"**: These Appellees are Ponderosa Pines Property Owner's Association and many of the property owners in the Ponderosa Pines Subdivision.

II. SUMMARY OF THE PROCEEDINGS

A. NATURE OF THE CASE

This is the fourth time our New Mexico appellate courts have considered whether the owner of a golf course built or represented to be part of a subdivision may change the use of the golf course property. Cree Meadows, Ute, and Knight all held that that an equitable servitude in favor of the individual subdivision property owners precluded changing the use of the golf course. Different theories of equity arguably could apply – e.g., implied grant, implied covenant, or equitable estoppel. Our Supreme Court instructed in Cree Meadows, however, that, "It makes very little difference upon which [theory] the holding is based." Cree Meadows, Inc. v. Palmer, 68 N.M. 479, 363 P.2d 1007, 1010 (N.M. 1961). According to the Supreme Court, if a golf course is built as an "essentially constituent and integral part" of the subdivision itself, the right to have the golf course continue in existence is "a valuable one and must be protected by the courts." Id.

The Cree Meadows line of cases set forth various rules for applying this principle to residential golf courses. The Trial Court noted three of them (RP975):

1. Grantees who purchase property in reliance on the existence of a golf course have the right to have the area preserved as a place of natural beauty and view (Cree Meadows);

2. Grantors are estopped to deny the existence of an abutting golf course if land was purchased from grantors under an agreement and representation that the golf course will remain a golf course (Huning); and/or

3. A developer may not induce buyers to purchase lots by pointing to the present or planned existence of a park or golf course, while retaining the power to alter the use of the park or golf course (Knight).

Which rule applies depends upon the evidence – i.e., whether the representations are "implied" by maps or plats used in selling the lots or are "expressed" orally by the owner. Notably, summary judgment is proper if any of the three theories applies.

In fact, the Trial Court found the undisputed evidence supports summary judgment on all three. Appellees provided undisputed evidence of implied representations (by maps) and express representations by the owners, including admissions by one of owners of the developer, Gisela Melkus. But, the most convincing fact is that the golf course owner, El Dorado, developed and built the golf course in the middle of the Ponderosa Pines Subdivision and sold lots to homeowners abutting that course. Once that occurred, no evidence could disprove this golf course is an "integral part" of the subdivision which "must be protected by the courts," as stated in Cree Meadows.

B. SUMMARY OF PROCEEDINGS AND RELEVANT FACTS

Appellees will track Appellant's Brief. However, an initial issue should be addressed:

FACTS DEEMED IN FAVOR OF APPELLEES:

Appellant failed to "state the number of the moving party's fact that is disputed" in compliance with N.M.R.A. 1-056(D)(2). It is impossible to determine from Appellant's Opposition which facts were admitted and disputed. That failure results in a deemed admission of Appellees' listed facts. N.M.R.A. 1-056(D)("All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted."); Bank of New York v. Regional Housing Auth. For Region Three, 2005-NMCA-116, ¶ 25, 138 N.M. 389, 120 P.3d 471(deeming facts admitted). Those deemed admissions are sufficient to uphold summary judgment. In particular, the most relevant, deemed facts are:

1. El Dorado purchased the property used to develop Ponderosa Pines because the owners "saw the possibility of a golf course." (RP728, ¶11).

2. Melkus and the other developers used "maps" with the golf course noted on it to sell lots in Ponderosa Pines. The developers would show the maps to the prospective purchasers as part of sale of the lots. (RP728, ¶13-14).

3. A copy of one of those "types" of maps was attached as Exhibit 1. (RP728, ¶15).

4. As part of the sale, El Dorado and the developers would "represent that the golf course was going to be part of the subdivision." Melkus and the other developers told the purchasers "the golf course would always remain there." The golf course was the sellers' "main selling point." (RP728, ¶16-19).

5. The sellers knew it was important to the buyers "that a golf course be part of the subdivision." Melkus and the other developers knew and expected the golf course was the main reason the buyers bought property. (RP728, ¶18, 23).

Notably, to the extent this evidence is not deemed admitted, it was verified by Melkus and remains undisputed as proven below. (RP735-37).

MISCELLANEOUS RELEVANT FACTS

Appellant claims the golf course is "in an area known as 'Ponderosa Pines Subdivision, Units I and II.'" (Brief, p.1). In fact, the stipulated fact is that the golf course is "located in an area known as Ponderosa Pines Subdivision, Units I and II." (RP81). That word "located" is important, because as shown by the 1979 map tendered by Appellant, the course runs throughout the neighborhood. (RP785, Ex. 4).

Appellant makes many claims on pages 2 and 3 of its Brief which are not supported by evidence, including that it paid $1,000,000 for the property; that it has tried to market the property; that the course will not be profitable in the future; that this subdivision is atypical; and others. Appellant cites only its own Complaint (RP81-83). However, a party resisting summary judgment may not rely on its complaint. N.M.R.A. 1-056; Quintana v. University of California, 111 N.M. 228, 836 P.2d 1249 (1992). Those facts should be disregarded.

Appellant claims none of the deeds reference the golf course, again citing its Complaint and various other pages. (Brief, p.2). Those pages do not prove the allegation. Notably, if Appellant had tendered evidence, Appellees would have tendered deeds containing easements on the golf course property. Regardless, this Court should disregard this alleged fact because it is not supported.

Appellant claims no documents prohibit other uses of the land, again citing its Complaint. That is not competent evidence. In fact, the use of the maps at issue prohibit changing the golf course under applicable law cited below.

Appellant's facts on pages 1-3 also fail to include the following undisputed facts:

1. This subdivision is located 9 miles south of Cloudcroft – i.e., in rural, mountain country. (RP901)

2. Appellant purchased the golf course from Mr. Gayso, who had purchased it from El Dorado. (RP81).

EVIDENCE ALLEGEDLY DISPUTING MELKUS'S CONTENTIONS

Appellant alleges facts provided by Melkus were disputed. (Brief, p.6-7). In fact, they were not disputed with any credible evidence and/or the facts are immaterial:

1. Melkus's Ownership and Involvement in El Dorado -- Appellant claims it "introduced evidence" Melkus was not an original owner in El Dorado, citing RP756, 770. (Brief, p.6). In fact, RP756 is merely a pleading, not evidence. Also, RP770 is a 1971 deed, which provides no evidence on ownership of the corporation. Melkus's testimony that she was an owner of El Dorado remains unrefuted. (RP735). The fact El Dorado bought the property from the Manatts and others is irrelevant. (See Brief, p.6). Melkus admitted they bought that land before she got involved in 1973. (RP736).

2. Melkus's Knowledge of What the Owners Did, Said, or Knew – Appellant further claims Melkus could not have had knowledge of "what the owners of El Dorado did, said, or knew during the conception, planning, and platting process, because she was not involved until two years after the purchase." (Brief, p.6). To begin with, this fact is irrelevant. What matters is what the owners represented to buyers in selling the lots, not in platting the property. Appellant admits Melkus was involved "two years after the purchase." Obviously,

it would take years to sell the hundreds of lots in this subdivision. Appellant's own exhibits show El Dorado sold Melkus a lot as late as 1980. (RP850). If the property was platted in December of 1972 and sales continued through 1980, anyone involved in lot sales over those years would have knowledge of representations to buyers. Simply because Melkus was not involved until a year after part of the property was platted and two years after the purchase, *even if true*, does not mean that she would not know what the owners "did, said or knew" during the selling of the subdivision (i.e., from 1974 to 1980).

3. Use of the "1979" Map – Appellant claims fact issues remain on the date and origin of the "map" referenced by Melkus. (Brief, p.6-7, 10-11). In its Opposition, Appellant initially attached a 1979 "map" similar to the Melkus map, claiming because another map was made in 1979, that necessarily means Melkus is lying. (RP757, 785). In fact, Melkus did not testify the exact map marked in her deposition was used; instead she said they used that "type" of map showing the golf course to buyers. (RP736, p.8). Also, the fact that other maps were created in 1979 confirms – not refutes -- that El Dorado used "maps" showing the golf course to sell the lots. (RP736, p.8-9). Appellant admitted El Dorado was selling lots in 1978. (RP763). In fact, El Dorado was still selling lots in 1980. (RP852). The fact realtors and others were using maps showing the golf course in 1979 merely confirms what common sense reveals: The golf course is a selling point for rural property.

4. Hearsay Objection to Melkus's Testimony – Appellant failed to preserve its hearsay and lack of personal knowledge objections to Melkus's testimony, and those objections are

waived. Houde ex rel. Delisle v. Ferri, No. 28,796, 2009 WL 6567157 (N.M.App.,2009). Regardless, the statements to purchasers are not hearsay, because they are not offered "to prove the truth of the matter asserted." N.M.R.A. 11-801C. Instead, these are the operative representations that create the estoppel and/or equitable remedies. Matter of Estate of Bergman, 107 N.M. 574, 761 P.2d 452, 455 (N.M.App.,1988)(holding statements not hearsay if part of relevant details under substantive law). The statements are not offered to prove their "truth," but rather simply to prove the statements were made. Id. Moreover, Melkus's personal knowledge on sales cannot reasonably be questioned. Melkus testified she personally helped El Dorado sell several of the lots. (RP736). That testimony remains unrefuted. Finally, it is irrelevant if she was at "every sales presentation." (Brief, p.7). Of course she was not. However, if the representations were made or the maps were used with any purchasers, estoppel applies. There is not some magical formula that 25% or 50% of the buyers must have been deceived. See Cree Meadows, 363 P.2d 1007 (holding golf course owner's rights are subordinated to the "easement in favor of the owners of **any** of the property in the subdivision"). And, Melkus confirms it happened with many purchasers. (RP736). She has knowledge of what she and the other developers said when she was present – that is enough.

5. Whether the Developers Understood the Golf Course Would Fund Itself – Appellant claims it refuted Melkus on this issue, citing RP848. (Brief, p.7). RP848 is the Affidavit of Tommie Herrell ("**Herrell**"). Appellees objected that his affidavit fails to state it is based on

personal knowledge and is true and correct. (RP878). Accordingly, the affidavit should be stricken under N.M.R.A. 1-056. Lackey v. Mesa Perto. Co., 90 N.M. 65, 559 P.2d 1192 (1976)(holding testimony on information and belief is incompetent); Carter v. Burn Constr. Co., 85 N.M. 27, 508 P.2d 1324 (1973)(holding affidavit properly stricken that does not satisfy personal knowledge requirements and show affiant's competence affirmatively). In paragraph 6, in particular, Herrell testifies regarding what Manatt and others told him and/or "intended." That is inadmissible hearsay and speculation. Even if that evidence could be considered, it does not create a fact issue. All Herrell said was Manatt indicated he intended to reserve the right to change the use of the property if it was no longer viable. That does not refute Melkus's testimony that the developers understood the golf course would fund itself. Admittedly, however, this fact is not particularly important.

6. Whether Melkus Owned Property in the Subdivision in "1974"

Appellant contends it refuted Melkus owned the house in 1974. In fact, that statement as to "1974" was a typographical error in the Motion, which Appellees corrected in their Reply. (RP881). Melkus never stated what year she owned the home. (RP736). Accordingly, there is no fact issue. Also, it is irrelevant when she owned the house. Appellant tendered a deed proving Melkus acquired title to at least one lot by 1980 (RP850).

7. Melkus's role in the conception and planning of the Subdivision

Appellant argues Herrell's affidavit proves Melkus did not participate "in the conception or planning of the Ponderosa Pines development." (Brief, p.7). In fact, Melkus

never said she did. She said she participated in the "development and sale of the lots at Ponderosa Pines." (RP736). That is the relevant fact, since that is when representations were made to buyers, not when the neighborhood was conceived. Also, Herrell did not even say what Appellant claims. (RP848-49). To the extent Herrell said anything, it is not based on "personal knowledge" and inadmissible. (Supra, p.7-8). Notably, Herrell claims "to my knowledge," Melkus was "never an owner of any of the land on which either the Ponderosa Pines subdivision or the golf course are located." (RP849). The very next page in the record, RP850, shows that Melkus acquired a lot from El Dorado in 1980! Herrell apparently conditioned his statement "to his knowledge", because he doesn't have this knowledge. That is the problem with a purported affidavit that is not verified to be "true and correct" and based on "personal knowledge." Accordingly, it should not be considered.

To the extent Herrell had any knowledge, it was based entirely upon hearsay, as revealed by his statement "based on my frequent contact with the principals of El Dorado...." (RP849). Appellees properly objected to paragraph 9 of the Affidavit as hearsay and conclusory. (RP878). Herrell does not even say he "knew" Melkus. Instead, he says he "knew <u>of</u> Gisela Melkus" and "believed" she was simply a lady friend of James Manatt. (RP849). Herrell apparently never even spoke to Melkus. He is simply speculating based on what he doesn't know and/or hearsay. Moreover, in the end, Harrell does not refute what Melkus said. All he says is that she was not involved in the decision making. (RP849).

Melkus never said she was; she testified as to what the developers and El Dorado represented, which remains unrefuted.

8. The Original Developers' Intent

Appellant tries to create a fact issue based on what Manatt and the original owners allegedly intended, again citing Herrell. (Brief, p.7). That is rank speculation and hearsay that Appellees timely objected to. (RP878). Even if such testimony were admissible, the "intentions" of the developers are irrelevant as proven below.

9. What Buyers Were Told

Appellant claims Harrell testified "the golf course was not used as the main selling point." (Brief, p.8). In fact, Harrell said no such thing. (RP848-49). Common sense tells you a golf course is a major selling point for realty. Even if it does not, Melkus's testimony remains unrefuted. (RP737).

Appellant also claims Harrell testified that buyers "were not told that the golf course would always remain a golf course," citing RP848-49. (Brief, p.8). In fact, Mr. Harrell did not say that. He testified that "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." (RP849). That does not prove representations were not made outside the "real estate business" or outside his knowledge. It just means he never heard them. Also, his knowledge is limited. He was not involved in the original sales by El Dorado, only "resale of 8 or 9 of the lots to subsequent purchasers" over the 1970's and 1980's. (RP849). Obviously, Harrell cannot

possibly know what was said when he was not present. In fact, Appellant judicially admitted Manatt, Gayso and realtors told 19 purchasers the golf course would always remain. (RP759). Appellees do not have to prove that a majority of the property owners were lied to. Nineteen is plenty! Finally, Appellant admitted the golf course's "existence was sometimes – but not always – referred to." (Brief, p.8).

ABSENCE OF USE RESTRICTIONS IN PLATS OR DEEDS

Appellees do not dispute that the golf course is not shown on any recorded document. (Brief, p.7). That, however, is irrelevant. In Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co. (**Ute I**), 77 N.M. 730, 427 P.2d 249, 253 (N.M. 1972), our Supreme Court said: "[W]here land is sold with reference to a map or plat showing a park or like open area, the purchaser acquires a private right, generally referred to as an easement, that such area shall be used in the manner designated. As stated, this is a private right, and it is not dependent on a proper making and recording of a plat." That quote proves: (1) a recording is unnecessary; (2) a plat or deed is unnecessary – i.e., any "map" invokes equity; and (3) the golf course need not be shown on the map, only an "open area." This plat shows the open area owned by El Dorado where the golf course is located. (RP772, 773, 785). Also, maps showing the course were used in lot sales. (RP736, 785).

CLUTE MOTION FOR SUMMARY JUDGMENT

Appellant objects for the first time to the Clute Affidavit. That objection is waived. Houde, 2009 WL 6567157. In fact, the Clute Affidavit supports judgment. (RP749-50). Mr.

Clute testified to "Bill Gayso, golf-course owner and relator" representing to him that the "original owner/developer of the subdivision had set out the land to be a golf course only." (RP749). Mr. Clute further provided common sense evidence that the golf course enhances the value of the lots. (Id.). That evidence was not rebutted and, at a minimum, shifted the burden to Appellant to rebut the *prima facie* case.

Appellant claims the Clutes purchased in 2001 and 2005 and that Mr. Gayso was not affiliated with El Dorado. (Brief, p.8). However, Appellant provided no evidence supporting these claims, instead citing its pleading. (RP752). In fact, Appellant admits Gayso was the second owner of the golf course and a realtor. His statements regarding the development are credible and unrefuted. Appellant's failure to properly refute the Clute motion should be outcome determinative.

DISCOVERY RESPONSES

Appellant's summary of the discovery is, perhaps, the most critical evidence. Appellant admitted 5 property owners were told directly by James Manatt, the president and part-owner of El Dorado, and another 14 property owners were told by realtors that "the golf course would always remain." (RP759; Brief, p.9). Those admissions, at a minimum, shifted the burden to Appellant to submit admissible evidence that property owners were <u>not</u> told the golf course would remain. Because Appellant submitted no contrary evidence, summary judgment was proper. Notably, however, that is not the most critical

representation: If the property was sold "with reference" to the golf course, the owner is estopped, regardless of representations that it will "always remain."

ADDITIONAL DISPUTED MATERIAL FACTS

Appellant argues its evidence shows the golf course lost money each year. (Brief, p.10). That evidence represents "income tax return" losses, and consists of approximately $52,500.00 per year. We don't know how much of those losses were owner draws, depreciation, or other accounting manipulations. However, that is irrelevant. Appellant obviously bought the property with the intention of running it as a golf course, as shown by Appellant's name, Ponderosa Pines Golf Course, L.L.C. Appellant operated it for at least five years from 2005 to 2009. (RP851). The fact the third owner is unable to figure out how to earn an "income tax" profit, does not somehow negate the (mis)representations by the original developer and first and second owner that create the easement. Notably, in the second appeal of Ute, the developer claimed it was "impossible" to build a golf course on the grounds. Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co. (**Ute II**), 83 N.M. 558, 494 P.2d 971, 973 (N.M. 1972). Our Supreme Court addressed that argument simply: "If a golf course was impossible, the statements and representations should not have been made." Id. Similarly, if El Dorado had not planned on maintaining the golf course, they should not have built it in the middle of the subdivision and then sold millions of dollars of lots based on its existence.

Appellant also claims that minutes of meetings from 1984 [Exhibit 9 (RP853-855)] somehow disprove Appellees' claims. (Brief p.3, 10). Appellees timely objected that Exhibit 9 is not authenticated and is hearsay. (RP883). It should be stricken. Regardless, that exhibit merely shows that, in 1984, Manatt was disputing the extent of formal covenants. That does not answer the question of whether an informal covenant or estoppel arose due to representations by Manatt and the others years earlier.

DISPOSITION BY THE DISTRICT COURT

Appellant relies on its oral argument at the hearing regarding its refutation of the facts and hearsay objections. (Brief, p.11). However, summary judgments are decided on the written record. N.M.R.A. 1-056D(2) expressly requires all responses and objections to be included in the "written memorandum" in opposition. All material facts not specifically controverted in the written memorandum are "deemed admitted." N.M.R.A. 1-056D(2). Notably, it is within the district court's discretion whether to even hold an oral hearing. See Sanchez v. Church of Scientology of Orange County, 115 N.M. 660, 857 P.2d 771 (N.M.,1993). Accordingly, the rules simply do not permit oral supplementation of the record.

Appellant incorrectly summarized several of the Trial Court's findings. First, Appellant left off the following finding:

> A developer may not induce buyers to purchase lots by pointing to the present or planned existence of a park or golf course, while retaining the power to alter the use of the park or golf course. Knight v. City of Albuquerque, 110 N.M. 265 (Ct. App. 1990).

(RP975, ¶C). Second, Appellant incorrectly claimed the district court declared the Property Owners have a right to have the golf course "remain a golf course in perpetuity." (Brief, p.12). The court issued a negative covenant, not an affirmative injunction, enjoining Appellant from "changing the use" of the Property from that of a golf course. (RP976). That does not require Appellant to maintain it as a golf course. Appellant is required only "to maintain the Property in a condition of natural beauty and view at least equivalent to that of a golf course." (RP976). Notably, Appellees requested this limitation as a compromise to eliminate any alleged burden from operating an unprofitable golf course, and yet maintain the status quo of the property's beauty.

III. GENERAL STANDARD OF REVIEW ON APPEAL

The purpose of summary judgment "is to hasten the administration of justice and to expedite litigation by avoiding needless trials...." Agnew v. Libby, 53 N.M. 56, 201 P.2d 775, 776 (1949). Summary judgment is proper when there is "no genuine issue of material fact." N.M.R.A. 1-056C. The movant must make a prima facie showing that summary judgment is merited. Romero v. Philip Morris Inc., 2010–NMSC–035, ¶ 10, 148 N.M. 713, 242 P.3d 280. A *prima facie* showing is "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. Id.

When the moving party makes a prima facie showing, "the party opposing summary judgment has the burden to show specific evidentiary facts in the form of admissible evidence that require a trial on the merits." Estate of Eric S. Haar v. Ulwelling, 2007–

NMCA–032, ¶ 10, 141 N.M. 252, 154 P.3d 67. Mere argument that a material issue of fact exists cannot override the moving party's *prima facie* showing. Id. Rather, "the party opposing the summary judgment motion must adduce evidence to justify a trial on the issues." Philip Morris, 2010–NMSC–035, ¶ 10. Although the opponent is permitted "reasonable" inferences, an inference is not conjecture, "but is a logical deduction from facts proved and guess work is not a substitute therefor." Id. Finally, "New Mexico requires that the alleged facts at issue be material to survive summary judgment. Id., ¶ 11. A court's focus should be on whether, under the pertinent substantive law, "the fact is necessary to give rise to a claim." Id.; Parker v. E.I. Du Pont de Nemours & Co., 121 N.M. 120, 124, 909 P.2d 1, 5 (Ct.App.1995) (fact is material if it "will affect the outcome of the case").

Appellees met their burden, whereas Appellant did not. To the extent Appellant tendered any admissible evidence (which is disputed), it is on "immaterial issues." Ute, 427 P.2d at 251.

V. ARGUMENTS AND AUTHORITY ON APPEAL

Issue One: ***May Verbal Representations Bind and Control the Perpetual Use of Property, After Its Purchase for Value By Others?***

Preservation for Appeal:

This issue was not preserved for appeal. The party claiming error must have "clearly" invoked a ruling by the trial court on the same grounds. Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 12, 125 N.M. 748, 965 P.2d 332; Woolwine v. Furr's, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.1987); Sedillo v. N.M. Dept. of Public Safety,

140 N.M. 858, 149 P.3d 955 (N.M.App.,2006)(holding party who only argued factual dispute waived appeal that court applied wrong standard). Appellant cites seven pleadings. (Brief, p.15). However, none of those pleadings allege statute of frauds or that verbal representations may not bind property.

Notably, statute of frauds is an affirmative defense, and the party raising it has the burden of "pleading and proving" it. N.M.R.A. 1-008(C); Kestenbaum v. Pennzoil Co., 108 N.M. 20, 766 P.2d 280, 284 (N.M.,1988). Similarly, bona faith purchaser is an affirmative defense that must be pleaded and proven. Yoakum v. Western Cas. & Sur. Co., 75 N.M. 529, 407 P.2d 367 (N.M. 1965); Witt v. Skelly Oil Co., 71 N.M. 411, 379 P.2d 61 (N.M. 1963)(noting good faith is affirmative defense); Independent Coal & Coke Co. v. U.S., 274 U.S. 640, 47 S.Ct. 714, 718 (1927); Madison v. Gordon, 39 S.W.3d 604, 606 (Tex.2001). Appellant waived those defenses by failing to plead or prove them.

Standard of Review:

The general review standards are cited above. Notably, to determine which facts are material, a court's focus should be on whether, under the pertinent substantive law, "the fact is necessary to give rise to a claim." Philip Morris, 2010–NMSC–035, ¶ 11. Also, statute of frauds is typically a legal question. Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct.App.1982).

Argument and Authorities:

The bona fide purchaser and/or statute of frauds defenses should be dismissed. Appellant quotes Ritter-Walker Co. v. Bell, 46 N.M. 125, 126, 123 P.2d 381, 382 (1970), arguing a writing is required to procure an easement. (Brief, p.13). In fact, the next sentence following Appellant's quote reads: "But an oral grant is sufficient if the consideration is paid by, and possession is given to, the purchaser." Id. In Ritter, in fact, the court held that appellee acquired an oral easement to real property, good against the purchaser, because appellee paid consideration and took possession of the property neighboring the easement. Id. Ritter supports Appellees, not Appellant. In this case, Property Owners indisputably gave consideration and took possession of the respective properties neighboring the golf course.[1]

Also, Appellant's statute of frauds defense to the implied easement/estoppel issues was rejected by our Supreme Court in Ute II, 494 P.2d at 973. The Court held that, whether the theory is considered implied grant, implied covenant, or estoppel makes very little difference and "to create such rights ... does not require an instrument in writing signed by the party to be charged." Id. That resolves statute of frauds.[2]

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[1] Ritter simply applies the general principle the statute of frauds will not be enforced where it would be inequitable or unjust to do so. See Nashan v. Nashan, 119 N.M. 625, 894 P.2d 402, 407 (N.M.App.,1995).

[2] Notably, our statute of frauds only applies to unrecorded instruments, not implied servitudes. N.M.S.A. § 14-9-3. And, courts unanimously hold implied servitudes are outside the statute of frauds. Precious Offerings Mineral Exchange, Inc. v. McLain, 194

Appellant further argues allowing oral, equitable servitudes "would be disastrous with regard to free ownership and alienability of land." (Brief, p. 14). That is not true. The Ute exceptions are limited, and only apply to representations made regarding golf courses, parks and similar open areas abutting a residential neighborhood. They were created to prevent fraud. Practically, the law carves exceptions out of virtually every legal doctrine for "fraud." Fraud is not even dischargeable in bankruptcy.

In Ute II, the property owner argued it would be impossible to comply with the golf course restriction. Our Supreme Court had a simple answer: "If a golf course was impossible, the statements and representations should not have been made." 494 P.2d at 974. Our courts have properly decided to prefer unwary buyers of neighborhood golf course lots over misrepresenting sellers and their assigns. See Knight v. City of Albuquerque, 110 N.M. 265, 794 P.2d 739, 740 (N.M. App. 1990)("The private rights created when buyers purchased their lots with reference to the plat are superior to the developer's attempt to reserve the power to alter the use....").

Also, Appellant's implied claim that it was a "subsequent purchaser for value" should be rejected. As noted above, Appellant failed to plead and prove lack of notice. The bona

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P.3d 455 (Colo.App.,2008); Owsley v. Hamner, 36 Cal.2d 710, 227 P.2d 263, 270 (Cal. 1951)(holding subsequent purchaser could not claim lack of notice of implied easement where it was open and obvious or rely on statute of frauds). The Restatement (Third) of Prop. Servitudes § 2.8, cmt. B (2000), states:

> Servitudes that are not created by an express contract or conveyance are not covered by the Statute of Frauds, ... [including] servitudes created by dedication, prescription, and estoppel.... [and] prior use, map or boundary descriptions....

fide purchaser defense only applies to those "who purchase the legal title to property without notice of outstanding equities, or knowledge of facts that charge them with such notice." Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740 (N.M. 1941). Notably, if Appellant would have raised the good faith defense, Appellees could have responded with evidence from Realtor Bill Gayso, Appellant's principals' depositions, and/or documents proving Appellant was on notice of the equitable easement issues. Appellees, however, did not have opportunity to prove notice because Appellant failed to argue that defense. The issue is waived.

The Cree Meadows line of cases, in fact, places all potential buyers of neighborhood golf courses on constructive notice of possible equitable easements.[3] That is not overly burdensome; it simply requires buyers to do some due diligence, demand express warranties from their grantor, and/or seek resolution before they buy – not after. See Shalimar Ass'n v. D.O.C. Enterprises, Ltd., 142 Ariz. 36, 688 P.2d 682 (Ariz. App. 1984)(holding purchaser who "knew that the golf course was surrounded by residential lots" had duty of inquiry and was not bona fide purchaser). Appellant admits it filed this Action because it "is aware of certain judicial cases involving similar developments which have precluded the discontinuance and alternative uses of golf courses." (RP4). Appellant named its company Ponderosa Pines Golf Course, L.L.C. It is disingenuous to now allege

[3] A prospective purchaser is deemed to have notice if the purchaser has "[k]nowledge of such facts as ought to put a prudent [person] upon inquiry." Hunt v. Ellis, 27 N.M. 397, 401, 201 P. 1064, 1065 (1921).

good faith purchaser. Appellant was on actual or constructive notice of the equitable claims. In re Crowder, 225 B.R. 794 (1998) (once a duty of inquiry arises, subsequent purchasers have constructive notice of even unrecorded documents).

Appellant's remaining arguments overlap and will be addressed in other sections. One further comment, however, is warranted. Appellant claims a "reasonable inference" is that the map used by the developers "was simply a tool used to show prospective purchasers which lots were still available for sale." (Brief, p.14). That cannot be a "reasonable" inference, when (1) Melkus testified "the original map included the golf course" and "that was our main selling point" and (2) 19 of the Property Owners testified in interrogatories they were told the golf course would always be there. (RP736; RP759). Even if Appellant were right, however, that use of the map still imposes an equitable easement under Knight: "A developer may not induce buyers to purchase lots by pointing to the present or planned existence of a park or golf course, while retaining the power to alter the use of the park or golf course." 794 P.2d at 740. If the owners used the maps showing the golf course in the Subdivision with prospective purchasers, an equitable servitude arises. Because they did, judgment was proper.

Issue Two: ***Did disputed material facts preclude summary judgment to the Association, where the parties disagreed and introduced contradictory evidence regarding what representations were made, by whom, and when, as the individual Defendants were purchasing lots?***

Issue Three: ***Did disputed material facts preclude summary judgment to the Association, where the parties disagreed and there was contradictory evidence that showed that the deeds and plats failed to mention the existence of the golf course?***

Appellees combine Issues Two and Three because they are similar: Both consider the type of representation required to invoke an equitable easement.

Preservation for Appeal:

Appellant preserved these issues for appeal.

Standard of Review:

A district court's application of equitable doctrines is reviewed for abuse of discretion. Cont'l Potash, Inc. v. Freeport–McMoran, Inc., 115 N.M. 690, 858 P.2d 66, 73 (1993) (equitable estoppel). Abuse exists only if the district court's decision is "clearly untenable or contrary to logic and reason." Id. In the context of summary judgment on an equitable doctrine, the question is whether the opponent "raised issues of material fact calling into question the court's exercise of its discretion." Id. As noted above, only "reasonable" inferences may support denying summary judgment, and a fact is only "material" if it is "necessary to give rise to a claim." Phillip Morris, ¶ 10-11. In Ute I, our Supreme Court noted disputes over non-material facts on equitable servitudes cannot defeat summary judgment. 427 P.2d at 251. Similarly, the facts Appellant disputes are not "material."

Argument and Authorities:

This case hinges upon proper analysis and application of the four key New Mexico

cases concerning neighborhood equitable servitudes: Cree Meadows, 363 P.2d 1007; Ute I, 427 P.2d 249; Huning v. Potts, 90 N.M. 407, 564 P.2d 612 (N.M. 1977); and Knight, 794 P.2d 739. Appellant contends it created fact issues regarding "whether the golf course was intended to always remain a golf course." That is not true. Regardless, a careful analysis of these cases reveals the developer's intent is immaterial. 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).

1. Cree Meadows

The rule at issue was first applied to a golf course in New Mexico in Cree Meadows, 363 P.2d 1007. In that case, the golf course owner sought to convert use of a portion of the golf course not abutting any of the subdivision property owners' property. The trial court entered judgment for the golf course owner. On appeal, however, the Supreme Court reversed, holding as a matter of law that property owners "who purchased their property in reliance on the existence of the golf course" have a right "to have the area preserved as a place of natural beauty and view." Id. at 1010. The court focused on the seller's use of a plat showing the golf course. The court noted that other jurisdictions generally impose easements for roads, parks and other similar uses displayed on subdivision plats. The Court ruled a golf course is equivalent to a park, and the right to have the golf course

continue in existence after sales were made based on its existence "must" be protected:

> The proper rule is that, entirely independent of any public right that may exist by reason of a dedication, private rights to the use of a park are created by implied grant, implied covenant, or estoppel. It makes very little difference upon which of the above three theories the holding is based. It is obvious from the record in this cause that the Cree Meadows golf course is a place equivalent to a park or other open area, and the right to have the same continue in existence as it was at the time of dedication and after sales were made is a valuable one and must be protected by the courts. It is obvious that the golf course as shown by the plat was an essentially constituent and integral part of the larger enterprise, namely, the subdivision itself.

Id. Notably, the court focused on whether the golf course was "an essentially constituent and integral part of the larger enterprise, namely, the subdivision itself."

In this case, that fact is undisputed. Appellant chose the name "Ponderosa Pines Golf Course, LLC." Appellant stipulated the golf course is "located in" the Ponderosa Pines Subdivision. (RP81). Moreover, the overwhelming evidence from the "maps," Melkus, Clute, and even discovery summarized by Appellant cited above proves the buyers purchased on reliance on the existence of the golf course and that the "golf course" is an integral part of the subdivision.

2. Ute I.

Our Supreme Court expanded Cree Meadows in Ute I. There, the Court held even unrecorded representations that contiguous property owned by the grantor would be used as a golf course may create a legally enforceable easement. The lower court had 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. The Supreme Court ruled such evidence is sufficient to preclude change of use. The Court refused to distinguish Cree Meadows on the basis the plat had not been recorded, ruling recording is irrelevant. The Court noted the material issue is whether "the 'golf course' area is obviously 'an essential constituent and integral part of a larger enterprise'...." Id. The Court stated:

> Just as in the Cree Meadows case, a reference to the plat in the present case demonstrates that the 'golf course' area is obviously '**an essential constituent and integral part of the larger enterprise**,' ...

The Court then stated a rule applying this standard when maps or plats are involved:

> In addition to the Cree Meadows case, ... cases ... have held, or support the rule, that where land is sold **with reference to a map** or plat showing a park or like open area, the purchaser acquires a private right, generally referred to as an easement, that such area shall be used in the manner designated. As stated, this is a private right, and it is not dependent on a proper making and recording of a plat for purposes of dedication....
>
> The rationale of the rule is that a grantor, who induces purchasers, by use of a plat, to believe that streets, squares, courts, parks, or other open areas shown on the plat will be kept open for their use and benefit, and the purchasers have acted upon such inducement, is required by common honesty to do that which he represented he would do. It is the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon a dedication to public use, or upon the filing or recording of the plat.

Id. Notably, the Court did not require evidence of reliance by the buyers, nor that the map or plat be recorded. If "land is sold **with reference** to a map" showing the golf course, an equitable easement arises. Id. "It is the use made of the plat in inducing purchasers, which gives rise to the ... right in the individual purchasers." Id.

In fact, the Court further clarified that a written map or plat is not even necessary.

The Court cited and quoted with approval Prescott v. Edwards, 117 Cal. 298, 49 P. 178 (1897). In Prescott, the California Supreme Court held that a written plat is unnecessary and that lot owners acquired private rights to have streets where the lots were staked upon the ground and the developer orally represented that the strips were streets. Our Supreme Court quoted Prescott approvingly:

> ... In principle, there can be no difference, as to any question of streets, in the legal status of a purchaser who buys a lot according to a plat made by the owner, whereon streets are delineated, and a purchaser who buys as plaintiff's predecessors bought. This land was platted upon the ground. The plat was ... as perfect and probably more satisfactory than though pictured upon paper.... The purchaser's condition was thus the same as if the land had been sold by a recorded or unrecorded plat. Under the circumstances we have depicted, it would be a gross injustice for the owner to deprive a purchaser of the privilege of using such strips of land as streets, and an injustice which the law does not countenance. ...

Ute I, 427 P.2d at 254.

Accordingly, under Ute I, no written map or plat is required to uphold an equitable easement. Instead, the material issue is whether the golf course area is "an essential constituent and integral part of a larger enterprise." Id. Plats and "maps" used by the developer and its agents obviously can prove that fact. However, admissions by one of the developers (Melkus), undisputed testimony regarding representations made to buyers, and/or the general layout of the development may equally prove the point (as in Prescott).

Notably, limiting Ute I to cases where the plat expressly shows the golf course makes no sense. If the seller impliedly or expressly represents that a golf course will be part of the subdivision and actually builds and then operates for decades such golf course in

the middle of the subdivision, should it matter whether the plat shows the golf course? The point of the estoppel or implied easement theory is the purchasers' reasonable expectations. A plat showing a "future" golf course is not nearly as effective selling tool for a developer as a fully constructed course with lots plotted along its fairways and greens. Most buyers of residential lots will not even review the subdivision plat. However, they certainly will inspect the lot they are considering purchasing. And, the fairway or green in their backyard (or across the street from their front yard), is necessarily an integral and necessary part of the neighborhood and their lot, in particular.

Ute I states a rule of general application. However, Defendants also fit squarely within the facts of Ute I. Like the homeowners in Ute I, Appellees rely upon a "map or plat." Id. at 253. Melkus confirmed that "maps" showing the golf course were used to sell the lots. (RP736). In fact, Appellant admitted numerous defendant landowners were sold their lots based on similar "maps" and representations. (RP759,763,764). Also, not only was the golf course "staked or marked," it was, in fact, built. For decades the golf course has run throughout the subdivision. The "maps" used to sell the lots were followed. In Ute I, the seller never built the golf course. Obviously, the equities weigh more heavily in favor of estoppel and implied easement when the implied representations are fulfilled.[4] Finally, it remains undisputed that the original seller (El Dorado) and its agents (including Melkus)

[4] Appellant's claim that it was just sales "puffery" is an admission to the equities at hand. Prescott held it would be a "gross injustice" to allow the seller to misuse stakes marking streets to sell the lots. How much greater is the injustice if the "stakes" are pulled up and the actual golf course is built?

represented there would be a golf course. (RP736). That is enough. In fact, Melkus went further, and testified that the developers and their agents represented that there always would be a golf course and that was the main part of the development. (RP736-37). Appellant even conceded purchasers "seem to have assumed that the golf course would always be there." (RP764). That evidence bolsters this case, making it stronger than Ute I. Admittedly, however, it is unnecessary. Ute I merely required evidence the golf course area is "an essential constituent and integral part of the larger enterprise." Id. at 254.

Notably, if a plat were necessary (which it is not), the admitted plats satisfy the required standards. Appellant's plats show the property utilized to build the golf course and label it owned by "El Dorado Land Corp." (RP772-73). In fairness, the plats do not say one way or the other how the open area will be used. However, Cree Meadows and Ute I refer not only to "golf courses" on plats, but "open areas." Accordingly, this plat does not contradict the "map" used by the developer, but instead complements it. Appellant, in fact, admits they used the maps to show the buyers "which lots were still available for sale." (Brief, p. 14). If the sellers used "maps" (which they did) or any other representations that the neighboring property would be (or is) a golf course, equitable estoppel arises.

Moreover, Appellant's argument that the deeds must reference the filed plat should be rejected out of hand. The Ute I decision held the failure of the deeds to note the golf course or reference the plat does not matter. The Court said,

> The rule that a contract to convey is merged in the deed ... is not applicable in a situation such as this.... The deeds given by defendant were not given as

performance of the implied, if not express, agreement arising from the use of the plat and the representations concerning the use to be made of the 'golf course' area. **The right in plaintiffs, as a result of this conduct on the part of defendant, is collateral to and in no way contradicts or varies the covenants, reservations and restrictions contained in the warranty deeds....**

Ute I, 427 P.2d at 254.

3. Huning

In 1977, our Supreme Court again addressed equitable easements in Huning. That case is not on point on its facts because it involved an express grant by plat and deed, rather than an implied grant by representations. However, in reaching its conclusions, the Court provided an important summary of New Mexico law on equitable easements:

> The contention as to 'private easement' is dispositive. It is well-settled in New Mexico that if land is purchased under an agreement and representation that it will abut upon a street, existing or to exist by the terms of the deed, and the grantor owns the land to be so used, the grantor and his heirs are estopped to deny the existence of the street and the purchaser acquires a right of way over the land in question. Nickson v. Garry, 51 N.M. 100, 179 P.2d 524 (1947). This rule was broadened in Cree Meadows, Inc. (NSL) v. Palmer, 68 N.M. 479, 363 P.2d 1007 (1961), where this court stated that private rights to the use of land delineated in a subdivision plat exist independently of any public right that might exist by reason of a dedication, and that it is unimportant whether this rule is based on a theory of implied grant, implied covenant, or estoppel. This rule was approved and elaborated in Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co., 77 N.M. 730, 735, 427 P.2d 249, 253 (1967), where we emphasized that:
>
> > (i)t is the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon a dedication to public use . . .

564 P.2d at 614. The Trial Court in this case properly construed Huning as stating the rule that "Grantors are estopped to deny the existence of an abutting golf course if land was

purchased from grantors under an agreement and representation that the golf course will remain a golf course." (RP975).

Melkus confirms that she and the developers represented to buyers the golf course would always remain a part of the subdivision. (RP736-737). In fact, Appellant's Brief admits the developer told at least five buyers the golf course would always remain. (Brief, p.9). That admission alone justifies summary judgment under Huning.

Appellant claims Huning implicitly requires a plat and a deed reservation to create the easement. (Brief, p.17-18). That simply isn't true. Huning did involve a recorded deed and plat. However, it never suggests they are necessary. Instead the Court quoted Cree Meadows and Ute I with approval, noting the "use made of the plat in inducing the purchasers" gives rise to the enforceable right -- not the plat itself. Id. at 614. Notably, if the representation is in a filed plat and recorded deed, it is not an "implied" grant or estoppel; it is an express grant.

4. Knight

In 1990, this Court had the opportunity to construe Cree Meadows and Ute I. In Knight, 794 P.2d 739, the owner of a subdivision golf course sought to change its use. This Court upheld summary judgment for the home owners. The original developers had used the golf course as a selling tool and noted it in the subdivision plat. It was undisputed the plaintiffs relied on the continued existence of the golf course in purchasing their properties. Citing Ute I and Cree Meadows, this Court held those facts alone "give rise to a private right

of action on the part of the property owners to prevent the golf course from being utilized for other purposes." Knight, 794 P.2d 739. Notably, the developer sought to distinguish Cree Meadows and Ute I because the developer specifically reserved the right to develop the open area in the recorded development restrictions incorporated into the buyer's deeds. The Court rejected that argument, stating a rule of general applicability:

> Concept contends that a developer may simultaneously use a subdivision plat showing open space areas as a selling tool, yet retain the right to unilaterally change the character of the open space. Such a result is patently unfair and violative of public policy. ... **A developer may not induce buyers to purchase lots by pointing to the present or planned existence of a park or golf course, while retaining the power to alter the use of the park or golf course**.

Knight explains and expands Cree Meadows and Ute I. If the golf course owner sells lots "by pointing to the present or planned existence of a park or golf course," he is estopped to change its use – period! In Knight, the developer sought to avoid the Cree Meadows principles by reserving his right to develop the golf course in recorded neighborhood restrictions. However, this Court forbid that, holding the implied representations trump any attempted reservations.

In this case, Appellant seeks to create fact issues regarding the developer's secret "intent" to perhaps change the use of the golf course some day. Even if that intent had been recorded (and not secret), it would have been unenforceable. Once El Dorado built the golf course in the middle of the subdivision, it was obviously "an essential constituent and integral part of a larger enterprise" under Ute I. The representations and "maps" regarding the golf course buttress Appellees' case and pull them directly within the facts of

Knight. Under Ute I, however, no written map or plat is required. Instead, the material question is whether representations were made by the owner and its agents sufficient to create an equitable servitude. Here, the admissions by one of the owners (Melkus), undisputed testimony regarding representations made to the buyers, and/or the general layout of the development prove that point. Summary judgment was proper.

Issue Four: ***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?***

Preservation for Appeal:

This issue was only partially preserved. Appellant did not argue lack of reliance until its motion for reconsideration, which was filed after the court pronounced summary judgment. (RP916). A motion for reconsideration filed after the court announces its ruling on summary judgment will not preserve the matter for review. Nance v. L.J. Dolloff Associates, Inc., 138 N.M. 851, 126 P.3d 1215 (N.M.App.,2005); Wilde v. Westland Development Co., Inc., 148 N.M. 627, 241 P.3d 628 (N.M.App.,2010); Rivera v. Trujillo, 1999–NMCA–129, ¶ 13, 128 N.M. 106, 990 P.2d 219; Dillon v. Select Portfolio Servicing, 630 F.3d 75, 80 (1st Cir. 2011). Also, Appellant failed to identify lack of reliance as a contested fact issue in its written Opposition as required by N.M.R.A. 1-056(D)(2). Accordingly, lack of reliance was waived.

Standard of Review:

The review standards are stated above. (Supra, p.15-16).

Argument and Authorities:

This issue should be easily dismissed. The Trial Court did not base its decisions on the credibility of any witnesses. Harrell's affidavit is inadmissible. Regardless, he provided no contrary evidence on the material facts. And, the material facts as proven above remain undisputed.

Appellant claims Appellees presented no admissible evidence that buyers relied on the existence of the golf course. That simply is not true. The following evidence proves reliance:

1. Melkus's testimony that buyers she dealt with while selling lots for El Dorado bought based upon the golf course. (RP736-737);

2. Melkus's testimony that she purchased her lot based on representations by El Dorado that the golf course would always be there. (RP737)

3. The Castaneda's unrefuted discovery answers tendered by Appellant that they bought "because of the existence of the course and the open and obvious beauty of the course itself." (RP781)

4. Appellant's admission that the golf course was "sometimes ... referred to" as a "selling point," that some purchasers assumed it would always be a golf course, and that the map showing the course was a "tool used to show prospective purchasers which lots were still available for sale." (Brief, p. 8,14).

Notably, Appellant submitted no evidence that purchasers did not rely on the representations. How could it? Common sense dictates one who purchases a lot on a golf course is relying on the existence of the golf course. One cannot buy a golf course lot by accident.

Appellant also claims that, in order for the Trial Court to assume the map relied on by the Association was indisputably the map used to sell lots to property owners, "thus condemning the land for use in perpetuity as a golf course, the district court had to judge the credibility of the Association witnesses and indulge all presumptions in favor of the Association's evidence." (Brief, p.26). However, that simply is not true.

To begin with, it is not essential that the actual map be admitted. It is enough that "land is sold **with reference** to a map or plat showing a park or like open area." Ute, 427 P.2d at 253. Melkus's testimony that those "types" of maps were used is sufficient.

Also, Appellant admitted the map was used to sell lots:

> It may be true that at some undefined point in time a map appeared that purports to show the lots in Ponderosa Pines ... and the golf course....
>
> It appears the map in question may have been used by Bill Gayso, who was a successor owner of the golf course, and who also was a realtor in Cloudcroft and sold lots in the 1990's and early 2000's.

(RP766-67). Appellant purchased directly from Gayso. It is irrelevant whether the original developer used the map, if Appellant's grantor used the map to sell lots. Appellant's Exhibit 4 proves the Castenadas purchased lots in 1992 and 2002 from Gayso based upon the express representations of the existence of the golf course:

> The real estate person ... mentioned the beauty of the rolling hills of the course and how attractive the area looked with the course. She stated that the course attracted a lot of people to the area .... We have never thought of the area without the course .... The destruction of the course would devalue the property. ...

> **[T]he golf course was the main attraction** and was mentioned as an obvious asset of the community, **we bought because of the existence of the course and the open and obvious beauty of the course itself**.

(RP781). The Castanedas' credibility was never challenged.

Moreover, Appellees dispute "reliance" in the ordinary sense is even an element to the equitable servitude at issue. The Court in Knight, 794 P.2d 739, did, in fact, note that it was undisputed that "plaintiffs relied on the continued existence of the golf course in purchasing their properties from the developer." The Court did **not**, however, state reliance is necessary, nor how it was proven. To the contrary, if reliance on the representations was necessary to recover, the court in Knight could not have granted summary judgment, since the developer's reservation of its right to change the golf course was recorded in the subdivision restrictions incorporated into each buyer's deeds. Notably, in Ute I, our Supreme Court laid out the general rule, conspicuously failing to include a "reliance" element. The Court said, "[W]here land is sold with reference to a map or plat showing a park or like open area, the purchaser acquires a private right, generally referred to as an easement...." 427 P.2d at 253. That easement arises from the use of the map, irrespective of evidence of further reliance by a purchaser. According to our Supreme Court, the "use" of the map causes buyers to believe the areas shown on the map "will be kept open for their use and benefit." Id. Accordingly, when the map or plat identifies the golf course, reliance is presumed upon purchase of the lots.

If the theory were only estoppel, or implied contract, individual "reliance" may, perhaps, be an element to the claim. But, our New Mexico courts have not been willing to limit this line of cases to one theory. Instead, our courts hold "it is immaterial whether the private right of action ... is termed an implied grant, an implied covenant, an easement, or a right based on estoppel." Knight, 110 N.M. at 740. And, implied covenant or easement theories do not require "reliance." See, e.g., Camino Sin Pasada Neighborhood Ass'n v. Rockstroh, 119 N.M. 212, 889 P.2d 247 (N.M.App.,1994)(discussing implied easement arising by implication of grantor and not mentioning reliance); Herrera v. Roman Catholic Church, 112 N.M. 717, 819 P.2d 264 (N.M.App.,1991)(recognizing easement by necessity, irrespective of any reliance). These two theories require proof only that the golf course was an integral part of the larger enterprise, "namely, the subdivision itself." In this case, that fact is undisputed.

In fact, no evidence Appellant could hypothesize can create a fact issue because the golf course was built in the middle of the neighborhood. By definition, the golf course is an "essential" part of the larger project. In Knight, the developer did the same thing, and was forbidden from reserving its right to change the golf course. Equity demands that a golf course built in the middle of a neighborhood in connection with the development and sale of lots remain a golf course.

Issue Five: ***Did the District Court err in taking judicial notice of a disputable personal assumption?***

Preservation for Appeal:

Appellees dispute this matter was preserved. Appellant only objected below on the alleged basis that a court may only take judicial notice of facts "on sources whose accuracy cannot reasonably be questioned." (RP917). In fact, Rule 11-201(B)(1) is not so limited and permits a court to take judicial notice of any fact "generally known within the community." Appellant's objection in the trial court was erroneous, and Appellant preserved no other objection.

Standard of Review:

Judicial notice is reviewed *de novo*. State ex rel. Children, Youth and Families Dept. v. Brandy S., 2007-NMCA-135, 142 N.M. 705, 168 P.3d 1129.

Argument and Authorities:

The trial court did not err in taking judicial notice that "a golf course is an inducement to purchasers of lots abutting the golf course." That is common sense and proper.

Rule 11-201(B)(1) permits a court to take judicial notice of any fact "generally known within the community." Our New Mexico courts have taken judicial notice on many common sense issues similar to this case. Gerner v. State Tax Commission, 378 P.2d 619 (N.M.,1963)(holding common knowledge land so situated as to be valuable for probable residences is increased in value by platting into smaller tracts); Laughlin v. Laughlin, 155 P.2d 1010 (N.M.,1944)(holding general knowledge irrigated land has a market rental value);

Mitchell v. Intermountain Cas. Co., 364 P.2d 856 (N.M.,1961)(holding common knowledge automobile depreciates when driven).

General knowledge tells you a golf course increases the value of a lot, particularly in rural, mountain country. Appellant tendered evidence that Mr. Manatt did not even play golf. He certainly would not have built the golf course in the middle of the subdivision if it did not enhance the property's beauty and/or value. The Court properly took judicial notice of the common sense fact that a golf course is an inducement to purchase lots. See Am. Jur. Evid. § 85 (noting judicial notice may be taken of the "characteristic functions and purposes of parks"); Am. Jur. Evid. § 73 (listing areas where judicial notice may be taken pertaining to real estate, including effects of certain events); Palumbo v. Donalds, 194 Misc. 2d 675, 754 N.Y.S.2d 856 (N.Y. City Civ. Ct. 2003)(judicial notice of particular fundamental facts pertaining to the city real estate market).

Appellant argues it should have had opportunity to contest that fact. (Brief, p.29). In fact, Appellant had that opportunity in the summary judgment record, if it could.[5] Instead, Appellant admitted there is "credible direct admissible evidence relating to one of the original purchasers [which] shows the golf course was presented as one of many recreational features which should lead potential buyers to purchase a lot in the Ponderosa

[5] Incredibly, Appellant argues it could have tendered evidence that a golf course is a disincentive to purchase to some people. (Brief, p.29). That misses the point. Some people don't like big houses because they are hard to clean. That does not change the fact houses are valued based on square footage.

Pines subdivision." (RP763). That is a binding, judicial admission that the existence of a golf course is an inducement to purchase lots.

Finally, even if the Court erred in taking judicial notice of this fact, it is harmless error. As noted above, Appellant failed to preserve the reliance issue. Accordingly, any alleged error in taking judicial notice on reliance is irrelevant.

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

Preservation for Appeal:

Appellant made this argument in the trial court (RP755, 762). However, Appellant has failed to cite any authority that failure to serve defaulting parties with a summary judgment motion against another party is fatal to that motion. That precludes review herein. Village of Angel Fire v. Board of County Com'rs of Colfax County, 2010-NMCA-038, ¶27, 148 N.M. 804, 242 P.3d 371.

Standard of Review:

Appellees are uncertain of the proper standard of review on this issue, and contend review should be only for an abuse of discretion. State v. Trujillo, 2002–NMSC–005, ¶ 49, 131 N.M. 709, 42 P.3d 814 (applying discretionary standard because trial court in best position).

Argument and Authorities:

Appellant fails to cite any authority that failure by a defendant to serve co-defendants with a motion for summary judgment against the plaintiff somehow permits plaintiff to defeat

summary judgment. Logic and judicial efficiency mandate summary judgment not be reversed simply because a disinterested party was not served with the motion. Having chosen not to hire counsel and file an answer, the other non-answering defendants showed their lack of concern regarding this litigation in general. In fact, Appellant lacks standing to object to failure to serve any third parties, especially co-defendants. The co-defendants were placed on notice of the Court's ruling by the public filing of the judgment. If they had an objection, they waived it.

Also, N.M.R.A. 1-005(A) expressly provides "no service need be made on parties in default for failure to appear...." All defendants who filed answers herein were served with the Motion. Appellant provided no evidence that any party who actually filed an answer was not served with the Motion. The Motion was properly served on Appellant, and that is all that matters.

Finally, under N.M.R.A. 1-005(D), the court may waive service on multiple defendants "upon motion or of its own initiative." Defendants requested the Trial Court waive any service requirement. (RP884). Appellees filed their Motion for Summary Judgment only against Appellant. By granting summary judgment, the Trial Court implicitly held service on the other co-defendants was unnecessary. Accordingly, the Trial Court did not abuse its discretion and judgment should be upheld.

VI. CONCLUSION

In conclusion, summary judgment is proper and the Trial Court should be affirmed.

VI. COMPLIANCE WITH N.M.R.A. 12-213(G)

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Martin, Dugan & Martin certifies that a copy of the foregoing Response was mailed to all counsel of record on the 19th day of January 2012.

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