IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DENSIL AND MARY GILLIS,

Plaintiffs– Appellants,

v.

No. 29,052
Sierra County
CV-08-79

BOARD OF COUNTY COMMISSIONERS
OF SIERRA COUNTY,

Defendant-Appellee.

APPELLANTS DENSIL AND MARY GILLIS' REPLY BRIEF

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Appellee, the Board of County Commissioners of Sierra County ("Sierra County") invited the District Court to commit error when it relied upon the doctrines of prescriptive easement and implied dedication. Sierra County now seeks to backpedal from its own argument at the District Court. In doing so, Sierra County virtually concedes error on its sovereign immunity claim when it fails to argue that county designation of the road passed title. Sierra County presents no new theory that would support affirmance. Its reliance upon NMSA 1978, § 67-2-1 (1953) is misplaced given that statute's explicit exclusion for private roads. Appellee fails even to address the New Mexico authority relied upon by Appellants to support declaratory judgment as a cause of action.

With respect to inverse condemnation, Sierra County again misstates the nature of its argument below. Curiously, Sierra County then refuses to address the merits of its argument below unless ordered by this Court to do so. Sierra County's arguments with respect to inverse condemnation are ultimately unavailing. This Court should reverse the District Court.

I. THE DISTRICT COURT ERRED WHEN IT GRANTED APPELLEE'S MOTION TO DISMISS APPELLANTS' CAUSE OF ACTION FOR DECLARATORY JUDGMENT.

Contrary to its assertions to this Court, Sierra County did in fact improperly rely

upon the doctrines of prescriptive easement and implied dedication. Sierra County does not dispute that designation of the road as a county road did not pass title to the property. Sierra County errs in reliance upon NMSA 1978, § 67-2-1 (1953) because of its explicit exclusion for private roads. Finally, Sierra County fails to address binding New Mexico authority that allows for declaratory judgment as a proper vehicle for this type of action.

A. Sierra County improperly relied upon and continues to attempt to rely upon the doctrines of prescriptive easement and implied dedication to obtain dismissal.

Sierra County states in its Answer Brief that "[c]ontrary to Appellant's contention, the ultimate question incident to the County's Motion to Dismiss did not relate to the roles of the doctrine of prescriptive easement and implied dedication and the Appellee did not primarily argue that these doctrines prevented Appellant's suit." *See* Appellee Board of County Commissioners of the County of Sierra's Answer Brief, at 3. This statement is false.

Sierra County's Memorandum in Support of Its Motion to Dismiss Complaint states as follows:

> Assuming without conceding the validity of Plaintiff's assertions, the only additional mechanisms by which this road may have become a County Road, absent evidence of the establishment of the road pursuant to 43 U.S.C. § 932, are by implied dedication and the creation of a prescriptive easement.

> See NMSA 1978, § 67-2-1 (1905) ("All roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways."); Trigg v. Alemand, 95 N.M. 128, 619 P.2d 573 (Ct. App. 1980) (explaining that a public highway may be established by prescription); Leuvano v. Maestas, 117 N.M. 580, 874 P.2d 788 (Ct. App. 1994) (setting forth the manner in which a road may be open to public use by virtue of an implied or common law dedication). Prescriptive rights or rights acquired by implied dedication are property rights. See, e.g., Leigh v. Village of Los Lunas, 2005-NCMA-025 (sic.), ¶ 8, 137 N.M. 119, 108 P.3d 525 ("[E]asements constitute valuable property rights.").
>
> Accordingly, Plaintiffs have named the Board of County Commissioners of the County of Sierra, a political subdivision of the State, a Defendant in a suit, action, case or legal proceeding involving a claim of title to or interest in real property, in contravention of NMSA 1978, section 42-11-1 (1979).

See Board of County Commissioners of the County of Sierra' Memorandum in Support of its Motion to Dismiss Complaint, R. at 18.

This passage illustrates the central place in Sierra County's argument of the doctrines of prescriptive easement and implied dedication. Indeed, while Sierra County spends many pages in its brief attempting to disavow itself of its own argument, in a rare moment of candor Sierra County finally concedes that it is still in fact relying upon prescriptive easement and implied dedication. *See* Appellee Board of County Commissioners of the County of Sierra's Answer Brief, at 10 – 11 ("Rather,

and as explained above, such references to implied dedication and prescriptive easement were for the limited purpose of demonstrating that this action involved a claim of title or interest in real property, which related to the County's assertion of immunity pursuant to Section 42-11-1.").

Sierra County attempts to argue that the "District Court did not dismiss or otherwise decide the matter on the basis of an established prescriptive easement or implied dedication. The District Court dismissed on the basis of sovereign immunity." *Id.* at 11 (citations omitted). However, as shown above, Sierra County's argument for sovereign immunity was that the claim involved a question of title because of the doctrines of prescriptive easement and implied dedication.

It is disingenuous for Sierra County to attempt to separate the District Court's ruling from its reasoning. It is equally disingenuous for Sierra County to invite error at the District Court level and then claim to this Court that it did not make the argument below that it clearly made in an effort to uphold an erroneous ruling. *See, Hodgkins v. Christopher*, 58 N.M. 637, 641, 247 P.2d 153, 155 (1954)("It is too well established for dispute that a party litigant may not invite error and then take advantage of it."). Sierra County's attempt to distance itself from its own arguments below speaks of a guilty conscience – a more than tacit admission that the District Court erred in granting Sierra County's Motion to Dismiss based on its reliance upon

the doctrines of prescriptive easement and implied dedication.

B. Sierra County Does Not Dispute that Designation of the Road Does Not Pass Title to the Road.

Sierra County admits that it never argued that designation of a county road for maintenance obligations passes title to the road. There is no dispute on this subject. Under the proper standard of review, this admission compels reversal.

A motion to dismiss tests the legal sufficiency of the complaint. *Healthsource, Inc. v. X-Ray Associates of New Mexico*, 2005-NMCA-097, ¶ 16, 138 N.M. 70, 76, 116 P.3d. 861, 867. The Court must accept all well-pleaded facts as true and evaluate whether claimant could prevail under any state of facts which might be proven in accordance with the allegations of the complaint. *See, N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991). No factual allegations outside the well-pled facts of the Complaint are considered. *Durham v. Guest*, 2009-NMSC-007, ¶ 2, _____ N.M. ____, ____ P.3d _____.

Appellants' First Amended Complaint alleged that between 2003 and 2005, Sierra County changed County Road B-043 to Mountain View Road. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 28. Appellants allege that on January 29, 2008, Sierra County, through counsel, took the position directly for the first time that County Road B-043 runs through

Appellants' property. *Id.* Prior to this time, Appellants allege that Sierra County had, save for extremely isolated circumstances, maintained or graded the road. *Id.* Appellants allege that Sierra County did not condemn or follow the statutory procedures set forth in NMSA 1978, § 67-5-5 (1941) when it unilaterally designated the road on their property County Road B-043. *Id.*

If Sierra County sought to dismiss this matter because it involved a question of title or interest in real property, under the proper standard of review, Sierra County was required to argue that the unilateral designation of the road as County Road B-043 for maintenance obligations transferred title or an interest in real property to obtain dismissal. Sierra County admits that it has never made this argument and does not make it now. *See* Board of County Commissioners of the County of Sierra' Memorandum in Support of its Motion to Dismiss Complaint, R. at 13. Instead, although Sierra County seeks to back away from this now, Sierra County requested the Court to dismiss this case because it involved a prescriptive easement and implied dedication. *Id.* at 18. This argument required assumption of facts outside of Appellants' First Amended Complaint in violation of the governing standard of review.

Appellants have consistently argued that their First Amended Complaint did not raise a title dispute; rather, Appellants challenged Sierra County's authority to

designate unilaterally and illegally their road a County Road. *See* Plaintiffs' Response to Defendant's Motion to Dismiss, R. at 32 ("Defendant mischaracterizes Plaintiffs' Declaratory Judgment action as a title dispute involving the questions of the prescriptive easement and implied dedication. Plaintiffs' Complaint seeks to challenge Defendant's authority to designate their road as a county road without following the required statutory procedures."); *see also, Id.* at 36 ("Defendant's effort to re-characterize this claim as a title dispute is ultimately unavailing."). The section in Apellants' Brief-in-Chief that illustrates that such a designation does not pass title is consistent with this argument. Sierra County's preservation argument is wholly without merit. *Durham v. Guest*, 2009-NMSC-007, ¶ 20, _____ N.M. ____, ____ P.3d _____ (rejecting preservation argument when issue has been "consistently argued.").

Indeed, Sierra County provides no explanation as to how Appellants should be required to preserve a response to an argument it does not even make. Sierra County even goes so far as to criticize Appellants for responding to the arguments it did make. *See* Appellee Board of County Commissioners of the County of Sierra's Answer Brief, at 13 ("the District Court did not consider any argument in opposition to the County's assertion of immunity in favor of objecting to ancillary references to prescriptive easements and implied dedication."). As Appellants have conclusively

shown, Sierra County did much more than make "ancillary references to prescriptive easements and implied dedication." *See e.g.*, Board of County Commissioners of the County of Sierra' Memorandum in Support of its Motion to Dismiss Complaint, R. at 18.

The remainder of Sierra County's arguments are unavailing. Sierra County argues that if title did not pass, an issue not in dispute, then some other form of interest in property did. *See* Appellee Board of County Commissioners of the County of Sierra's Answer Brief, at 14 – 15. Sierra County does not identify the nature of this "other interest" or cite any authority for this proposition. *See State v. Woodward*, 121 N.M. 1, 11, 908 P.2d 231, 242 (1995) ("We will not entertain arguments unsupported in the briefs.").

Finally, Sierra County argues that because Appellants went to the trouble of pointing out that title was not at issue, title somehow must be at issue. *See* Appellee Board of County Commissioners of the County of Sierra's Answer Brief, at 15. Under this self-serving theory, Sierra County could raise the question of title to a road in any case, no matter how frivolous, and argue that title was at issue because the opposing side had to argue that title was not at issue. The flawed logic of this position is self-evident.

Ultimately, Sierra County concedes that it is not arguing that unilateral

designation of the road passes title in a manner that would implicate sovereign immunity. Under the proper standard of review, accepting Appellants' First Amended Complaint as true, dismissal on the grounds of sovereign immunity was thus improper.

C. NMSA 1978, § 67-2-1 (1905) Does Not Apply to Private Roads.

Under the right for any reason doctrine, Sierra County next attempts to rely upon NMSA 1978, § 67-2-1 (1905). This statute contains an explicit exclusion for "private roads." *See* NMSA 1978, § 67-2-1 (1905) ("[a]ll roads and highways, except private roads). New Mexico courts have consistently rejected its application to roads such as that found on Appellants' property.

For example, in *Moore v. Armstrong*, 67 N.M. 350, 355 P.2d 284, the Supreme Court of New Mexico examined whether a road in Las Cruces was a public highway or a private road. The Court affirmed the finding that it was a private road because it was not on the City of Las Cruces map and had never been dedicated as a public road. *Moore*, 67 N.M. at 353, 355 P.2d at 286. Similarly, in this case, Appellants allege that County Road B-043 is not on their property on the Sierra County map. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 27 (Paragraphs 9 and 10 of said First Amended Complaint). Appellants allege that Sierra County have never followed the statutory procedures to establish the road as a County Road or condemned the road. Therefore, as in *Moore*,

and accepting the facts in Appellants' First Amended Complaint as true, the road is a private road under NMSA 1978, § 67-2-1 (1905).

In *Norero v. Board of County Commissioners of Grant County*, 82 N.M. 300, 481 P.2d 88, Grant County argued that blading operations with county machinery and the presence of the road on the Grant County map established the road as a public highway under NMSA 1978, § 67-2-1 (1905) (at the time codified as Section 55-1-1, N.M.S.A. (1953 Comp.). The Supreme Court disagreed. *Norero*, 82 N.M. at 301, 481 P.2d at 89. The Court relied upon "the protestations of the plaintiff landowner" to the blading operations. *Id.* In this case, Appellants alleged that they immediately protested Sierra County's attempt to perform maintenance on the road at issue. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 28 – 29 (Paragraphs 16 and 17 of said First Amended Complaint). Thus, as in *Norero*, and accepting the facts in Appellants' First Amended Complaint as true, the road is a private road under NMSA 1978, § 67-2-1 (1905).

Sierra County does not cite any factually specific cases to support its argument that NMSA 1978, § 67-2-1 (1905) establishes the road at issue as a public highway. Sierra County only cites cases for general legal propositions. The above authority shows that New Mexico law recognizes Appellants' road as a private road. Therefore, NMSA 1978, § 67-2-1 (1905) does not support affirmance of the dismissal under the

right for any reason doctrine.

D. Under New Mexico Law, Declaratory Judgment is Proper.

Sierra County completely ignores the case of *Harriet v. Lusk*, 63 N.M. 383, 320 P.2d 738 (1958). This case is directly on point in Appellants' favor. Appellants cited authority from other jurisdictions to note to the Court that their position was in accord with general law throughout the United States. Sierra County presents no authority to the contrary. Instead, Sierra County simply asks this Court to reject this persuasive authority in spite of the fact that Sierra County completely fails to address New Mexico authority that is in accord.

Sierra County's argument related to a separate abrogation of sovereign immunity is unavailing. Sovereign immunity has never existed with respect to questions of government's authority to act – an action that sounds in injunction, mandamus, or prohibition. *See e.g.*, NMSA 1978, § 41-4-17(A) (1982)("Nothing in this section shall be construed to prohibit any proceedings for mandamus, prohibition, habeas corpus, certiorari, injunction, or quo warranto."); *see also*, *Harriet*, 63 N.M. at 387, 320 P.2d at 741("The only point in the above analysis is to point out that where other remedies as mandamus or prohibition will lie that declaratory judgment should issue and would not be an enlargement of actions against the state."). Ultimately, Sierra County falls back on its sovereign immunity argument related to

actions involving title to real property. *See* Appellee Board of County Commissioners of the County of Sierra's Answer Brief, at 26 (citing NMSA 1978, § 42-11-1 (1979)). Appellants have already discussed and discounted above. *Supra.* at 2 – 8.

The New Mexico Declaratory Judgment Act provides that:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

See NMSA 1978, § 44-6-4 (1975).

As Appellants have repeatedly argued, they seek a construction of NMSA 1978, § 67-5-5 (1905) that they have a right to have the procedures followed contained within said statute before the road on their property can be designated a public road. Thus, by virtue of this action, Appellants seek to obtain a declaration of rights under NMSA 1978, § 67-5-5 (1905). This is exactly the kind of action the Declaratory Judgment act contemplates. The Supreme Court of New Mexico agrees. *see also*, *Harriet*, 63 N.M. at 387, 320 P.2d at 741. The District Court erred in holding to the contrary. This Court should reverse and remand for further proceedings accordingly.

II. THE DISTRICT COURT ERRED WHEN IT GRANTED SIERRA COUNTY'S MOTION TO DISMISS ON APPELLANTS' INVERSE CONDEMNATION CLAIM.

Sierra County treats Appellants' claim for inverse condemnation as somewhat of an afterthought. Sierra County argues in confusing fashion that it "neither requests that this Court assume that the road was acquired by prescription or by implied dedication, as alleged by Appellants both here and in the District Court, but rather to recognize, as a matter of law, to the extent the public has acquired any interest in the subject road, that it would have done so by having acquired an easement by prescription or by implied dedication, given Appellants' allegations." *See* Appellee Board of County Commissioners of the County of Sierra's Answer Brief, at 30. Appellants did not plead any allegations that would support prescription which requires open, uninterrupted, peacable, notorious, and adverse use of the property for ten years. *See Luevano v. Maestas*, 117 N.M. 580, 584, 874 P.2d 788, 795 (Ct. App. 1994). Appellants pled the exact opposite, to wit that they objected immediately to County maintenance of the road. *See* Appellants' First Amended Complaint for Declaratory Judgment and Inverse Condemnation, R. at 28 – 29 (Paragraphs 16 and 17 of said First Amended Complaint). Protestations to the contrary aside, Sierra County requested this Court to assume facts outside of Appellants' First Amended Complaint in violation of the standard of review that governs a motion to dismiss.

The District Court thus committed reversible error in dismissing Appellants' claim.

Sierra County's Answer Brief then takes a curious turn when it states that it will only address the merits of its own argument under order from this Court. *See* Appellee Board of County Commissioners of the County of Sierra's Answer Brief, at 32. This bizarre argument again speaks of a guilty conscience. Sierra County succeeded on an argument that it knows it should not have. Through avoidance of a meaningful discussion of its argument, Sierra County hopes to avoid recognition of this inconvenient truth to see if lightning will strike twice. To the extent title or an interest in property passed when Sierra County unilaterally designated Appellants' road County Road B-043, without following any statutory procedures for dedication of a road or condemnation, a taking occurred without just compensation. Sierra County's factually-based affirmative defenses of prescriptive easement or implied dedication are a matter for trial. It was error for the District Court to rule to the contrary.

PRAYER FOR RELIEF

WHEREFORE, For the above-stated reasons, Apellants respectfully request that this Court reverse the District Court, remand for further proceedings, and for such other and further relief as to the Court may deem just and equitable.

RESPECTFULLY SUBMITTED BY:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he did cause to be sent by first-class mail, a true and correct copy of the foregoing instrument to the following opposing counsel of record on this 18th day of April 2009.

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