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

BRIEF IN CHIEF

ORAL ARGUMENT IS REQUESTED

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STATEMENT OF PAGE/WORD COUNT COMPLIANCE:

This Brief contains fewer than the permitted 35 pages. Counsel used Microsoft Office Word 2003 with a proportionally spaced Times New Roman typeface. The body of the document consists of 7,567 words total.

Nature of the Case:

Plaintiff-Appellant Ponderosa Pines Golf Course ("Ponderosa Pines") sought a declaratory judgment that it was free to discontinue operation of an unprofitable golf course, and to place the land now occupied by the golf course in an economically viable and appropriate activity. The district court granted summary judgment to Defendants-Appellees, comprised of Ponderosa Pines Property Owners Association and certain individual residents near the golf course (collectively "Association").

Summary of Proceedings and Relevant Facts:

Consistent with the standard of review applicable to summary judgment proceedings, the facts are presented in the light most favorable to Ponderosa Pines as the party resisting summary judgment. *Marquez v. Gomez*, 116 N.M. 626, 630, 866 P.2d 354, 358 (Ct.App. 1991).

Ponderosa Pines is the owner of a golf course in the Ponderosa Pines development in Otero County. [RP 81; 727] The golf course consists of 37 acres and is in an area known as "Ponderosa Pines Subdivision, Units I and II," in Otero County. [RP 81; 727] The subdivision was created in 1973 by El Dorado Land Corporation ("El Dorado"). [RP 81; 727] The subdivision contains approximately 125 building lots, and approximately 50 homes have been built in the subdivision since 1973. [RP 727-28]

Ponderosa Pines purchased the golf course in 2005, becoming its third owner. [RP 81] Ponderosa Pines invested over one million dollars ($1,000,000.00) to purchase and operate the golf course. [RP 81] The golf course has been professionally maintained, and operates May 1 through October 30, weather permitting. [RP 81]

Despite Ponderosa Pines' efforts to advertise and promote the golf course since 2005, the golf course has suffered losses exceeding two hundred thousand dollars ($200,000.00) due to lack of demand. [RP 82; 851] It is not likely that the economic conditions will improve anytime in the foreseeable future. [RP 82]

The relationship of the golf course to the subdivision building lots is not typical of other housing subdivision-golf course developments in New Mexico. [RP 82] The building owners and lot owners are not required to pay capital or maintenance fees to maintain the golf course, nor is membership in a "golf club" mandatory, with the attendant payment of fees or assessments. [RP 82] This diminishes Ponderosa Pines' ability to operate the golf course without losing money. [RP 82] There is no evidence in the record that any property owner paid consideration for an extraordinary easement in perpetuity for continued existence of a golf course or open space.

None of the deeds to any of the owners of lots located in the subdivision contain any reference to the golf course. [RP 82, 772-777, 785, 870-873] There are no deeds, restrictive covenants or other recorded or unrecorded documents that

instruct or require that the property comprising the golf course shall be dedicated or used for any period as a golf course. [*Id.*] No documents exist which would prohibit other uses of the land. [RP 83] In fact, The Association minutes from 1984 contemplates alternative development, and a recorded document directed by the El Dorado Land Corporation to address the concerns of the Association was recorded at that point. [RP 853-4, 855]

THE DECLARATORY JUDGMENT ACTION

In order to end the operating losses incurred each year, in December 2009, Ponderosa Pines sought a declaratory judgment that it could cease operations as a golf course and use the land for an economically sustainable purpose. [RP 1] Ponderosa Pines named and served the Ponderosa Pines Property Owners' Association and its officers and directors, reasoning that each individual lot/ property owner in the development automatically becomes a member of the Association and is subject to the articles of incorporation of the Association. [RP 46] The Bylaws of the Property Owners Association, Article 1, Section 2 state that "one of the purposes for forming the Property Owners Association is to assume rigid enforcement of the Ponderosa Pines Subdivision restrictive covenants." [RP 47]

The Petition committed Ponderosa Pines to reasonable covenants and restrictions to protect the beauty, viability and setting of the subdivision, and agreed to comply with Otero County subdivision rules and regulations. [RP 4] In

any event, the declaratory judgment action was filed specifically because the continuing operation of the golf course caused ongoing and unreasonable hardship on Ponderosa Pines. [RP 1-4]

The Association opposed the declaratory relief action, and filed a counterclaim for declaratory judgment and a permanent injunction, seeking enforcement of the continued maintenance and operation of the golf course. [RP 26-31] The Association then moved to dismiss the Declaratory Judgment action for failure to join the individual property owners in the subdivision as indispensible parties. [RP 39] On June 14, 2010, the district court ordered each lot owner within the Ponderosa Pines Subdivision to be named as a party defendant and served with process. [RP 77] Ponderosa Pines was given the opportunity to amend the Petition to name each individual lot owner and to have each individual lot owner served with process. [RP 78-9]

Ponderosa Pines filed an Amended Petition for Declaratory Judgment on July 9, 2010, naming each individual property owner. [RP 80] Each property owner was served with process. [RP 88 ~ 594] Respondents answered, and again counterclaimed for declaratory judgment and a permanent injunction. [RP 635-641; 644-650; *see also, e.g.*, 618-622; 623-629, 610-617, 602-609, 544-548; 580-81]

THE MOTION FOR SUMMARY JUDGMENT

The Association, including its officers and directors and certain property owners moved for summary judgment. [RP 725-33] The Association claimed that the use of the subdivision as a golf course was mandatory as a matter of law.

The Association's motion relied heavily upon the deposition testimony of one Gisela Melkus. [RP 734-737, 743-745] Melkus claimed to be an "original owner" and vice president of El Dorado, the entity that created the subdivision. [RP 735-6] Melkus claimed that she joined El Dorado "in 1972 or 1973", and claimed to have been an initial partner in the development and owner of realty. [Id.] Melkus claimed that she and the other developers of Ponderosa Pines used maps showing the golf course to sell lots, and as part of the sale, would represent that the golf course was going to be part of the subdivision. [RP 736] Melkus claimed that the golf course was the sellers' main selling point. [RP 737] Melkus claimed that she and the other developers told lot purchasers that "the golf course would always remain there", [RP 737] and that it was always the developers' intention that the golf course would remain in perpetuity. [RP 736-7] Melkas also represented herself as a homeowner in the subdivision in 1974, and stated her expectation that the golf course would exist in perpetuity. [RP 737] Melkus stated the initial developers understood and expected that the golf course would fund itself. [RP 736-37]

EVIDENCE DISPUTING MELKUS' CONTENTIONS

In response and opposition to the motion, Ponderosa Pines introduced evidence that Melkus was not, in fact, an original owner or partner in El Dorado. [RP 756; 770] The realty constituting Ponderosa Pines development was initially held by James C. and Norma K. Mannatt, Robert J. and Jane Fate, and Irene Price. [Id.] The realty was later transferred to El Dorado. [RP 774-5] Ponderosa Pines produced the plats for Ponderosa Pines subdivision that were submitted to the county officials for approval, and recorded in the Otero County land records. [RP 772-5] The plats were submitted on December 16, 1972, and approved on January 3, 1973. [Id.]

The inference from the contrary evidence - which should have been drawn in favor of Ponderosa Pines on summary judgment - was that the subdivision had been conceived, planned and platted before Melkus' time. [RP 756] Melkus did not and could not have personal knowledge about 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. [Id.]

Melkus claimed that she and other developers of Ponderosa Pines used "maps" to sell the lots to prospective purchasers, that the golf course was the main selling point and that purchasers of the lots were told that "the golf course would always remain there; and that she and the other developers knew and expected that the golf course was the main reason the purchasers wanted to buy there." The

origin of the map Melkus referred to is uncertain. [RP 757] A map version that may have originated in 1979 - six years after the development was created - was provided with discovery responses from one property owner. [RP 785] It could not have been used to make sales in 1973. Moreover, unless Melkus was present at every sales presentation - whether made by her or someone else - she had no personal knowledge regarding what was said, and any such statements were inadmissible hearsay, inadequate to support summary judgment. Ponderosa Pines provided evidence contradicting Melkus' claim that the developers understood and expected that the golf course would "fund itself" by lot sales. [RP 848]

Melkus' statement that she herself owned a house in the subdivision in 1974 was untrue. Melkus did not own property until 1980, after she left El Dorado and moved to Albuquerque. [RP 850] Additional evidence contradicted Melkus' claims; Melkus did not participate in the conception or planning of the Ponderosa Pines development. [RP 849] James Manatt always considered alternate uses for the land on which the golf course was constructed, including construction of condominiums. [RP 848-9] The original owners/partners did not want to obligate El Dorado to perpetual existence of any particular project. [Id.]

ABSENCE OF USE RESTRICTION IN PLATS OR DEEDS

In further contradiction to the Association's presentation, Ponderosa Pines adduced evidence that the golf course was never shown on any recorded document in the Otero County land records. [RP 770-5, 855, 870-873] Contradicting

Melkas, Tommie Herrell averred that the golf course was not used as the main selling point for the lots in the development; its existence was sometimes - but not always - referred to. [RP 848-9] Purchasers, including current owners who purchased lots on resale were not told that the golf course would always remain a golf course, though some assumed that it would be. [RP 848-9]

CLUTE MOTION FOR SUMMARY JUDGMENT

Defendants Michael P. and Janet Clute filed a Motion to Adopt and Supplement the initial Motion for summary judgment that set forth the testimony and evidence of Melkas. [RP 746] Clute executed a hearsay affidavit regarding statements allegedly made to Clute regarding the land. [RP 749-50]

In response and rebuttal to the Clute Motion, Ponderosa Pines, stated in contradiction to Clute's affidavit 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. Moreover, the Clutes did not purchase their lots under 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 affidavit, being both substantively and procedurally inadequate, failed to shift the burden to Ponderosa Pines for purposes of summary judgment.

DISCOVERY RESPONSES

During the course of discovery, Ponderosa Pines served all of the 87 originally named Defendants with interrogatories, requests for admissions, and requests for production of documents. The material consisted of 26 pages to each Defendant. [*See, e.g.*, RP 819-823] One of the interrogatories asked whether, when the Defendant purchased a lot in the subdivision, anyone had represented to them that the golf course would always remain a golf course. [RP 759] Twenty-nine (29) Defendants did not respond to the complaint or to the discovery requests. [RP 759] Some Defendants responded to the discovery requests, but did not answer the complaint. [*Id.*]

Of the Defendants who responded to the discovery, thirty-three (33) said no representations were made to them that the golf course would always remain a golf course. [E.g., RP 792; 797, 801-2; 808; 813] Five (5) claimed that they were told by James Manatt that the golf course would remain. [E.g. RP 821] Ten (10) claimed to have been told by realtors not connected to the developers. Four (4) were told by realtor Bill Gayso, but one of these admitted that Gayso sold the property, but made no representations. [RP 759] At least three (3) said that they had dealt with James Manatt and Irene Price, but no representations were made. [RP 759] At least two (2) said they "assumed" the golf course would always be a golf course. [RP 759] Twenty-two (22) said they received no promotional materials. [E.g., 791, 796, 801]

ADDITIONAL DISPUTED MATERIAL FACTS

Ponderosa Pines produced significant evidence that disproved or contradicted the Association's presentation in its motion for summary judgment, and averred that discovery was beginning and expected to yield additional contrary evidence. [RP 755] Viewed in the light most favorable to Ponderosa Pines, the evidence established that the golf course was never presented as the centerpiece of the development, in contrast to the case precedents relied upon by the Association.

Further, Ponderosa Pines introduced evidence that corroborated its claim that the golf course has lost money each year because of lack of demand by lot owners and members of the public. [RP 851] Ponderosa Pines introduced additional evidence that contradicted individual Defendants' claims, including minutes of an Association meeting on September 2, 1984 that demonstrated the knowledge of Association members that the golf course lots were privately owned by El Dorado, contained no restrictions, that the golf course was losing money, that El Dorado Land Corporation was considering its options and might close the course and subdivide, and that covenants should be imposed to control the nature of that subdivision when it occurred. [RP 853-854; 855]

Ponderosa Pines subsequently established that the golf course exhibit relied upon by Melkus showed the present golf course configuration, not the configuration in the 1970s. [RP 895-904] The exhibit put forth by Melkus could

not have been relied upon by the Association members when they purchased their lots.

Disposition by the District Court:

The summary judgment motion was heard at oral argument by the district court on March 7, 2011. [RP 905] Ponderosa Pines reiterated its refutation of the facts that the Association had insisted were undisputed. [TR 11:41:00 through 11:44:00; 11:48-20 through 12:00:00] Ponderosa Pines further noted that the evidence relied upon by the Association was inadmissible hearsay and could not support summary judgment. [TR 11:54:00 through 12:00:00]

Subsequently, the district court filed its March 22, 2011 minute order, finding that Ponderosa Pines is the owner of the golf course, and acknowledging that the plat of the development filed with the Otero County Clerk does not identify the open area as a golf course. [RP 913] The district court noted that "some of the people who ultimately bought lots" were allegedly told by the developer that the golf course would remain a golf course. [*Id.*] While acknowledging Ponderosa Pines' assertion that it is economically viable to operate the golf course as a golf course, the court took "judicial notice" that the existence of a golf course is an inducement to purchasers of lots abutting the golf course. [Id.] The court then announced there were no genuine issues of material fact, and held that the grantees alleged reliance on the existence of a golf course outweighed Ponderosa Pines' property rights as a matter of law, and granted summary

judgment to the Association. [RP 914] The district court's Final Judgment [RP 973-976] held that grantees who purchased 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. No dedication of public use is necessary. [*Id.*] 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 would remain a golf course. [*Id.*] The district court declared that the Association and property owners have the right to have the Ponderosa Pines Golf Course remain a golf course in perpetuity. [*Id.*] Ponderosa Pines, its heirs and assigns and all those in privity with petitioner are hereby permanently enjoined and restrained from changing the use of the approximate 37 acres of property at issue from that of a golf course. [*Id.*] The restrictions shall run with the property and bind all subsequent purchasers. [*Id.*]

This appeal followed.

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?

Standard of Review:

The application and interpretation of law is subject to *de novo* review by this Court. *Martinez v. Segovia*, 2003-NMCA-023, ¶ 9, 133 N.M. 240, 62 P.3d 331.

Argument and Authority:

While the Association may be entitled to an inference that, at some undefined point in time, a map existed that purported to show the lots in Ponderosa Pines and a sketch of a golf course, this is insufficient to support summary judgment in the Association's favor. A trial on the merits in necessary to determine the propriety of judgment in this case.

The consequences of allowing the Association to cobble together maps and self-serving testimony, contradicted by some parties, impeached by other evidence, which are nowhere supported by recorded documents designed to give notice to subsequent purchasers for value, to support a virtual taking of private property, is alarming. Restrictive covenants must be construed where possible to favor free use of the property. *Montoya v. Barreras,* 81 N.M. 749, 474 P.2d 363 (1970). In *Ritter–Walker Co. v. Bell*, 46 N.M. 125, 126 123 P.2d 381, 382 (1942), the New Mexico Supreme Court affirmed that "[t]itle to an easement passes like title to any other real estate and the statute of frauds requires that a grant of an easement be in writing unless acquired by adverse user."

The record reflects that the Association's evidence regarding representations and reliance was disputed in every particular. Melkus, the Association's witness, did not testify unequivocally that the map proffered by the Association in support of its motion was actually used in sales, only that it was the "type" of map used. [RP 736] Later in her deposition, Melkus testified that the map she saw used was

larger than the one adduced at her deposition. [RP 867] Thus, the map attached to the Associations motion cannot be relied upon as establishing as a matter of law that the Association is entitled to judgment. The evidence was conflicting regarding whether the map referred to in Melkus' deposition was ever used to make sales, or used to make sales prior to 1979. Indeed, it was questionable whether Melkas actually made sales prior to 1979; Ponderosa Pines' affidavits were to the contrary. [RP 848-9] A reasonable inference from the evidence is that the map relied upon by the Association was simply a tool used to show prospective purchasers which lots were still available for sale. [RP 778, 785] Such reasonable inferences must be drawn in favor of Ponderosa Pines on summary judgment.

To adopt the Association's position in this case - that enforceable, perpetual private rights can be created as a matter of judicial fiat based on hearsay testimony about unrecorded, verbal sales pitches that were never reduced to writing and are nowhere reflected in documents providing notice to purchasers - would be disastrous with regard to the free ownership and alienability of land. This Court recently noted in *Agua Fria Save The Open Space Ass'n v. Rowe*, 2011–NMSC–054, 149 N.M. 812, 255 P.3d 390, that:

> Contextual understanding is necessary to construe restrictive covenants in a manner consistent with the intent and expectation of the parties. Thus, extrinsic evidence is admissible to explain or clarify, but not to vary or contradict, a restrictive covenant's terms. []To hold otherwise would be to relegate to judicial divination the determinative issues of many [] disputes.[]

Id. at ¶ 21 (citations omitted). *Agua Fria* went on to reverse the summary judgment awarded in that case. This Court should rule likewise.

Preservation:

Ponderosa Pines raised, briefed and argued its points in the following:

1. Amended Petition for Declaratory Judgment [RP 80-4],

2. Opposition to Defendant's First Motion for Summary Judgment and Supporting Brief [RP 755-875],

3. Plaintiff's Opposition to Defendants Clute Motion for Summary Judgment [RP 752-3],

4. Plaintiff's Supplement to Opposition to Motion for Summary Judgment [RP 895-904],

5. Plaintiff's Motion for Reconsideration [RP 916-921],

6. Plaintiff's Supplement to Motion for Reconsideration [RP 923-935],

7. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Reconsideration [RP 963-972],

8. At oral argument in the district court on March 7, 2011 (summary judgment) and July 5, 2011(reconsideration).

ISSUE 2:

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?

Standard of Review:

The Court reviews *de novo* a district court decision to grant summary judgment. *Rehders v. Allstate Ins. Co.*, 2006-NMCA-058, ¶ 12, 139 N.M. 536, 135 P.3d 237. In reviewing a grant of summary judgment, the Court reviews the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009–NMCA–081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. The pleadings, depositions, affidavit and admissions must be viewed in the most favorable aspect they will bear in support of the party opposing the motion. *Ginn v. Mac Aluso*, 62 N.M. 375, 310 P.2d 1034 (1957).

Argument and Authority:

The Association argued that Ponderosa Pines is barred from developing the golf course tract based upon *Huning v. Potts*, 90 N.M. 407, 409, 564 P.2d 612, 614 (1977), *Ute Park Summer Homes Association v. Maxwell Land Grant Co.*, 77 N.M. 730, 427 P.2d 249 (1967); *Cree Meadows, Inc. v. Palmer*, 68 N.M. 479, 362 P.2d 1007 (1961); and *Knight v. City of Albuquerque,* 110 N.M. 265, 794 P.2d 739 (Ct.App.1990), which hold that "a developer [is not] allowed to induce purchasers to buy property by purporting to include open space such as parks or golf courses

in a subdivision plat, only to subsequently change the uses of those open space areas." *See Knight*, 110 N.M. at 266, 794 P.2d at 740.

In reviewing a grant of summary judgment, this Court steps into the shoes of the district court, reviewing the motion, the supporting papers, and the non-movant's response as if this Court were ruling on the motion in the first instance. *Farmington Police Officers Ass'n v. City of Farmington*, 2006–NMCA–077, ¶ 13, 139 N.M. 750, 137 P.3d 1204. The standard requires this Court to engage in its own independent review of the record, and the Court is not relieved of this responsibility merely because some other or prior court has granted summary judgment, or upheld a grant of summary judgment, applying analogous substantive law to a similar record.

Ponderosa Pines responded to the Association's motion by showing that there is significant conflicting evidence regarding whether the golf course was intended to always remain a golf course. A careful reading of *Huning, Ute Park, Cree Meadows,* and *Knight* shows that the cases do not support the decision reached by the district court in this case.

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. The *Huning* Court

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 *Huning* court thus held that both the plat and a deed reservation created the easement in question. In *Huning*, the deeds made specific reference to the streets that had been shown on the recorded plat. *Id.* In contrast, no reference was made in any of the Ponderosa Pines lot deeds to the golf course. Reference in the deeds was to the recorded plats, which nowhere referred to the golf course.

Huning made clear it was the recorded plat inducing purchasers to buy that gave rise to any rights, not public rights existing because of a dedication to public use. 90 N.M. at 409, 564 P.2d at 615. In the instant case, the deeds given by El Dorado Land Corporation referenced the recorded plat, which plat had no reference to the golf course. [RP 772-3] Other than the unreliable hearsay testimony of Melkus, which was contradicted by exhibits adduced by Ponderosa Pines in opposing the motion for summary judgment, there was no evidence that would support judgment as a matter of law that the original developers either intended or represented to purchasers that they intended for the golf course to remain forever a golf course. [RP 767-874; 848-9]

Cree Meadows held that a recorded plat showing a golf course as an integral part of the subdivision, which was referred to specifically in making sales, was enough to create a right, whether based on easement, covenant or estoppel theories.

Id., 68 N.M. at 483-4, 362 P.2d 1009-10. In the instant case, it is undisputed that no such recorded plat showing a golf course exists. No recorded document was used in making sales, and the map adduced by the Association appears to have been created in 1979. [RP 785] There is conflicting evidence regarding whether representations were actually made by anyone with authority, and whether those representations were relied upon. [RP 848-9] *Cree Meadows* is distinguishable on its facts and cannot support summary judgment in this case.

A close reading of *Ute Park* reveals that it is equally inapposite. The individual making the sales representations in *Ute Park* was expressly identified with and an agent of the developer. *Ute Park*, 77 N.M. at 732, 427 P.2d at 251.

> [H]e prepared a plat of a tract consisting of approximately 160 acres in Cimarron Canyon at Ute Park. This plat was designated as 'The Maxwell Land Grant Company, Ute Park Cabinsite Area.' The plat showed the area divided into a large number of lots, showed the location of the lot lines and lot numbers, the existing roads and proposed roads, the Cimarron River, and many other objects and places thereon, and, as a part of the platted area, showed an open area of approximately 27 acres which was labeled 'Golf Course.' Near the one end of this area a small area was marked and labeled, 'Clubhouse.' Another small area in this same vicinity was labeled 'Tennis Courts.'

Id. at 732-33, 427 P.2d at 251. Markers were placed on the ground corresponding with the lot numbers shown. *Id.* Clearly, 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, the map or plat in question 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]

Preservation:

Ponderosa Pines raised, briefed and argued its points in the following:

1. Amended Petition for Declaratory Judgment [RP 80-4],

2. Opposition to Defendant's First Motion for Summary Judgment and Supporting Brief [RP 755-875],

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7. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Reconsideration [RP 963-972],

8. At oral argument in the district court on March 7, 2011 (summary judgment) and July 5, 2011(reconsideration).

ISSUE 3:

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?

Standard of Review:

The Court reviews *de novo* a district court decision to grant summary judgment. *Rehders v. Allstate Ins. Co.*, 2006-NMCA-058, ¶ 12, 139 N.M. 536, 135 P.3d 237. In reviewing a grant of summary judgment, the Court reviews the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009–NMCA–081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. The pleadings, depositions, affidavit and admissions must be viewed in the most favorable aspect they will bear in support of the party opposing the motion. *Ginn v. Mac Aluso*, 62 N.M. 375, 310 P.2d 1034 (1957).

Argument and Authority:

The Association also relied upon *Knight v. City of Albuquerque*, 110 N.M. 265, 794 P.2d 739 (Ct.App. 1990) for its position. In *Knight*, subdivision property owners sued to prevent development of any property that had been denominated on subdivision plats as part of golf course. 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.

In the instant case, the evidence is disputed. The Association has failed to come forward with any evidence of demonstration or reliance other than the hearsay testimony of Melkus, which is contradicted and impeached by Herrell, [RP 848-9], a map that is undated and not anchored to other testimony, and that may been drawn in 1979 or after 2000, well after the initial development and offer of the properties by El Dorado. [RP 785; 895-904] There are no recorded plats, there are no deeds that reflect the Associations' position, there is no unequivocal testimony, and there can be no determination of this case without a trial on the merits.

To hold otherwise would be to deprive Ponderosa Pines of any hope of beneficial use of the property under current market conditions. It is well settled that prior considerations, negotiations or stipulations are 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). The award of summary judgment on the facts of this case must be reversed.

Preservation:

Ponderosa Pines raised, briefed and argued its points in the following:

1. Amended Petition for Declaratory Judgment [RP 80-4],

2. Opposition to Defendant's First Motion for Summary Judgment and Supporting Brief [RP 755-875],

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8. At oral argument in the district court on March 7, 2011 (summary judgment) and July 5, 2011(reconsideration).

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?

Standard of Review:

The Court reviews *de novo* a district court decision to grant summary judgment. *Rehders v. Allstate Ins. Co.*, 2006-NMCA-058, ¶ 12, 139 N.M. 536, 135 P.3d 237. The pleadings, depositions, affidavit and admissions must be viewed in the most favorable aspect they will bear in support of the party opposing the motion. *Ginn v. Mac Aluso*, 62 N.M. 375, 310 P.2d 1034 (1957). In reviewing a grant of summary judgment, the Court reviews the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009–NMCA–081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. The application and interpretation of law is subject to *de novo* review. *Martinez v. Segovia*, 2003-NMCA-023, ¶ 9, 133 N.M. 240, 62 P.3d 331.

Argument and Authority:

The Association produced no admissible evidence that anyone who purchased lots from the developers of Ponderosa Pines Subdivision actually relied on the existence - planned or actual - of the golf course. The district court referred to Exhibit 5 to Ponderosa Pines' memorandum in opposition to summary judgment.

[RP 786-847] However, Patricia Ximenes - the only purchaser from El Dorado Land Corporation whose discovery responses are included in Exhibit 5 - stated that representations made to her referred to two golf courses, winter sports facilities, fishing and snow-mobiling, which could not have been located at Ponderosa Pines subdivision, and that Ponderosa Pines was a top golf course played by many locals. [RP 838, 917] She admitted that representations were "implied". [RP 837]

In direct opposition and contradiction of the evidence proffered by the Association in support of its Motion, Herrell filed an affidavit [RP 848-9] which disputed the contention that the golf course was the central perpetual purpose for the subdivision. Herrell sold the land to the developers, was on the Otero County Commission when the plat was filed, and sold lots as a real estate agent. [RP 848-9] Herrell's affidavit established that the construction of the golf course was never intended by the original developers to be in perpetuity, but only so long as it remained commercially viable. [RP 848-9]

In filing its motion for summary judgment, the Association relied upon a map allegedly used by El Dorado, but which was later suggested to have been created in 1979 - years after the development came into being. Subsequently, Ponderosa Pines adduced the affidavit of Jim Haynes. [RP 897-904] Haynes averred that he had played golf regularly at Ponderosa Pines Golf Course beginning in 1990-1991, and he noted that the map used in the Melkus deposition and attached to the Association's motion for summary judgment did not reflect the

configuration of the course in the 1990s. [*Id.*] In fact, Haynes averred that the map provided by the Association showed features and holes that were constructed by subsequent owner Mr. Gayso after the year 2000. [RP 898] In support of his contentions, Haynes attached score cards that reflected the 1990s configuration and later changes to the course. [*Id.*]

In order to assume that the map produced at Melkus' deposition and relied upon by the Association was undisputedly the map used to sell the 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. This is precisely the reverse of the standard of review to be applied by the district court in passing upon a motion for summary judgment. *See Rummel v. Lexington Ins. Co.*, 1997–NMSC–041, ¶ 18, 123 N.M. 752, 945 P.2d 970 (holding the court is to view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits). The district court erred in its application of the law to the facts, and must be reversed, and the matter remanded for a trial on the merits.

Preservation:

Ponderosa Pines raised, briefed and argued its points in the following:

1. Amended Petition for Declaratory Judgment [RP 80-4],

2. Opposition to Defendant's First Motion for Summary Judgment and Supporting Brief [RP 755-875],

3. Plaintiff's Opposition to Defendants Clute Motion for Summary Judgment [RP 752-3],

4. Plaintiff's Supplement to Opposition to Motion for Summary Judgment [RP 895-904],

5. Plaintiff's Motion for Reconsideration [RP 916-921],

6. Plaintiff's Supplement to Motion for Reconsideration [RP 923-935],

7. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Reconsideration [RP 963-972],

8. At oral argument in the district court on March 7, 2011 (summary judgment) and July 5, 2011(reconsideration).

ISSUE 5:

Did the district court err in taking judicial notice of a disputable personal assumption?

Standard of Review:

The Court reviews *de novo* a district court decision to grant summary judgment. *Rehders v. Allstate Ins. Co.*, 2006-NMCA-058, ¶ 12, 139 N.M. 536, 135 P.3d 237. In reviewing a grant of summary judgment, the Court reviews the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in

dispute." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009–NMCA–081, ¶ 7, 146 N.M. 717, 213 P.3d 1146.

Argument and Authority:

The district court took judicial notice of the "fact" that the existence of a golf course, *ipso facto*, is an inducement to purchasers of lots abutting the golf course. [RP 914, 974] Generally, facts relevant to a party's case must be proven through the traditional mechanisms of real, direct, or circumstantial proof, filtered through the traditional rules of evidence. Rule 11-201(B) NMRA provides that a judicially noticed adjudicative fact must be one not subject to reasonable dispute in that it is either generally known within the community, or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See Rozelle v. Barnard*, 72 N.M. 182, 183, 382 P.2d 180, 181 (1963) (precluding judicial notice when uncertainty surrounds the fact or matter in question); *see also* Rule 11–201(B) NMRA (providing that judicial notice is generally not appropriate for matters that are subject to reasonable dispute or incapable of ready and accurate determination).

Adjudicative facts that have been properly noticed by New Mexico courts include, *inter alia*, the branding and range of cattle (*Territory of New Mexico v. E.J. McLean*, 27 S.Ct. 1 (1906)), that the records kept by the Catholic clergy of date of birth, baptism, marriage, and death are held in high esteem for their probative force

(*State v. Apodaca*, 42 N.M. 544, 82 P.2d 641 (1938)), or that morphine is an opium derivative (*State v. Yanez*, 89 N.M. 397, 553 P.2d 252 (1976)).

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. The pleadings, depositions, affidavit and admissions must be viewed in the most favorable aspect they will bear in support of the party opposing the motion - Ponderosa Pines, in this case. *Ginn v. Mac Aluso*, 62 N.M. 375, 310 P.2d 1034 (1957). The court must view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits. *Romero v. Philip Morris Inc.*, 2010–NMSC–035, ¶ 14, 148 N.M. 713, 242 P.3d 280.

The district court's judicial notice that the existence of a golf course is an inducement to the purchase of abutting residential property is a disputed adjudicative fact in this case that was improperly drawn in favor of the moving party Association on summary judgment. *See, e.g.* Zitter, Jay M., *Golf Course or Driving Range as Nuisance*, 49 A.L.R.6th 477 (2009). Ponderosa Pines should have been given the opportunity at a trial on the merits to adduce contrary evidence to the judicial notice, for example, that a nearby golf course can be a disincentive to purchase to some homebuyers, because of the physical danger and property damage associated with golf balls being hit into private lands, and that other commercially feasible uses would equal or greater attraction. *Frost v. Markham*,

86 N.M. 261, 522 P.2d 808 (1974) (noting a specification of what is being judicially noticed should be clearly and timely stated so that the parties affected have the opportunity to address themselves to such matters).

Preservation:

Ponderosa Pines raised, briefed and argued its points in the following:

1. Plaintiff's Motion for Reconsideration [RP 916-921],

2. Plaintiff's Supplement to Motion for Reconsideration [RP 923-935],

3. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Reconsideration [RP 963-972],

8. At oral argument in the district court on July 5, 2011.

ISSUE 6:

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

Standard of Review:

The application and interpretation of law is subject to *de novo* review. *Martinez v. Segovia*, 2003-NMCA-023, ¶ 9, 133 N.M. 240, 62 P.3d 331.

Argument and Authority:

The Association's motion for summary judgment certified that it was served on Counsel of record. [RP 733] However, at the Association's insistence [RP 39-44], Ponderosa Pines was forced to amend its petition to name all property owners, and then to undertake a lengthy and expensive service endeavor. [E.g. RP

85-594] The Association failed to comply with the requirements of Rule 1-005 NMRA, which requires that every written motion and similar paper must be served on each of the parties. *See, e.g. Hale v. Brewster*, 1970, 81 N.M. 342, 467 P.2d 8 (holding under Rule 1-004 NMRA that where there is more than one defendant, a complaint and a summons must be delivered for each defendant being served).

The Association's motion for summary judgment was served only on counsel of record for those parties that had entered an appearance, not on unrepresented parties. [RP 733] The Association did not move the district court for approval to serve a limited number of parties. Had those parties been notified, additional evidence might have come to light regarding the merits of the Petition, and parties previously unaware of the status of the matter might have been inspired to participate in discovery and court processes, leading to a more just and complete adjudication. The district court erred in recognizing and ruling upon a motion that - by the Association's own certification - had not been properly and duly served upon all parties so that all parties had notice and could be heard. The district court's decision should be reversed.

Preservation:

Ponderosa Pines raised, briefed and argued its points in the following:

1. Opposition to Defendant's First Motion for Summary Judgment and Supporting Brief [RP 755-875],

2. At oral argument in the district court on March 7, 2011 (summary judgment) and July 5, 2011(reconsideration).

CONCLUSION:

For the foregoing reasons, 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,

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