IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

HIGH MESA GENERAL PARTNERSHIP,
a New Mexico general partnership,
JON McCALLISTER, DAVID W. HARPER,
and PLACITAS, INC., a New Mexico corporation,

Plaintiffs-Appellants,

v. **Ct. App. No. 28,802**

WILLIAM J. PATTERSON III, JAMES LAWRENCE SANCHEZ, and JAMES LAWRENCE SANCHEZ, TRIAL LAWYER, P.C., a New Mexico professional Coporation,

Defendants-Appellees.

An Appeal from the Thirteenth Judicial District Court, Sandoval County
Cause Number D-1329-CV-2008-231
Hon. Louis E. DePauli, Jr. (Eleventh Judicial District Court, McKinley County)
Sitting by designation

ANSWER BRIEF OF APPELLEE WILLIAM J. PATTERSON

Submitted by:
E.W. Shepherd
Jake A. Garrison
Post Office Box 94750
Albuquerque, NM 87199-4750
Telephone: (505) 341-0110
Attorneys for Appellee
William J. Patterson

TABLE OF CONTENTS

Table of Authorities

New Mexico Cases:

New Mexico Statutes and Court Rules:

II. SUMMARY OF PROCEEDINGS

Appellants filed a Complaint for Damages for Malicious Abuse of Process and Slander of Title ("Complaint") on February 6, 2008 (R.P. at. 1-8). The Complaint arose out of Appellee William J. Patterson's ("Patterson") appeal of the Sandoval County Commission's approval of Appellants' Preliminary Plat for a proposed subdivision in Sandoval County ("Appeal"). During Patterson's Appeal, a notice of lis pendens was filed to place the public on notice of the pending appeal. (R.P. at 59). The overall basis of Appellants' Complaint was that Patterson's filing of a lis pendens was not appropriate nor allowed under Rule 1-074 NMRA, which controls appeals to the District Court from administrative bodies such as the Sandoval County Commission ("Commission"), in the State of New Mexico.

The Commission initially approved Appellants' application for a preliminary plat approval for their Wild Horse Mesa Subdivision on November 6, 2006. Appellee Patterson appealed the Commissions' decision. On November 20, 2007, the District Court granted Appellee Patterson's appeal, and reversed the Commissions' preliminary plat approval, thereby making Appellants' preliminary plat void. Prior to the District Court's decision, Appellants never requested that the lis pendens filed by Appellee Patterson be removed or voided pursuant to NMSA Section 38-1-15.

On June 5, 2008, after reviewing the pleadings, motions, responses, and exhibits the District Court ruled in favor of Appellees' Motion for Judgment on the Pleadings and to Dismiss for Failure to State Claim or in the Alternative For Summary Judgment and found that the appeal taken by Appellees affected the title to Appellants' real estate, and therefore the notice of lis pendens did not record or publish matter which was untrue

about Appellants' real estate. (See RP at pgs 11-12) The District Court also found that the Appellees did not act improperly by filing the notice of lis pendens and were reasonably justified under the circumstances. (Id)

III. ARGUMENT

A. Standard of Review:

An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo. Tafoya v. Rael, 2008 NMSC 57, 193 P.3d 551, 553-554.

B. Appellees' filing of a notice of lis pendens was proper, as it was absolutely privileged.

In addition to the arguments offered herein, Appellee Patterson hereby incorporates the arguments offered by Appellees James Lawrence Sanchez and James Lawrence Sanchez, Trial Lawyer, P.C. in their Answer Brief previously filed with this Court.

Controlling New Mexico case law states that a notice of lis pendens may be properly filed in a cause of action which involves or **affects the title to**, or any interest in or a lien upon specifically described real property (emphasis added). Superior Construction, In. v. Linnerooth, 103 N.M. 716, 712, P.2d 1378 (1986), quoting Rehnberg v. Minessota Homes Inc., 236 Minn, 230, 233-234, 52 N.W.2d 454, 456 (1952). The court in *Linnerooth* further stated that the filing of a lis pendens is absolutely privileged. Moreover, the Court in *Linnerooth* stated;

> "As previously noted, Section 38-1-14 authorizes the filing of a notice of lis pendens. Further, under our statute the notice of lis pendens serves merely for

> constructive notice to subsequent purchasers and encumbrances. It is therefore merely a republication of the pleadings filed in the pending judicial proceeding and it should enjoy the same absolute privilege accorded those proceedings."

Appellants argue that an action that affects title to real estate must relate solely to the issue of a claim of ownership. However, the language of the controlling statutes does not contain any such limitation. Therefore, when a statute's meaning is clear from its plain language, the Court must apply the statute as written by the Legislature. See State ex rel. Helman v. Gallegos, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994). Additionally, the Court should not read into any statute, language that is not within the manifest intention of the Legislature as gathered from the statute itself. See Burch v. Foy, 62 N.M. 219, 224, 308 P.2d 199, 202 (1957). Furthermore, if the legislature decides not to include language to include or exclude certain applications of the statute, then the legislature did not intend for the statute to be limited in that manner. Appellants are effectively requesting that this Court read language, i.e. limitations, into the controlling statutes and rules that do not exist. The applicable statutes and rules of civil procedure should be interpreted by the language that they contain, i.e. the plain meaning wording of the statute.

Moreover, Appellants' argument that Patterson's Appeal did not affect the title to their property has absolutely no basis in New Mexico law. As Appellees successfully argued below, many land use actions may "affect" title to real property, including Appellants' application for a subdivision plat. The entire purpose of subdividing land, which transforms a single legal parcel of land into numerous, individual, legally described parcels, is to the effect every aspect of the title to said land. See NMSA 47-6-8 1978.

Furthermore, the subdivision process affects how and if, Appellants were able to sell their land and dictates the placement of utility easements, infrastructure easements, land boundaries, and use restrictions (See 47-6-5, 47-6-11, 47-6-19 NMSA 1978). Therefore, if the subdivision of land affects title, then a judicial proceeding, which successfully invalidates said subdivision, must also affect title as it invalidates all requested changes in title and the land reverts to the title status it held before the subdivision was approved.

Appellants have argued, but failed to provide any New Mexico case law to support their contention that to be eligible to file a notice of lis pendens, the party recording the lis pendens must assert a present claim to the property's title or have some other present interest in the subject property. In support of this argument, Appellants cite to Richard R, Powell, Powell on Real Property (See Appellants' Brief in Chief at pg 9). However, the language directly cited by Appellants does not stand for this proposition. Rather, the language cited by Appellants merely states that public policy dictates that the property interests existing at the time the court action is initiated be preserved until the court's judgment. This cite does not state which property interests, if any, the person filing a lis pendens must have. This language does **not** state that the party filing a notice of lis pendens have any ownership interest in the in the subject property.

The only prerequisite for filing a notice of lis pendens is that the matter in which the lis pendens is filed affects the title to real estate. There is no prerequisite that the party filing the lis pendens must have an interest or claim of ownership in said real estate.

C. **Appellants filing of a lis pendens did not stay the agency decision, nor did it circumvent the terms of Rule 1-074 NMRA.**

Appellants have misconstrued the language of Rule 1-074 NMRA. Appellants claim that Appellees sought to circumvent the requirements and failed to comply with Rule 1-074. See Appelants Brief in Chief at ¶ 14-16. According to Rule 1-074, Section S:

> "A party appealing a decision or order of an agency **may** petition the district court for a stay of enforcement of the order or decision of the agency. Upon notice and hearing, the district Court **may** grant a stay of enforcement of the order or decision of the agency... As a condition of granting a stay, the court, **may** require the posting of a surety or other bond sufficient to assure the payment of any amount that may be owed to a party upon final determination of the appeal."

The above language shows that requesting a stay of an agency decision is completely discretionary and Appellee Patterson was in no way obligated to do so. Appellants' claim must therefore fail, as there was no duty to request a stay, and no case law or statutory language that shows his actions were other than what would be proper. Appellants' argument fails to consider that the terms of requesting a judicial stay under Rule 1-074 and the lis pendens statues are completely separate procedures that produce completely separate outcomes.

If Appellees had in fact requested and received a judicial stay of the Commission's decision during the appeal, the subdivision's approval would have been completely halted before the Court's final ruling and Appellants would have been precluded from making any sales whatsoever. Appellees' choice to file a notice of lis pendens was less restrictive than a stay would have been, as lis pendens does not by itself preclude the sale of land.

D. Appellants did not suffer any damages as a result of the lis pendens:

The tort of malicious abuse of process is defined by the following elements: "(1) the initiation of judicial proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages." *DeVaney*, 1998-NMSC-001, ¶17.

Appellants failed to provide any affidavits/evidence that would have been sufficient to overcome Appellees' Motion for Summary Judgment below. Besides their bare contentions that the lis pendens was the reason they lost sales of lots in their subdivision, the Court appropriately ruled in Appellees favor. (See R.P. at pgs 89-90) (Where the movant has made a prima facie showing, the opponent cannot rely on the allegations contained in its complaint or upon the argument or contention of counsel to defeat it. Oschwald v. Christie, 95 N.M. 251, 253, 620 P.2d 1276 (1980) Rather, the opponent must come forward and establish with admissible evidence that a genuine issue of fact exists. Tinley v. Davis, 94 N.M. 296, 297, 609 P.2d 1252. Appellants provided no such evidence to the Court below to prove they had suffered any damages as a result of any action taken by Appellees.

Additionally Appellants argue that the District Court prematurely decided a case on an insufficient record. However, Appellants did not make this argument below, and did not specifically request additional time from the Court to conduct discovery into Appellants claims that Appellees filed a lis pendens to accomplish an illegitimate end. Without such a request, the Court was correct in its decision to rule in favor of Appellees'

Motion after reviewing the facts it had in front of it, and determining that the Appellants could not, at the very least, meet all the points of the *DeVaney* test listed above.

IV. CONCLUSION

The Order of the District Court should be affirmed.

Respectfully submitted,

HATCH, ALLEN, & SHEPHERD, P.A.

By: _____

E. W. Shepherd
Jake A. Garrison.
Post Office Box 94750
Albuquerque, NM 87199-4750
Telephone: (505) 341-0110
Attorneys for Appellee
William J. Patterson

I hereby certify that a copy of the foregoing *Answer Brief of Appellee William J. Patterson III* was mailed to the following persons on February 19, 2009.

David A. Grammer, III
Aldridge, Grammer, Jeffrey & Hammar, P.A.
1212 Pennsylvania Street, NE
Albuquerque, New Mexico 87110
Attorneys for Plaintiffs-Appellants

Pedro G. Rael, Esq.
P.O. Box 460
Los Lunas, New Mexico 87031-0460
Attorney for Appellee James Lawrence Sanchez

_____
Jake A. Garrison