IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DENSIL AND MARY GILLIS,

Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SIERRA,

Defendant-Appellee.

The Honorable
Edmund H. Kase, III
Sierra County
Dist. Ct. No. CV-08-79
Ct. App. No. 29,052

APPELLEE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SIERRA'S ANSWER BRIEF

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SUMMARY OF PROCEEDINGS

COMES NOW Appellee, Board of County Commissioners of the County of Sierra and, pursuant to Rule 12-213(B) NMRA 2008, files this Answer Brief. Insofar as Appellants request that this Court engage in a different analysis than that presented to, and considered by, the District Court in their statement of the Summary of Proceedings, Appellee will respond to this request in its Argument section. See Rule 12-213(A)(3) NMRA 2008 (detailing appropriate contents of Summary of Proceedings).

Standard of Review

This Court reviews the District Court's determination that Appellee was entitled to dismissal on the basis of its sovereign immunity pursuant to NMSA 1978, § 42-11-1 (1979) under a de novo standard. See, e.g., Rutherford v. Chavez County, 2003-NMSC-010, ¶ 8, 133 N.M. 756, 69 P.3d 1199 (rejecting request to review grant of immunity on motion for summary judgment in light most favorable to nonmovant, and reviewing grant of immunity under a de novo standard, where pure question of law was at issue); Godwin v. Mem'l Med. Ctr., 2001-NMCA-033, ¶ 23, 130 N.M. 434, 25 P.3d 273 (applying de novo standard to review determination of governmental immunity pursuant to the Tort Claims Act); Bd. of Comm'rs v.

Greacen, 2000-NMSC-016, ¶ 4, 129 N.M. 177, 3 P.3d 672 (holding that statutory construction concerns are pure questions of law, subject to de novo review).

In reviewing the District Court's grant of Defendant's Motion to Dismiss pursuant to Rule 1-012(B)(6) NMRA 2008, this Court accepts all well-pleaded facts as true, and reviews the District Court's application of the law to the facts under a de novo standard. Durham v. Guest, 2007-NMCA-044, ¶ 12, 142 N.M. 817, 171 P.3d 756. Ultimately, though, this Court's function is to correct an erroneous result, rather than to make a determination as to whether the District Court decided the matter on an appropriate basis. Consequently, an Appellate Court will affirm the District Court if it was right for any reason. See State v. Barber's Super Market, Inc., 74 N.M. 58, 58, 390 P.2d 439, 439 (1964) ("A reviewing court's primary function is to correct an erroneous result rather than to approve or disapprove the grounds upon which it is based, so that where the record, as in this case, is silent as to the reason for a ruling, it will be sustained if it is correct upon any proper theory."); see also Meiboom v. Watson, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 ("[E]ven if the district court offered erroneous rationale for its decision, it will be affirmed if right for any reason."); See Henning v. Rounds, 2007-NMCA-139, ¶ 18, 142 N.M.

803, 171 P.3d 317 (affirming District Court's dismissal of Plaintiff's claims on Motion to Dismiss on a different basis than the District Court). A favorable determination on the matter of Appellants' failure to state a claim upon which relief can be granted, on Appellee's assertion of immunity, or on any other basis identified by this Court, will provide a sufficient basis for affirming the District Court's dismissal of Appellants' cause of action. See Meiboom, 2000-NMSC-004, ¶ 20.

ARGUMENT

Rather than requesting that this Court review the District Court's determination de novo to consider whether the District Court's dismissal of Appellant's action was appropriate on the basis of the Appellee's assertion of immunity or for failure to state a claim upon which relief could be granted, Appellants seeks to reshape the matters to be considered by this Court and raises matters Appellants failed to preserve in the District Court. **See BIC at 3.**

Contrary 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. **BIC at 3.** Rather, the primary question was the County's immunity from suit pursuant

to NMSA 1978, Section 42-11-1, which, in turn, hinged upon a determination of whether this action named the County a defendant in a suit that involved a claim of title to or interest in real property. NMSA 1978, § 42-11-1 (1979) ("The state of New Mexico and its political subdivisions or any of their branches, agencies, departments boards, commissions, instrumentalities or institutions are granted immunity from and may not be named a defendant in any suit, action, case or legal proceeding involving a claim of title to or interest in real property except as specifically authorized by law."). The County argued, and the District Court agreed, that it was Section 42-11-1 that prevented Appellant's suit. **RP at 16-21, 40-44, 53**. The District Court made no determination whatsoever regarding the doctrines of implied dedication and prescriptive easement. **See RP at 53.** It is based on this apparent mistaken understanding of the basis for the District Court's dismissal, and apparent misunderstanding of the basis for the request for dismissal below, that Appellants request that "[a]s a preliminary matter, this Court must determine the role of the doctrine of prescriptive easement and implied dedication," that it contends that "[a]ppellee primarily argued that these doctrines prevented Appellants' suit," and that it asserts that "the District Court committed procedural error for failure to apply the proper standard governing consideration of a motion to dismiss." **BIC at 3-4.**

I. The District Court Properly Dismissed Appellant's Cause of Action on the Basis of Sovereign Immunity

The District Court granted the Board of County Commissioners of the County of Sierra's Motion to Dismiss on the basis of sovereign immunity pursuant to Section 42-11-1. **RP at 53.** The District Court was presented with the law recognizing the Board of County Commissioners of the County of Sierra as a political subdivision of the State for the purposes of Section 42-11-1. **RP at 17.** See, e.g., City of Sunland Park v. Santa Teresa Servs. Co., 2003-NMCA-106, ¶ 6, 134 N.M. 243, 75 P.3d 843 (stating that a Board of County Commissioners is "of course, a political subdivision of the State of New Mexico"). The District Court was further able to take judicial notice that this lawsuit was most clearly a suit, action, case or legal proceeding for the purposes of Section 42-11-1, and that the Board of County Commissioners of the County of Sierra had been named a Defendant in the suit. **RP at 17.** All, then, that remained for the Court to determine was whether the suit involved a claim of title to or interest in real property, and whether it had been specifically authorized by law. **See RP at 17-21.**

Appellee argued that this action 'involv[ed] a claim of title to or interest in real property,' seeking, by its very terms, a declaration with respect to the public's rights to traverse a road and, as such, argued that it was barred by Section 42-11-1. **See RP at 17.** Appellee identified

Appellants' contentions that "Sierra County has never complied with the procedures related to the establishment of a county road, pursuant to NMSA [1978], § 67-5-5 (1941), as to the above-described road on Appellants' property. Sierra County has never condemned said road or otherwise exercised their power of eminent domain as to said road. Sierra County has never purchased an easement for said road from Appellants or their predecessors-in-interest. Appellants and/or their predecessors-in-interest have never received compensation related to said land." **RP at 17-18, 28.**

Based on Appellants' averments alone, and its requested relief that the Court "declare the above-described road that runs through Appellants' property is not Sierra County Road B-043 or any other County Road," it was identified for the District Court that the action involved either the County's title to or the County's interest in the road. **RP at 17-18, 43.** The references to the doctrines of implied dedication and prescriptive easement in the context of the discussion of whether this action challenged the County's title to or interest in real property anticipated a response that never came, i.e., to foreclose the argument the acquisition of a prescriptive right would not constitute a property interest for the purposes of Section 42-11-1 and therefore not entitle the County to immunity. **RP at 18.** For this reason, Appellee argued in its Memorandum in Support of its Motion to dismiss that

"[p]rescriptive rights or rights acquired by implied dedication are property rights," and cited a case that provides that "easements constitute valuable property rights." See, e.g., Leigh v. Village of Los Lunas, 2005-NCMA-025, ¶ 8, 137 N.M. 119, 108 P.3d 525. **RP at 18.**

Finally, Appellee set forth the only exception to the legislative grant of immunity that it knew to be "specifically authorized by law," which was set forth in NMSA 1978, § 42-6-12 (1947) and discussed by the Supreme Court in Maes v. Old Lincoln County Memorial Comm'n, 64 N.M. 475, 478, 330 P.2d 556 (1958), which "was enacted for the limited purpose of aiding a mortgagee who discovers that the State has acquired an interest in [a] mortgaged property and is unable to pass a marketable title to the purchaser at a foreclosure sale unless the state can be joined in the foreclosure suit." **RP at 19.** Appellee argued that this action did not fit within the narrow exception embodied in NMSA 1978, Section 42-6-12 (1947), and therefore was not "specifically authorized by law" for the purposes of Section 42-11-1. **RP at 20.**

As noted in the Reply Brief before the District Court, and above, the Appellants neglected to even once reference the Board of County Commissioners' assertion of immunity in its Answer Brief before the

District Court, or to negate any element of the Section 42-11-1 immunity asserted by Appellee. **RP at 40-41; See RP at 32-39.**

A. The District Court Applied the Proper Standard Governing Consideration of the County's Motion to Dismiss

The County requested that the Court accept as true Appellants' averment that the County never complied with the condemnation procedures set forth in NMSA 1978, § 67-5-5 (1941), and identified the only additional legal mechanisms under New Mexico law by which the subject road may have become a County road for the limited purpose of determining whether this suit would involve a claim of title to or interest in real property as would entitle the County to immunity pursuant Section 42-11-1. **RP at 17-18, 48-49.** By doing so, the County attempted to demonstrate that, under any facts provable, even those beyond and additional to that which had been asserted by Appellants, i.e., whether the road has been established pursuant to a prescriptive easement or implied dedication, the County was entitled to dismissal because it was requested that the Court make a determination involving a claim of title to or interest in real property in an action in which the County had been named a defendant. **RP at 18-19.** Accordingly, the Court considered and applied the proper standard governing consideration of the County's Motion to Dismiss. See Durham v. Guest, 2007-NMCA-044, ¶

12 (accepting all well-pleaded facts as true on Motion to Dismiss incident to Rule 1-012(B)(6)).

B. That Appellants did not Plead any Facts that Would Support a Claim for Prescriptive Easement or Implied Dedication is Immaterial to this Court's Review of the District Court's Dismissal of Appellant's Complaint on the Basis of the County's Sovereign Immunity

Appellants have apparently mistaken the purpose of the County's references to implied dedication and prescriptive easement, and the roles the doctrines of prescriptive easement and implied dedication played in the District Court's dismissal of their complaint. Appellants complain that the "analysis improperly invited the District Court to assume that Sierra County employed proper 'mechanisms,'" by way of an established prescriptive easement or implied dedication, to designate Appellant's road County Road B-043," that the "Appellee sought to inject facts outside of the complaint in its effort to obtain dismissal," that the "District Court committed procedural error to the extent it accepted in any way Appellee's discussion of the concepts of prescriptive easements and implied dedication," and argues that if the County "wishes to raise the claim that Sierra County's action was proper based upon the existence of a prescriptive easement or implied dedication, this should be done by affirmative defense or counterclaim and proven at trial." **BIC at 6-9.**

The excerpt from the County's Memorandum in Support of its Motion to Dismiss, replicated in part on page 7 of Appellants' Brief in Chief does not "inject facts outside of the complaint." **BIC at 6.** No factual issues were presented by the County in its Memorandum in Support of its Motion to Dismiss. The County was not "improperly invit[ing] the District Court to assume that Sierra County employed proper 'mechanisms,' by way of an established prescriptive easement or implied dedication, to designate Appellants' road County Road B-043." **BIC at 7.** Rather, accepting for the purposes of the Motion to Dismiss as true the averment that the County did not follow the condemnation procedures set forth in Section 67-5-5, the County was demonstrating that that, or any of the remaining mechanisms available and not identified by Appellants for establishing a County road, result in the naming of the County as a Defendant in suit, action, case or legal proceeding involving a claim of title to or interest in real property as entitled the County to dismissal on the basis of its immunity pursuant to Section 42-11-1.

Furthermore, the references to implied dedication and prescriptive easement did not "inject facts outside of the Complaint" nor did the County request that the "Court [] assume the[] [County's] waiver defenses are true," as characterized by Appellant on appeal. **BIC 6, 8; see RP at 38.** 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.

Rather than negating any of the elements that provided the basis for the County's assertion of immunity to which the County devoted the majority of its Memorandum in Support of its Motion to Dismiss, Appellants rendered, and continues to render, arguments objecting on the basis that the County has requested that the District Court "assume [its] waiver defenses are true." **RP at 38.** Appellants never argued that the Board of County Commissioners was not a political subdivision of the State. **See RP at 32-39; Cf. RP at 17, 40.** Appellants never argued that this was not a suit, action or legal proceeding. **See RP at 32-39; Cf. RP at 16, 40-41.** Except for on appeal, Appellants never argued that this action did not involve a claim of title to or interest in real property. **See RP at 17-18, 41; BIC at 9.**

The District Court did not dismiss or otherwise decide the matter on the basis of an established prescriptive easement or implied dedication. **See RP at 53.** The District Court dismissed on the basis of sovereign immunity. **RP at 53.** Accepting all of Appellants' averments as true, the District Court determined that the County, as a political subdivision of the State, had been

named a Defendant in a suit, action or legal proceeding, involving a claim of title to or interest in real property as would entitle it to dismissal pursuant to Section 42-11-1. **RP at 16-17, 43, 53.**

That Appellants did not plead any facts that would support a claim for prescriptive easement or implied dedication is immaterial to this Court's review of the District Court's dismissal of Appellant's complaint on the basis of the County's sovereign immunity. The only facts necessary to support the Court's determination that the County was immune from this action pursuant to Section 42-11-1 was that the County was a political subdivision of the state, that the County had been named a Defendant in this action, that the proceeding involved a claim of title to or interest in real property, and that the action was not specifically authorized by law. Section 42-11-1. Accordingly, dismissal was appropriate incident to a Motion to Dismiss for Failure to State Claim. Gutierrez v. West Las Vegas School Dist., 2002-NMCA-068, ¶ 21, 132 N.M. 372, 48 P.3d 761 (affirming trial court's dismissal of action on basis of sovereign immunity under Rule 1-012(B)(6) for failure to state a claim on which relief may be granted); Hern v. Crist, 105 N.M. 645, 648, 735 P.2d 1151, 1154 (Ct. App. 1987) ("The defense of sovereign immunity may properly be raised incident to a motion

to dismiss for failure to state a claim upon which relief can be granted under Rule 1-012(B)(6).").

C. Neither Appellant nor Appellee Have Ever Argued Whether the Designation of a County Road for Maintenance Obligations Passes Title to the Road to the Public, and Such an Argument Would Potentially Negate Only One Portion of One Element of the County's Assertion of Immunity

Appellants argument that "[t]he [m]ere [d]esignation of the [r]oad as County Road B-043 [d]id [n]ot [p]ass [t]itle to the [r]oad" is raised for the first time on appeal, and the District Court was not afforded the opportunity to consider and address such an argument. **BIC at 10-14.** Liberty Mutual Ins. Co. v. Salgado, 2005-NMCA-144, ¶ 16, 138 N.M. 685, 125 P.3d 664 ("In reviewing a Rule 1-012(B)(6) dismissal for failure to state a claim, the normal rules of preservation apply."); Spectron Dev. Lab. v. Am. Hollow Boring Co., 1997-NMCA-025, ¶ 32, 123 N.M. 170, 936 P.2d 852 (noting that the rules "serve the important purposes of expediting litigation and promoting finality" and holding that normal preservation rules apply to dismissals for failure to state a claim). In fact, the District Court did not consider any argument in opposition to the County's assertion of immunity because Appellant did not present any but instead ignored completely the County's assertion of immunity in favor of objecting to ancillary references to prescriptive easements and implied dedication. **See RP at 37-38.**

Accordingly, Appellee respectfully requests that this Court reject this new argument on preservation grounds alone. See DeFillipo v. Neil, 2002-NMCA-085, ¶ 12, 132 N.M. 529, 51 P.3d 1183 (explaining that the primary purposes of the preservation rule are to alert the District Court to a potential error and to opportunity to avoid mistakes and to afford the opposing party a fair opportunity to meet the objection). The District Court never had an opportunity to review this novel argument and to potentially correct an error, Appellants had a fair opportunity to raise this issue in their Reply to the County's assertion of immunity, and Appellee would have had a full and fair opportunity to reply to the argument had it been raised and developed before the District Court.

On appeal, Appellants focus only on one portion of Section 42-11-1 immunity, i.e., the claim of title to the road, as opposed to the interest in real property. **See BIC at 10-14.** To the extent that this Court determines that Appellant preserved the issue of whether the designation of a road as a County road passes title to the road, and even assuming *arguendo* that Appellants are correct in their argument that the designation of the road as County Road B-043 did not pass title to the road, Appellants nonetheless fail to negate both that the action involves title to *or* an interest in real property as would save it from an assertion of immunity pursuant to Section 42-11-1.

Again, in reviewing the District Court's dismissal on the basis of the County's immunity, this Court only need examine whether the County had been named a defendant in any suit, action, legal proceeding, relating to title to or interest in the subject road. Section 42-11-1. The County need not have obtained title to the road, and "title to the road in some form" need not have "passed when it was designated," for this action to involve the County having been named a defendant in a suit, action or legal proceeding relating to a "claim of title to or interest in the subject road." Section 42-11-1. **RP at 16-21, 40-44; BIC at 10-14.**

Indeed, Appellants Arguments before this Court regarding whether title transferred by virtue of the County's designation of the road further demonstrate that Appellants' action involves the existence, nature, and extent of the County's title to or interest in the subject road. Appellants' new contention that the designation of a road as a County road does not pass title to the road does little in advance of Appellant's argument against the County's assertion of immunity, which hinges not only on whether there is a claim of title to the road, but also upon whether the County has been named a defendant in an action involving an interest in the road. Consequently, even if this Court were to conclude that the designation of a road as a County road does not pass title to the road, the County was nonetheless

entitled to immunity on the basis that it has been named a Defendant in an action relating to a claim of title to or interest in real property. Section 42-11-1.

II. Even were this Court to Determine that Dismissal Pursuant to NMSA 1978, Section 42-11-1 (1979) was Inappropriate, the County was Nonetheless Entitled to Dismissal for Appellants' Failure to State a Claim Upon Which Relief Could be Granted

The Legislature has made plain that "[a]ll 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." NMSA 1978, Section 67-2-1 (1905) (emphasis added). Appellants' recognize that the County considers the road on their property a County road, and further recognize that the County has graded and maintained the subject road. **See RP at 28.** By virtue of Appellants' own averments, they acknowledge that the subject road is recognized by the County as a County Road and has been maintained by the County. **RP at 28.** As such, the road is a public highway by virtue of the application of Section 67-2-1, and Appellants' thereby fail to state a claim upon which relief can be granted pursuant to Rule 1-012(B)(6) NMRA 2008. See Bd. of Comm'rs of San Miguel County v. Friendly Haven Ranch Co., 32 N.M. 342, 342, 257 P. 998,

998 (1927) ("It appears from this statute that we have three methods of establishing highways: They must be established in pursuance of some law of the state; or they must be dedicated to public use; or they must be recognized and maintained by the public authorities."); Hall v. Lea County Elec. Co-op., 78 N.M. 792, 795, 438 P.2d 632, 635 (1968) ("There is nothing in our statutes to suggest that one method of establishing a public highway, as contrasted with any other method, creates a greater or lesser estate in the public in and to the lands embraced within the highway, or creates any differences in the uses to which these lands may properly be put."); Barber's Super Market, Inc., 74 N.M. at 58, 390 P.2d at 439 (explaining that the Court will sustain a ruling on any proper theory where the record is silent as to the basis for the ruling); Meiboom, 2000-NMSC-004, ¶ 20 (providing that the Court will affirm the decision of the District Court if it is right for any reason.).

Appellants' acknowledgement of the County's designation of the road as County Road B-043 and its recognition that the County has maintained the road is further demonstrative of the nature of the interest the County has with respect to the road for the purposes of Section 42-11-1 as would entitle it to dismissal. Hall, 78 N.M. at 795, 438 P.2d at 635 ("Although the interest which the state or its political subsidivisions [sic] acquire in streets

and highways is often described in different terms, what is ordinarily acquired is an easement, by which the state or its political subdivisions are authorized by law to use the lands, lying within the boundaries of the streets and highways, for all lawful purposes consistent with every reasonable method of travel, transportation and communication for which public streets and highways are normally used."). The County here has been named a Defendant in an action relating to an interest or claim of title to real property, and it is on this basis that the County sought dismissal pursuant to Section 42-11-1.

III. Bringing an Action pursuant NMSA 1978, Section 44-6-4 (1975) Does not Serve to Abrogate the County's Immunity Pursuant to NMSA 1978, Section 42-11-1 (1979)

NMSA 1978, Section 44-6-4 (1975) provides that "[a]ny 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." It is well established that the Declaratory Judgment Act creates no substantive rights and waives sovereign immunity only to the extent that other statutes allow a claim to be brought in other

procedural contexts. See, e.g., Gill v. Pub. Employees Ret. Bd. of the Pub. Employees Ret. Ass'n Of New Mexico, 2004-NMSC-016, ¶ 11, 135 N.M. 472, 90 P.3d 491 (rejecting notion that the Declaratory Judgment Act in and of itself contains a general waiver of immunity for any declaratory judgment action against a sovereign and explaining that "[t]he Declaratory Judgment Act does not have the effect of general consent to be sued; it merely permits parties to sue the state when the states consent to be sued otherwise exists"); In re Bogart's Will, 64 N.M. 438, 442, 329 P.2d 1023, 1026 (1958) (recognizing that the Declaratory Judgment Act only permits suits against the State only where the State's consent to suit otherwise exists and where that waiver is "clear, unambiguous, and not left to inference"). Neither here nor in the District Court have Appellants' identified a "clear, unambiguous" waiver evincing the County's consent to suit as would permit their claim. **RP at 32-39; BIC at 14-21.**

If anything, the Legislature has made clear its intent that the County not be required to defend against *any* action involving an interest to or title to real property. Section 42-11-1 does not specifically except declaratory judgments actions from "any suit, action, case or legal proceeding." Rather, the Legislature's use of such broad and sweeping language as "any suit, action, case or legal proceeding" in Section 42-11-1 evinces its intent to

preclude any action, including a declaratory judgment action, against the sovereign.

Additionally, Appellants here seek a declaration that "the road that runs through Appellants' property is not Sierra County Road B-043 or any other County road." **RP at 29.** Appellants' Complaint does not arise under a deed, will, written contract or other writing constituting a contract, nor does it state a claim for an individual's whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise. In fact, Appellants state that "Sierra County has never purchased an easement for said road from Appellants or their predecessors-in-interest." **BIC at 2; RP at 28.** Appellants identify no county ordinance, contract or franchise under which this claim arises, nor do they identify any will, written contract or other writing constituting a contract under which it seeks to have determined questions of construction or validity. See, e.g., Smith v. City of Santa Fe, a Municipal Corp., 2007-NMSC-055, ¶ 14, 142 N.M. 786, 171 P.3d 300 (explaining that the Declaratory Judgment Act is specifically designed to bring an action challenging the constitutionality or validity of local laws or ordinances). **See BIC at 14-20.** While Appellants identify the deed by virtue of which Appellants came into ownership of this property, Appellants seek neither a determination of the construction of this deed nor a

determination of the validity of this deed, as might be permitted by the Declaratory Judgment Act. **BIC at 14-20.** See NMSA 1978, Section 44-6-4 (1975). Additionally, the County was not a party to the issuance of this deed, and therefore has no interest in litigating either the construction or the validity of the deed. That matter would be between the Appellants and their predecessors in interest.

Furthermore, whether Appellants rights may be affected by a statute is but one part of what precipitates a review pursuant to the Declaratory Judgment Act. **See BIC at 17**. The second part of the Act details what that person might have determined by the Court, provided, of course, that some other statute allows a claim to be brought in another procedural context. NMSA 1978, § 44-6-4 (1975) (providing that such a person who has rights affected by a statute "may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise"); see In re Bogart's Will, 64 N.M. at 442, 329 P.2d at 1026 (recognizing that the Declaratory Judgment Act only permits suits against the State only where the State's consent to suit otherwise exists).

The County recognizes that "[t]he interpretation of ordinances and statutes are proper matters for declaratory relief." See Smith v. City of Santa Fe, a Municipal Corp., 2007-NMSC-055, ¶ 14, 142 N.M. 786, 171 P.3d 300.

This action, however, does not involve a challenge to the constitutionality or validity of Section 67-5-5, nor does it involve the construction or interpretation of Section 67-5-5. While Appellants claim that Section 67-5-5 has certain procedural requirements by which they could have received notice and may have participated in the process of the declaration of the road on their property as a county road, they do not seek an interpretation of the statute, or question the constitutionality or validity of the statute, but instead seek a determination of the existence, nature, and extent of the County's title to or interest in the subject road, hence their requesting for relief a declaration that "the road that runs through Plaintiffs' property is not Sierra County Road B-043 or any other County road." **BIC at 17; RP at 29.** Not only is such a determination inappropriate pursuant to the Declaratory Judgment Act, but it is further foreclosed by virtue of the legislative grant of immunity.

As rejected by the District Court, Appellant again relies on Smith, 2007-NMSC-055, to demonstrate that the Declaratory Judgment Act can be utilized to challenge administrative actions, without any explanation of the basis and limitations of the randomly extracted maxim. **BIC at 15-16.** Smith involved a direct challenge to the City of Santa Fe's authority to enact an ordinance regulating the permitting of domestic water wells on the basis

that NMSA 1978, Section 72-12-1 (2003) granted only the State Engineer the authority to grant or deny permits for the uses of underground water. Smith, 2007-NMSC-055, ¶ 17. The Court made clear that the Smith Plaintiffs did not argue that the City made the wrong decision with respect to the denial of their water well applications, but rather sought a determination as to "whether the City's attempt to regulate the permitting of domestic wells within the City's municipal limits was appropriate in light of existing state statutes concerning the regulation of wells." Id. ¶ 18. The Court determined that such a determination is expressly permitted pursuant to the Declaratory Judgment Act, given that the "the Act grants jurisdiction to the district court to entertain an action for a declaratory judgment to review municipal ordinances." Id. ¶ 14; NMSA 1978, § 44-6-4 (1975) ("[a]ny person . . . whose rights, status or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance. . . and obtain a declaration of rights, status or other legal relations thereunder.").

Appellants here do not seek a determination as to whether the County has a right to designate roads pursuant to Section 67-5-5, or even whether Section 67-5-5 provides an exclusive mechanism by which a road can become a County Road. It does not challenge the validity or construction of

any statute, ordinance, or resolution, as was at issue in Smith. Rather, Appellants challenged the County's designation of a particular road as a County road, and seek to have determined whether the County has an interest in or title to the road. **RP at 28-30.** These are not actions expressly permitted by the Declaratory Judgment Act. Cf. Smith, 2007-NMSC-055, ¶ 18 (recognizing the District Court's jurisdiction to review challenge to municipal ordinance where "the [Declaratory Judgment] Act grants jurisdiction to the District Court to entertain an action for a declaratory judgment to review municipal ordinances").

As an additional matter, it is not clear whether sovereign immunity was or could have been asserted in the Smith case, as it has been here. A challenge to the constitutionality or validity of a local law or ordinance, as provided the basis for the Smith decision, is expressly permitted by the Declaratory Judgment Act, and is quite distinct from Appellants attempt to use the declaratory judgment act as a generalized consent to be sued for the purposes of abrogating a specific grant of sovereign immunity.

Appellants next cite a Texas case, Cobb v. Harringston, 190 S.W.2d 709 (1945), again factually inapposite, in apparent support of its proposition that the Court should reject the Appellees's assertion of sovereign immunity. **See BIC at 16.** Appellants' reliance on this Texas case is of questionable

value to the Court's consideration of this matter. While noting that "[i]n rejecting the sovereign immunity defense, the Texas Supreme Court explained that declaratory judgment did not impose liability upon the State or compel the performance of its contracts nor was it an action for the recovery of money from the State that would be paid out of the State Treasury," Appellant fails to detail whether Texas's Declaratory Judgment Act is similar to the New Mexico Declaratory Judgment Act as would warrant a similar construction of our Act, whether Texas jurisprudence establishes that its Declaratory Judgment Act creates no substantive rights and waives sovereign immunity only to the extent that other statutes allow a claim to be brought in other procedural contexts as recognized by our jurisprudence in Gill and In re Bogart's Will, whether New Mexico has or should waive immunity in all instances except where the action would "impose liability upon the State or compel the performance of its contracts" or where "recovery of money from the State that would be paid out of the State Treasury" is sought, as has apparently been done in Texas pursuant to this case, and, most importantly, why this Court should disregard a clear immunity statute and apply a random principle extracted from a legally and factually inapposite Texas case in that is in contravention of New Mexico law. See Clark v. Lovelace Health Systems, Inc., 2004-NMCA-119, ¶¶ 16-

19, 136 N.M. 411, 99 P.3d 232 (rejecting request that Court rely on out-of-state cases, in the face of the plain language of the New Mexico statute, even where it resulted in the anomaly of defendants being better off in some cases causing the death of someone rather than leaving them alive).

Appellee's respectfully contend that New Mexico has not waived, nor should it waive, immunity in all instances except where an action would "impose liability upon the State or compel the performance of its contracts" or where "recovery of money from the State that would be paid out of the State Treasury" is sought. See, e.g., NMSA 1978, § 42-11-1 (1979). Appellants fail to identify whether Texas has the same legislative grant of immunity that we have in New Mexico, as is embodied in Section 42-11-1, or whether such grant has been interpreted in the same manner as has New Mexico's grant of immunity in the event Texas even has a similar grant of immunity. Indeed, the Texas case cited by Appellants does not even relate to an interest in land, but rather was an action relating to whether a Texas Company was subject to taxation as a motor carrier. See Cobb, 190 S.W.2d at 710.

Even the Wisconsin case cited by Appellants does little in advance of its argument that this action is permissible pursuant to the New Mexico Declaratory Judgment Act. See Berlowitz v. Roach, 30 N.W.2d 256, 258

(1947). **BIC at 16-17.** The excerpted portion of the Wisconsin case permits an action against the sovereign "where the action taken or threatened by an officer, is alleged to be in violation of the complainant's rights, either because of a misconstruction or misapplication by the officer of a statute, or on account of the alleged unconstitutionality of the statute, the action is not in fact one against the state [for the purposes of sovereign immunity] but is rather against the individual because of his lack of power and authority to do the thing complained of." Berlowitz, 30 N.W.2d at 258. **BIC at 17.**

Assuming *arguendo* that this case involves an action taken by the County and, assuming *arguendo*, that the alleged action constitutes a violation of the Complainant's rights, this action is nonetheless not based on either a misconstruction or misapplication by the officer of a statute, and does not allege the unconstitutionality of the statute as would be permitted to abrogate sovereign immunity even in Wisconsin. Again, Appellants fail to identify whether the Wisconsin Declaratory Judgment Act is similar to the New Mexico Declaratory Judgment Act as would warrant a similar construction of our Act, whether Wisconsin jurisprudence establishes that its Declaratory Judgment Act creates no substantive rights and waives sovereign immunity only to the extent that other statutes allow a claim to be brought in other procedural contexts as recognized by our jurisprudence in Gill and In re

Bogart's Will, whether New Mexico has or should waive immunity in all instances except "where the action taken or threatened by an officer, is alleged to be in violation of the complainant's rights, either because of a misconstruction or misapplication by the officer of a statute, or on account of the alleged unconstitutionality of the statute," as has apparently been done in Wisconsin pursuant to this case, and most importantly, why this Court should disregard a clear immunity statute and apply a random principle extracted from a legally and factually inapposite Wisconsin case in contravention of New Mexico law.

Appellees agree that, as between private individuals, a party seeking to establish adverse rights by prescription bears the burden of proof. **BIC at 19-20.** See Ward v. Rodriguez, 43 N.M. 191, 191, 88 P.2d 277, 281 (1939); Vigil v. Baltzley, 79 N.M. 659, 660, 448 P.2d 171, 172 (1968). Appellants, however, cite no authority demonstrating that, as between a private party and a political subdivision of the State, where the political subdivision of the State has been named a defendant in an action relating to a title to or interest in land, and where sovereign immunity has been asserted pursuant to Section 42-11-1, that the political subdivision of the State bears the burden of establishing adverse rights by prescription. All three cases cited by Plaintiffs

are between private individuals, and do not involve the State or political subdivisions of the State. **See RP at 19-20.**

Our Courts have recognized that "we have three methods of establishing highways: They must be established in pursuance of some law of the state; or they must be dedicated to public use; or they must be recognized and maintained by the public authorities." See Bd. of Comm'rs of San Miguel County v. Friendly Haven Ranch Co., 32 N.M. 342, 257 P. 998 (1927) (interpreting NMSA 1978, Section 67-2-1 (1905)); NMSA 1978, § 67-2-1 ("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."). Absent a bar from suit such as a Section 42-11-1, it should follow that, as Plaintiffs, a party seeking a declaration that a public highway was not established must negate the three methods the Legislature provided, and the Court has recognized, that a road may have become a public highway, i.e., that the road was not established in pursuance of some law of the state, that it was not dedicated to public use, and that it was not recognized and maintained by the public authority. **RP at 49-50.** Here, based on Appellants own pleadings, Appellants have

recognized that this road was both recognized and maintained by the County. **RP at 28.** Consequently, dismissal was appropriate.

IV. The District Court Appropriately Dismissed Appellants' Claim for Inverse Condemnation

Appellant argues that the District Court "accept[ed] Appellee's unpled, unproven allegation that a prescriptive easement existed or an implied dedication had occurred," and contends that "Appellee's primary argument for dismissal was its request that the District Court accept its unpled, unproven position that it acquired the road by prescriptive easement or implied dedication." **BIC at 21, 24.** Despite the clarification provided in Appellee's Reply Brief before the District Court, it appears that Appellant continues to misunderstand the basis for Appellee's Motion to Dismiss in relation to its claim for damages for Inverse Condemnation.

Appellee 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 RP at 23-24, 50-52.** Consequently, Appellee contends that even were Plaintiffs able to prove that "Defendant has tak[en] and/or damaged Plaintiffs' property without making

just compensation or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation," as alleged in paragraph 27 of their Amended Complaint, Plaintiffs nonetheless would not be entitled to relief because, accepting all facts asserted in their Complaint for Inverse Condemnation as true, the limited extent of such a taking would not constitute a compensable taking pursuant to the Fifth Amendment of the United States Constitution and Article 2, Section 20 of the New Mexico Constitution, to the extent that any taking had occurred. Algermissin v. Sutin, 2003-NMSC-001, ¶ 26, 133 N.M. 50, 61 P.3d 176 ("The general rule is that acquisition of an easement by prescription is not a taking and does not require compensation to the landowner."); Luevano v. Maestas, 117 N.M. 580, 587-88, 874 P.2d 788, 795-96 (Ct. App. 1994) (recognizing that Plaintiffs could not make a prima facie showing of a taking under either the federal or state constitution where Plaintiffs complained of an acquisition of a road by implied dedication). **RP at 23-24, 50-51.**

In its Reply Brief, Appellee conceded that it did not follow the referenced statutory procedure complained about by Appellant. **RP at 50.** In its Memorandum in Support of its Motion to Dismiss, its Reply and here,

Appellee asserts that by virtue of the allegations of Plaintiff's Complaint,[1] the only manner by which Defendant may have acquired any interest in the subject road, if indeed the Appellee acquired any interest in the subject road whatsoever, is by prescription or by implied dedication. **RP at 23-24, 50.** Of course, if the Appellee acquired no interest in the subject road, Appellant clearly would not be entitled to damages for inverse condemnation.

On appeal, and upon the apparent continued misconception that the "Appellee's primary argument for dismissal was its request that the District Court accept its unpled, unproven position that it acquired the road by prescriptive easement or implied dedication," Appellee delves into the merits of whether the road was established pursuant to a prescriptive easement or pursuant to implied dedication. **BIC at 21-24.** Defendant did not in either its Memorandum in Support of its Motion to Dismiss or its Reply brief address the merits of an implied dedication or prescriptive easement claim. **RP at 23-24, 50-51.** Except upon Order of this Court, it will not do so now either. A discussion of the merits of a prescriptive easement or implied dedication claim is not necessary for a determination of whether Appellants would be entitled to damages for inverse condemnation

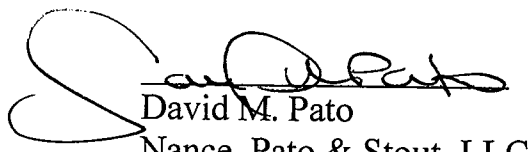
[1] Plaintiffs allege that "Sierra County has never complied with the procedures related to the establishment of a county road, pursuant to NMSA 1978, Section 67-5-5 (1941), as to the above-described road on Plaintiff's property. Sierra County has never condemned said road or otherwise exercised their power of eminent domain as to said road. Sierra County has never purchased an easement for said road from Plaintiffs or their predecessors-in-interest. Plaintiffs and/or their predecessors-in-interest have never received compensation related to said road." Amended Complaint, ¶ 14.

where Appellee concedes it did not follow the statutory process set forth in Section 67-5-5 for designating the road a County road, and the road may only otherwise have been established, if at all, in the manner set forth in Section 67-2-1. The District Court appropriately dismissed Appellants' claim for inverse condemnation for failing to plead facts that would give rise to a compensable taking, given Appellee's concession that it did not follow the referenced statutory process with respect to the subject road and given that any interest the County acquired with respect to the subject road would not be compensable pursuant to Luevano and Algermissin.

PRAYER FOR RELIEF

WHEREFORE, Appellees respectfully request that this Court affirm the Distirct Court's dismissal of Appellants' Complaint, and for such other and further relief as the Court may deem just and equitable.

Respectfully Submitted,



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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 pleading to the following opposing counsel of record on this 26th day of March, 2009.

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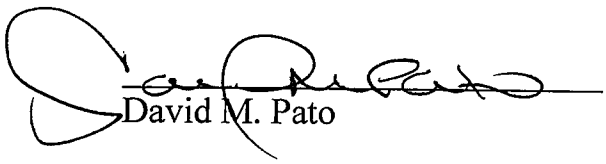

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