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Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass

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GABALDON v. SANCHEZ: NEW DEVELOPMENTS IN THE LAW OF NUISANCE, NEGLIGENCE AND TRESPASS

In *Gabaldon v. Sanchez*,[1] the Court of Appeals held that a subdivider who failed to undertake statutorily required terrain management was not liable for nuisance, negligence, or trespass if windblown topsoil from his leveled subdivision accumulated on an adjacent landowner's property in such amounts that it clogged irrigation ditches, damaged crops and made it necessary to re-level the land. The court summarily concluded that the defendant subdivider had a legal right to clear his land, had not been negligent in clearing it, and thus was not liable for damages caused by windblown sand and dirt. This note will summarize the court's discussion in *Gabaldon,* outline the analyses required by nuisance, negligence and trespass law, and discuss the court's failure to apply those analyses.

FACTS OF THE CASE

According to the transcript of record on appeal,[2] the plaintiffs, the Gabaldons, owned 32 acres of land in Los Chavez in Valencia County.[3] They leveled the land in 1970 at a cost of about $3,000[4] and then leased it. The lessors planted the land in alfalfa, from which they could take three to four cuttings a year.[5] In 1974 the defendant, Sanchez, bought approximately 85 acres of land adjoining the Gabaldon property for subdivision.[6] He leveled it in June of 1975 after his subdivision had been approved by the Valencia Board of County Commissioners.[7]

The facts which led the Gabaldons to file suit because of Sanchez's subdivision activities were summarized by the court of appeals from the trial court's findings.[8] The court noted that after stripping the

1. Gabaldon v. Sanchez, 92 N.M. 224, 585 P.2d 1105 (Ct. App. 1978). Judge Hernandez dissented from the decision by Judges Sutin and Lopez. He would have sustained the trial court's finding of nuisance on the grounds that defendant's conduct substantially interfered with plaintiff's use and enjoyment of land. 92 N.M. 229, 585 P.2d 1110.
2. On file at the University of New Mexico Law Library.
3. Facts concerning the Gabaldons' land are taken from the Transcript of Proceedings at pp. 197-199 of the Record.
4. *Id.* at 215.
5. *Id.* at 199.
6. *Id.* at 230.
7. *Id.* at 182.
8. 92 N.M. at 225, 585 P.2d at 1106.

natural vegetation from his land, Sanchez failed to undertake the terrain management program he was required to and had agreed to undertake. The Gabaldons' land was damaged by windblown topsoil because of Sanchez's failure to undertake the required terrain management. Supplementing this bare factual summary with information about the New Mexico Subdivision Act[9] and some of the evidence considered by the trial court provides greater detail for evaluating the court's decision.

The Subdivision Act requires subdividers to have their proposed subdivisions approved by the board of county commissioners before leasing or selling the land.[10] Each county was required to adopt subdivision regulations covering specific areas of concern, including terrain management, and any other areas the county chose to regulate in order to ensure proper planning.[11] The Subdivision Act specifies the minimum information subdividers must disclose to prospective purchasers in a disclosure statement that must be reviewed and approved by the board of county commissioners.[12] Subdividers must provide the services, including terrain management, described in their disclosure statements.[13] Before a board approves a subdivision, it must determine whether a subdivider can fulfill his disclosure statement proposals and whether those proposals meet the county's subdivision regulations. In determining this, the board must request opinions from various state and local agencies, including the local soil and water conservation district.[14]

Sanchez submitted a disclosure statement for his proposed subdivision to the Valencia Board of County Commissioners [hereinafter the Board]. The East Valencia Natural Resource Conservation District [hereinafter NRCD] would not approve Sanchez's first proposal for terrain management.[15] Sanchez then proposed a re-vegetation program which included installation of a sprinkling system.[16] The NRCD found his new proposal met its specific concern with protection of the land from extreme spring winds, but informed the Board that it couldn't recommend approval of Sanchez's plat until "some method of soil stabilization is complete."[17] In his disclosure state-

9. N.M. Stat. Ann. §§47-5-9, 47-6-1 to 47-6-28 (1978). The court's references to the Subdivision Act are to N.M. Stat. Ann. §§70-5-1 to 70-5-29 (Supp. 1975). This note will refer to the Subdivision Act as codified in the 1978 Compilation.

10. N.M. Stat. Ann. §47-6-8 (1978).

11. N.M. Stat. Ann. §47-6-9 (1978).

12. N.M. Stat. Ann. §47-6-17 (1978).

13. N.M. Stat. Ann. §47-6-11 (1978).

14. N.M. Stat. Ann. §47-6-11(E) (1978).

15. Transcript of Proceedings at p. 133 of Record.

16. *Id.* at 134.

17. Record at 23. Letter from Davila, Chairman of the East Valencia Natural Resource Conservation District, dated Dec. 13, 1974.

ment, Sanchez said the NRCD members "agree that the terrain-management plan proposed for La Ladera Estates is adequate."[18] He did not indicate that the NRCD would not recommend approval because he had not carried out his terrain management proposal. The Board approved the subdivision despite the NRCD's adverse opinion.[19]

Sanchez never implemented the terrain management plan described in his disclosure statement. Wind stripped the bare topsoil from his subdivision and deposited it on the Gabaldon property. Sanchez cleared the Gabaldons' irrigation ditch of sand in 1975,[20] cleared half the ditch of sand in 1976, but then refused to remove any more sand.[21] An official of the USDA Soil Conservation Service testified he had gridded the Gabaldon property prior to trial in 1977 and estimated that approximately 5,000 cubic yards of sand and dirt had blown onto their land from Sanchez's subdivision. He said the amount of dirt represented by that figure could be visualized by approximating it to 1,000 dump truck loads of dirt.[22] Crops on the Gabaldon land were damaged by the blowing topsoil itself, and the accumulations of dirt and sand both on their land and in their ditch contributed to the damage by interfering with irrigation. Estimates of damage due to crop loss varied.[23] One witness testified that the Gabaldons would have to re-level their land in order to irrigate properly again.[24]

COURT PROCEEDINGS

When Sanchez refused to again clear their ditch, the Gabaldons sued for damages, and sought an order directing Sanchez both to clear their land of the accumulated dirt and to take steps, including re-vegetation, to ensure soil from his land would not continue to blow onto their property.[25] The district court ruled that Sanchez had violated the Subdivision Act and that his acts also constituted nuisance, negligence and trespass. The Gabaldons were awarded $3,000 in damages plus costs. Sanchez was ordered to implement a terrain management program in compliance with the Subdivision Act and to either remove the dirt accumulated along the Gabaldons'

18. Record at 17. Defendant's Disclosure Statement.
19. Transcript of Proceedings at p. 234 of Record.
20. *Id.* at 201-202.
21. *Id.* at 207-208.
22. *Id.* at 155.
23. *Id.* at 193-195, 203-205.
24. *Id.* at 157, 166.
25. Plaintiffs' Complaint at p. 5 of Record.

irrigation ditch or take steps to ensure it did not fall into the ditch.[26]

The court of appeals reversed the trial court's decision. It held first, that the Subdivision Act does not provide for private causes of action and could not support the award of damages and injunctive relief to plaintiffs.[27] The court also held that defendant was not liable to plaintiffs for nuisance, negligence or trespass because he had the legal right to clear his land and was not negligent in clearing it.

THE SUBDIVISION ACT

The Subdivision Act had two possible uses in *Gabaldon.*[28] The first use was rejected by the court when it found the Subdivision Act did not create a private cause of action that enabled those injured by violations of the Act to sue under it. A second use of the statute was not addressed by the court. The Subdivision Act could have been found to create a standard of care, and violation of the Act could then either establish negligence per se or be used as evidence on the issue of negligence. This use of the statute is addressed below under the discussion of negligence.

The trial court specifically concluded that Sanchez had violated the Subdivision Act and that the Act "was promulgated to protect a class of which plaintiffs are members."[29] The trial court did not indicate whether Sanchez's violation was a separate basis for awarding relief to plaintiffs, or whether it simply was one indication of negligence. On appeal, both parties considered that the trial court's decision was based at least in part on plaintiffs' ability to recover under the Subdivision Act.[30] The court of appeals viewed this as the

26. Judgment of the Court at p. 79 of Record.

27. The court did "believe, however, that defendant should be compelled to comply with the Act. This result can be obtained if plaintiffs will convince either the district attorney of Valencia County or the attorney general to proceed for injunctive relief or mandamus." 92 N.M. at 226, 585 P.2d at 1107.

28. The Subdivision Act arguably could have been used in a third way that was not advanced before either the trial court or the court of appeals. Even if violation of the Subdivision Act does not support a private cause of action, it might support an injunction for public nuisance. Other jurisdictions have found that the open, continuous, public and intentional violation of a public statute is a public nuisance. State v. Rabinowitz, 85 Kan. 841, ——, 118 P. 1040, 1043 (1911); Knight v. Foster, 163 N.C. 329, ——, 79 S.E. 614, 615 (1913). Private citizens can sue to enjoin public nuisances in New Mexico, both as a statutory right [N.M. Stat. Ann. §30-8-8 (1978)] and a common law right [Fink, Private Nuisance in New Mexico, 4 N.M.L. Rev. 127-28 (1974). To sue under the common law of public nuisance, a plaintiff must have suffered particular injury because of the nuisance.]. If the court of appeals had accepted the view that continued violation of a public statute is a public nuisance, then Sanchez created a public nuisance by his continued refusal to comply with the Subdivision Act.

29. Conclusion of Law No. 2, Decision of the Court at p. 77 of Record.

30. Appellant's Brief-in-Chief at p. 5. Appellee's Reply Brief at p. 6.

issue before it,[31] and ruled that the Subdivision Act did not create private causes of action for violations of the statute.

The court's decision was based on Section 47-6-26 of the Subdivision Act, which provides in part:

> In addition, the district attorney or the attorney general may bring mandamus to compel compliance with the provisions of this act. However, nothing in this section shall be construed as limiting any common-law right of any person in any court relating to subdivisions.

The court was correct in finding that this section precludes private causes of action under the statute. The New Mexico Supreme Court has recognized "that, where a statute gives cause of action, and designates the persons who may sue, they alone can sue. . . ."[32] The principle has been recognized elsewhere.[33]

THE COMMON LAW COUNTS

After its discussion of the Subdivision Act, the court said the remaining issue was whether Sanchez had a right to clear his land of vegetation.[34] The court found that right existed. It then concluded defendant's use of his land was lawful and reasonable, and there could thus be no negligence or liability to an adjoining landowner.[35] Establishment of a legal right to clear land apparently supported the court's earlier statement that no findings had been made "that could support any theory that defendant owed plaintiffs a duty as to negligence, nuisance or trespass, and that defendant breached that duty."[36] The court's conclusion is puzzling because the court did

31. 92 N.M. at 226, 585 P.2d at 1107.

32. Romero v. Atchison, Topeka & Santa Fe Ry. Co. 11 N.M. 679, 686, 72 P. 37, 39 (1903), citing Oates v. The Union Pacific Ry. Co., 104 Mo. 514, ____, 16 S.W. 487, 488 (1891).

33. "It is basic law that when a statute creates a cause of action, and designates those who may sue thereunder, none except the persons so designated may bring such an action." City and County of Denver v. Miller, 151 Colo. 444, ____, 379 P.2d 169, 173 (1963), citing Avery v. County Court, 126 Colo. 421, ____, 250 P.2d 122 (1952); 39 Am. Jur. *Parties* §9 (1938).

34. 92 N.M. at 227, 585 P.2d at 1108.

35. The court apparently adopted the contention of defendant on appeal that "It is a well-established common law principle that a landowner has a legal right to clear his own land of natural brush or vegetation even if the result is the blowing of dirt on to the land of an adjacent landowner." Appellant's Brief-in-Chief, p. 4.

36. 92 N.M. at 226, 585 P.2d at 1107. It is possible, though, that the court's statement was meant to indicate the trial court's conclusion that defendant was liable for negligence, nuisance and trespass was being reversed because the trial court's findings did not support its conclusions. Judge Hernandez's dissent raises this possibility, since he specifically rejected the argument: "In my opinion the trial court's findings are supported by substantial evidence and that [sic] it correctly concluded that defendant's actions constituted a private

not employ the legal analyses required in nuisance and negligence actions and failed completely to address the question of trespass.

The Law of Nuisance

Private nuisance is not defined by statute in New Mexico, and is thus a matter of common law. Under the common law, private nuisance is defined as "an unreasonable interference with the use and enjoyment of land."[37] A court must make two determinations in a nuisance action. First, it must determine whether a defendant has caused a substantial interference with the use and enjoyment of a plaintiff's land.[38] Secondly, the court must decide whether the defendant is liable for that substantial interference because his conduct in causing or maintaining the interference was unreasonable under the circumstances.[39]

According to Prosser, "[w]here the invasion affects the physical

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nuisance." 92 N.M. at 229, 585 P.2d at 1110.

If the court of appeals was reversing the trial court's decision on the common law claims because the findings were insufficient, it should have specifically listed that reason as a ground for its decision. If it had done so, the court should then have specified in what ways the findings were insufficient. The findings as summarized by the court seem on their face sufficient to support all of the common law counts.

37. Sans v. Ramsey Golf and Country Club, Inc. 29 N.J. 438, ____, 149 A.2d 599, 605, 68 A.L.R.2d 1323, 1330 (1959). *See* W. Prosser, The Law of Torts §89 at 591 (4th ed. 1971). No New Mexico case sets out all the elements of private nuisance. Various decisions, however, discuss separate elements that are required to find nuisance. These cases are discussed as the different elements are defined.

38. Merriam v. McConnell, 31 Ill. App.2d 241, ____, 175 N.E.2d 293, 295, 83 A.L.R.2d 931, 934 (1961); Clinic and Hospital, Inc. v. McConnell, 241 Mo. App. 223, ____, 236 S.W.2d 384, 390, 23 A.L.R.2d 1278, 1286 (1951); Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336, ____, 198 P.2d 847, 852, 5 A.L.R.2d 690, 698 (1948); Essick v. Shillam, 347 Pa. 373, ____, 32 A.2d 416, 418, 146 A.L.R. 1399, 1402 (1943). The New Mexico Supreme Court referred to this step of the analysis in Wofford v. Rudick, 63 N.M. 307, 310, 318 P.2d 605, 607 (1957), when it ruled that although appellees had not established the amount of their damages with exactness, the proof did show that "appellees suffered substantial damages."

39. Nicholson v. Connecticut Half-Way House, Inc., 153 Conn. 507, ____, 218 A.2d 383, 385, 21 A.L.R.3d 1051, 1056 (1966); Merriam v. McConnell, 31 Ill. App.2d 241, 175 N.E.2d 293, 83 A.L.R.2d 931 (1961); Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847, 5 A.L.R.2d 690 (1948). *See* W. Prosser, The Law of Torts, §87 at 580 (4th ed. 1971) and cases cited therein. Section 822 of the Restatement (Second) of Torts (1966) delineates four determinants for nuisance liability:

> (a) the other person [whose interest in land is invaded] has property rights and privileges in respect to the use or enjoyment interfered with; and
> (b) the invasion is substantial; and
> (c) the actor's conduct is a legal cause of invasion; and
> (d) the invasion is either
> (i) intentional and unreasonable; or
> (ii) unintentional and otherwise actionable under the rules governing liability for negligence, reckless or ultrahazardous conduct.

These determinants are implicit in this note's discussion of the analysis required by nuisance law.

condition of the plaintiff's land, the substantial character of the interference is seldom in doubt."[40] Substantial interference may be found when only annoyance or inconvenience is caused, as well as when physical damage occurs. The amount of damage claimed need not be great before substantial interference is found. Substantial damage was defined in *Jost v. Dairyland Power Cooperative*[41] as "'* * * a sum, assessed by way of damages, which is worth having . . . .'"[42] In *Jost,* substantial damage to one plaintiff was found when damages were only $145 for each of two years.

If a court finds there has been substantial interference, it then must determine whether the defendant is liable for damages because his creation or maintenance of the interference was unreasonable under the circumstances. In every determination of reasonableness, the court must strike a balance between two "antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor."[43]

In balancing these opposing principles, the gravity of harm to the plaintiff must be weighed against the utility of the defendant's conduct.[44]

> An invasion of plaintiff's interest is unreasonable "unless the utility of the actor's conduct outweighs the gravity of the harm." 4 Restatement, Torts, § 826, p. 241 . . . . Some of the specific factors considered in determining the interests of the parties are the extent and character of harm involved; the social value of the respective uses; the suitability of each use to the character of the locality in which it is conducted; the ability of the defendant or plaintiff to prevent or avoid the harm.[45]

If defendant's conduct has no utility from the standpoint of one of the factors, the fact that it has utility from the standpoint of other factors is not controlling.[46] Thus, if it is "practicable for the actor to

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40. W. Prosser, The Law of Torts, § 87 at 578 (4th ed. 1971).
41. 45 Wis.2d 164, 172 N.W.2d 647 (1969).
42. *Id.* at ____, 172 N.W.2d at 651.
43. Antonik v. Chamberlain, 81 Ohio App. 465, ____, 78 N.E.2d 752, 759 (1947).
44. Sans v. Ramsey Golf and Country Club, 29 N.J. 438, ____, 149 A.2d 599, 605, 68 A.L.R.2d 1323, 1330 (1959); Gronn v. Rogers Constr., Inc., 221 Or. 226, ____, 350 P.2d 1086, 1089 (1960). *See* W. Prosser, The Law of Torts, § 89 at 596 (4th ed. 1971) and Restatement (Second) of Torts § 826 (1977).
45. Gronn v. Rogers, 221 Or. at ____, 350 P.2d at 1089. *See* Restatement (Second) of Torts § § 827 and 828, Comment c (1977); W. Prosser, The Law of Torts, § 89 at 597 (4th ed. 1971).
46. Restatement (Second) of Torts § 828, Comment b (1965).

avoid the harm [to plaintiff] in whole or in part without undue hardship,"[47] the defendant's invasion of plaintiff's interests is unreasonable.

The assessment of these factors will vary over time, since "[t]he court should take into consideration public policy, [and] the interests of the community as a whole . . . ."[48] As public policy evolves, courts may find that a defendant is liable for nuisance although the same conduct twenty years earlier would not have been viewed as unreasonable. "For generations, courts, in their tasks of judging, have ruled on these extremes according to the wisdom of the day, and many have recognized that the contemporary view of public policy shifts from generation to generation."[49]

New Mexico courts have not expressly employed a balancing test, nor have they discussed the factors which influence their decisions in nuisance cases. In *Phillips v. Allingham,*[50] however, the court assessed the defendant's conduct by many of the factors listed above and acknowledged the public policy supporting defendant's activity. Plaintiffs in *Phillips* sued to enjoin defendant from constructing gasoline storage tanks on his property, claiming such tanks would be a nuisance per se. The court reversed a granting of an injunction after considering that the defendant was locating the tanks on industrially-zoned property, that the tanks met acceptable construction criteria and that the proposed method of handling gasoline was safe. It also cited another case involving gasoline storage in which an injunction would have restrained " 'the defendants from supplying a public need. . . .' "[51]

Because many factors are involved and because the weight given those factors varies as public policy evolves, " 'nuisance cannot be determined by any fixed general rules, but depend[s] upon the facts of each particular case . . .' "[52] As Justice Holmes said: "The respective rights and liabilities of adjoining land-owners cannot be determined in advance by a mathematical line, or a general for-

47. *Id.*, § 830. *See* W. Prosser, The Law of Torts, § 89 at 599 (4th ed. 1971), and Sans v. Ramsey Golf and Country Club, 29 N.J. 438, 149 A.2d 599, 68 A.L.R.2d 1323 (1959) (the appellate court drew attention to the slight burden on defendant to avoid the harm to plaintiff).

48. 58 Am. Jur.2d *Nuisances* § 23 (1971).

49. Antonik v. Chamberlain, 81 Ohio App. at ____, 78 N.E.2d at 759.

50. 38 N.M. 361, 33 P.2d 910 (1934).

51. *Id.* at 367, 33 P.2d at 914 [quoting from City of Electra v. Cross, 225 S.W. 795, 796 (Tex. Civ. App. 1920)].

52. Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336, ____, 198 P.2d 847, 852, 5 A.L.R.2d at 698 (1948) [quoting from 39 Am. Jur. *Nuisances* § 16 (1938)]. *See* W. Prosser, The Law of Torts, § 89 at 602 (4th ed. 1971).

mula . . . ."[53] Because of this, "the cases are often of little value except as a general guide to the principles involved."[54]

Courts sometimes err when they fail to recognize that reasonableness can be determined only by an inquiry into the particular facts of each case. Two common errors should be considered before turning to the court's decision in *Gabaldon.* One error is to assume that a defendant's conduct is reasonable if he was making legal use of his property. "[T]he fact that an act may otherwise be lawful may not prevent it from constituting a nuisance"[55] when considered with all the circumstances of a case. The second error is to assert that a defendant's lack of negligence precludes liability for nuisance. "[L]iability for nuisance does not depend upon the question of negligence . . . and may exist although there was no negligence."[56] New Mexico courts have recognized that the focus in nuisance cases is not on the quality of the act or omission which leads to the invasion of property interests. "Care or want of care is not involved. Whether there was a wrongful invasion of property rights is the question, not whether it was negligently done."[57] Liability for nuisance can exist "regardless of the degree of care exercised to avoid injury."[58]

Though the court of appeals quoted case law which reflects the common law nuisance principles outlined above, it did not apply those principles. The court did not address the question of whether there had been substantial interference with the Gabaldons' use and enjoyment of their land. The court may have assumed that substantial damage was shown, and its references to reasonable and lawful conduct may have been a conclusion that defendant was not liable for any damage because his conduct was reasonable. Since substantial interference is usually found whenever any actual physical harm to land or any real damage is caused,[59] it is unlikely the Gabaldons' damages would not meet the requirement of substantial interference.

If the court did determine that Sanchez's conduct in causing the substantial interference was reasonable, it did not do so by balancing the factors traditionally reviewed in nuisance cases. The court quoted

53. Middlesex v. McCue, 149 Mass. 102, ____, 21 N.E. 230, 231 (1889). The court of appeals included this quotation in *Gabaldon,* 92 N.M. at 228, 585 P.2d at 1109.

54. W. Prosser, The Law of Torts, § 89 at 602 (4th ed. 1971).

55. 58 Am. Jur.2d *Nuisances* § 28 (1971). *See* W. Prosser, The Law of Torts, § 87 at 575 (4th ed. 1971).

56. Cities Service Oil Co. v. Merritt, 332 P.2d 677, 684 (Okla. 1958). *See* W. Prosser, The Law of Torts, § 87 at 574 (4th ed. 1971).

57. Wofford v. Rudick, 63 N.M. 307, 311, 318 P.2d 605, 608 (1957).

58. *Id.*

59. See text accompanying notes 39 through 41 *supra.*

extensively from cases in which courts had found there was no liability for negligence or nuisance when windblown sand from stripped land damaged another's property.[60] The court apparently found in the cases cited a set principle of nuisance law regarding blowing sand, despite the express recognition even in the cases it cited that nuisance law can seldom be made a matter of definite rule, but must in every case be determined from the facts.[61]

The court made no mention of the special weight given to public policy in nuisance cases. It did not indicate whether the courts in the cases it reviewed had shown any concern about wind erosion and protection of the environment. No defendant in any of the cited cases was bound by a government regulation to institute special terrain programs to tie down his soil. The Subdivision Act indicates Sanchez violated the public policy in New Mexico to protect land from abusive subdivision activities.

In addition to the failure to refer to any balancing test or consider public policy, two other errors are implicit in the court's opinion. In its discussion of nuisance and negligence, the court concluded that "defendant had the *legal right* to remove brush and vegetation from his land and was *not negligent* in removing them."[62] That conclusion alone does not negate actionable nuisance. Nuisance may be found even if a defendant exercises a legal right in a non-negligent manner.[63]

While even lawful conduct may give rise to nuisance, the court failed to explain why it concluded that Sanchez's subdivision activity was lawful. It may be inferred from its opinion that the court assumed every property owner has the legal right to clear his land. The court buttressed this common sense assumption with dicta from other cases. If Sanchez's activity, however, had been defined as something other than "clearing land," it could have been found to be unlawful. The Subdivision Act requires subdividers to comply with the terrain management plans described in their disclosure state-

60. If the court wished to find precedent for an opposite conclusion, it could have cited Waters v. McNierney, 185 N.Y.S.2d 29 (1959), aff'd 202 N.Y.2d 808 (1960). The court there upheld a finding of nuisance on facts similar to those in *Gabaldon.* The defendant had cleared his land to construct a golf course. Exposed sand blew onto plaintiff's property, accumulating in substantial amounts. The sand interfered with plaintiffs' use and enjoyment of land and necessitated cleaning and painting their house. The court ruled that since plaintiffs' damages were substantial, the "appellant's conduct could be classified as unreasonable and a nuisance and . . . damages were properly awarded." 185 N.Y.S.2d at 33. New York's position—that the defendant's conduct is unreasonable if the plaintiff's damages are substantial—represents, however, a minority viewpoint. See text accompanying notes 38 through 43 *supra.*

61. See text accompanying notes 51 through 53 *supra.*

62. 92 N.M. at 228, 585 P.2d at 1109 (emphasis added).

63. See text accompanying notes 54 through 57 *supra.*

ments; therefore, Sanchez was arguably acting unlawfully in clearing his land without re-vegetating it.

The Law of Negligence

The court's conclusion that Sanchez was not negligent was also unsubstantiated. Some legal phrases from negligence law, such as "ordinary care" and "negligence," do surface occasionally in the court's opinion. The court did cite defendant's argument that there was no "breach of duty owing by defendant to plaintiffs,"[64] and did say the defendant was not negligent in removing vegetation.[65]

The court, however, neither defined negligence nor undertook the applicable analysis. If the court was applying negligence principles without verbalizing its analysis, then it erred again in its use of the term "reasonable" and also did not consider the standard of conduct required of subdividers.

Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[66] The reasonableness of the risk of harm is determined by "weighing the magnitude of the risk against the utility of the [defendant's] act or the particular manner"[67] in which the act is done. Factors which determine the utility of defendant's conduct and the magnitude of risk are similar to those used in nuisance cases. The utility of defendant's conduct is assessed in part by the social value attached by law to the interest advanced by a defendant's conduct and the availability of any alternate, less dangerous course of conduct that would adequately advance the interest.[68] The magnitude of risk depends in part on the social value of the interest imperiled by the defendant's conduct and the extent of harm likely to be caused to that interest.[69] Reasonableness is not determined solely by the legality of a person's conduct. The court's decision is incorrect to the extent it rested on a conclusion that Sanchez's conduct was reasonable because it was lawful.

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64. 92 N.M. at 226, 585 P.2d at 1107.

65. *Id.* at 228, 585 P.2d at 1109.

66. Restatement (Second) of Torts §282 (1965). *See* Flanary v. Transport Stop, 78 N.M. 796, 800, 438 P.2d 636, 640 (Ct. App. 1968): ' An act may be negligent if a reasonably prudent person would foresee that the act involves an unreasonable risk of injury to another and the reasonably prudent person, in the exercise of ordinary care would not do that act."

67. *In re* Texas City Disaster Litigation, 197 F.2d 771, 778 (5th Cir. 1952). *See* Schance v. H. O. Adams Tile Co., 131 Cal. App.2d 549, 555, 280 P.2d 851, 855 (1955); Winsor v. Smart's Auto Freight Co., 25 Wash.2d 383, ——, 171 P.2d 251, 254 (1946). *See* Restatement (Second) of Torts §291 (1965). *See also* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

68. Restatement (Second) of Torts §292 (1965).

69. *Id.*

If the court had employed the required balancing test, the Subdivision Act might have been used to assess the social value attached to clearing land for subdivisions without re-vegetating it. Clearing land for subdivisions may have economic and social value, but New Mexico circumscribed that value by defining acceptable subdivision methods and practices in the Subdivision Act. New Mexico requires a terrain management plan from subdividers; Valencia County approved Sanchez's subdivision on the basis of a disclosure statement which included a terrain management plan promising re-vegetation. The court should have addressed the issue of whether Sanchez's land clearing activity, when coupled with his failure to re-vegetate the land, had any social value in the face of the Subdivision Act.

The Subdivision Act could also have guided the court if it had attempted to determine the standard of conduct required of Sanchez in developing his land. The unexcused violation of a statute may be viewed as negligence in itself if a court adopts a legislative standard "as defining the standard of conduct of a reasonable man," or it may be "relevant evidence bearing on the issue of negligent conduct."[70] The court could have adopted the Subdivision Act as setting the standard of conduct required of Sanchez. Then Sanchez's violation of the Subdivision Act would have been negligence per se if the court had found that the Act was designed in whole or in part to protect property owners with land adjoining subdivisions from damage to their land caused by blowing dirt from cleared subdivision land.[71]

In discussing plaintiffs' inability to claim damages under the Subdivision Act, the court rejected the contention that the Act was designed to protect landowners like plaintiffs from the damage they suffered. The court said the statute does not "refer to adjoining landowners directly or indirectly, nor to sand and dirt blowing on adjacent property. . . . We are unable to agree with plaintiffs that the Act was designed to protect landowners owning land adjoining land being subdivided."[72]

The court apparently overlooked Section 47-6-7 of the Subdivision Act.[73] That section outlines the procedures a board of county commissioners must follow in approving the vacating of any ap-

70. *Id.* at §288B. *See* Sanchez v. J. Barron Rice, Inc., 77 N.M. 717, 722, 427 P.2d 240, 244 (1967): "Violation of a statute or ordinance is negligence per se and when as a proximate result thereof a person is injured, damages may be recovered if the statute or ordinance violated was for the benefit of the person injured." *See also* Butler v. L. Sonneborn Sons, Inc., 296 F.2d 623, 626 (2nd Cir. 1961) (the court upheld using breach of regulations as evidence of negligence).

71. Sanchez v. J. Barron Rice, Inc., 77 N.M. 717, 722, 427 P.2d 240, 244 (1967).

72. 92 N.M. at ____, 585 P.2d at 1107.

73. N.M. Stat. Ann. §47-6-7 (1978).

proved subdivision plat. It directs the board to determine "whether or not the vacation will adversely affect the interests of persons on contiguous land or persons within the subdivision being vacated."[74] So while the Subdivision Act may have been designed primarily as a consumer protection measure,[75] the Legislature also had the interests of adjoining landowners in mind.

The Subdivision Act provides no express protection from blowing dirt to anyone—either purchaser or adjoining landowner. The Valencia County Subdivision Regulations, however, which were enacted pursuant to the Subdivision Act, include a terrain management provision aimed at reducing erosion due to land clearing:

> A. All grading, clearing and filling operations ... shall be designed to ....
>
> ...
>
> 2. Retain native vegetation, reduce erosion ...
>
> B. Whenever the native ground cover is removed or disturbed, or whenever fill material is placed on the site, the exposed surface shall be treated to reasonably minimize erosion from the exposed material.[76]

The Valencia County regulations were patterned after model regulations prepared by the New Mexico Association of Counties [hereinafter the Association] and the Natural Resource Conservation Commission.[77] An explanation accompanying the model regulations emphasizes that stringent terrain management requirements are necessary because of the state's high susceptibility to erosion.[78] The Association provided references for its model regulations.[79] For the terrain management provisions, including the Valencia County provision cited above, the Association referred to N.M. Stat. Ann. § § 73-22-1 to 73-22-5 (1978). This statute authorizes the creation of wind erosion districts empowered to require persons to take mea-

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74. N.M. Stat. Ann. §47-6-7(B) (1978).

75. New Mexico Legislative Council Service, Information Memorandum No. 202.23929a. On file at Sierra Club office in Santa Fe, N.M.

76. Land Subdivision Regulations of Valencia County, New Mexico, Article XIX, p. 49. Reference is to the regulations adopted Oct. 1, 1973. They were in force at the time Sanchez obtained approval for his subdivision, but have since been replaced by new regulations.

77. A County Handbook of Model Subdivision Regulations and Information: Terrain Management Edition. Copy loaned to author by Salomon Montano, Administrative Assistant, Valencia County.

78. *Id.* at 89.

79. Memo of June 18, 1973, from Philip D. Larragoite, Executive Director of New Mexico Assn. of Counties, to All County Officials, etc. On file at Sierra Club office in Santa Fe, N.M.

sures to reduce wind erosion when it begins to damage the land of adjoining property owners.[80]

The court of appeals, relying on the Subdivision Act and the Valencia County Subdivision Regulations,[81] could have concluded that the plaintiffs were in a class which the statute was designed to protect, rather than reaching the decision it did in *Gabaldon.* If it had done so, Sanchez's failure to re-vegetate his land would have been negligence per se and he would have been liable to the Gabaldons.

If the court had reviewed the Subdivision Act provisions and county regulations cited above and yet rejected any contention that the Subdivision Act defined the standard of conduct required of Sanchez, it could still have used the Act as evidence on the issue of negligent conduct. Even if it was not enacted to protect adjacent landowners from blowing sand, the statute could still be used to indicate that a reasonable man, or more specifically the reasonable subdivider in New Mexico, would have undertaken terrain management.[82]

The Law of Trespass

The court did not undertake any analysis of the trial court's conclusion that Sanchez was also liable to the Gabaldons for trespass. In its introductory statements the court said the trial court had made no findings that "could support any theory that defendant owed plaintiffs a duty as to negligence, nuisance or trespass, and that defendant breached that duty."[83]

If trespass analysis was framed in terms of "duty,"[84] then every person could be said to owe a duty to any person with a possessory interest in property not to intentionally invade the other's property. An actor is liable for trespass if "he intentionally . . . enters land in the possession of [another], or causes a thing or a third person to do so . . . irrespective of whether he thereby causes harm to any legally protected interest of the other . . . ."[85] An invasion is intentionally caused if an actor desires to cause the invasion, or if he acts knowing that the invasion is substantially certain to follow. One

80. *Id.* at 94.

81. N.M. Stat. Ann. §47-6-7 (1978). the Valencia County Subdivision Regulations, and the County Handbook were not drawn to the court's attention.

82. Restatement (Second) of Torts §288B, Comment d (1965).

83. 92 N.M. at ____, 585 P.2d at 1107.

84. " 'Duty' is rarely used in dealing with the invasions of legally protected interests by acts which are intended to invade them." Restatement (Second) of Torts §4, Comment b (1965).

85. Restatement (Second) of Torts §158 (1965).

court held a defendant liable for damages caused by invasion of invisible gases and microscopic particles from a factory's exhaust fumes when the defendant knew the wind was substantially certain to blow the particles and gases across the plaintiff's land.[86]

Even a sketchy summary of the black letter law of trespass supports the trial court's conclusion that Sanchez was liable for trespass. He stripped his land of vegetation though any reasonable person would have been substantially certain that, given New Mexico's winds and aridity, dirt from his land would be blown onto the Gabaldon property. The trial court did not even have to hold Sanchez to the knowledge that a reasonable person would have had about wind erosion in New Mexico in order to find intentional conduct. Since Sanchez cleared the Gabaldons' ditch of sand twice, he was well aware of the damage being caused by his failure to re-vegetate his subdivision. The trial court's conclusion should not have been reversed without some discussion of the law of trespass and reasons for the reversal.

CONCLUSION

The court of appeals erred in its discussion of negligence and nuisance law, and in its failure to address the issue of trespass. The court did not apply the balancing tests required under both nuisance and negligence law, nor did it even indicate such tests were required to decide the "reasonableness" of defendant's actions. Only a determination of reasonableness could support the court's conclusion that defendant owed plaintiffs no duty under the law.

Few cases of nuisance, negligence involving land use, or trespass have been decided in New Mexico. It is unfortunate that *Gabaldon v. Sanchez* was so summarily decided. It has the potential of clouding New Mexico law for years because the court failed to adequately discuss and analyze the law that was at issue.

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86. Martin v. Reynolds Metals Company, 221 Or. 86, 342 P.2d 790 (1959), *cert. denied* 362 U.S. 918 (1960). See discussion in W. Prosser, The Law of Torts §13 at p. 66 (4th ed. 1971).