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Property

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PROPERTY

I. COVENANTS

A. Private Controls Of Land Use - Restrictive Covenants in Planned Subdivisions

Land-use covenants in a planned subdivision are designed to provide for a general plan or scheme of development.[1] In subdivisions, restrictive covenants also perform the function of a sales tool by encouraging potential buyers to make the decision to purchase based upon the existence of certain amenities.[2] The continued existence of these amenities are protected by restrictive covenants that run with the land.[3] Three cases during the survey period addressed the developer's responsibilities in creating, enforcing, and modifying restrictive covenants that run with the land.[4]

In *Appel v. Presley Cos.*,[5] Appel purchased land in the Vista Del Sandia subdivision in Albuquerque in 1982.[6] The subdivision was developed by the Presley Companies ("Presley").[7] Presley created a set of restrictive covenants for the subdivision that regulated the land use, building type, quality, and size of the residential single-family dwelling that were to be built within the subdivision.[8] These restrictive covenants were used as a sales tool to encourage prospective buyers to purchase property within the subdivision.[9] Appel relied upon these restrictive covenants when making a decision to purchase property within the subdivision.[10]

In 1984, the subdivision's three member Architectural Control Committee executed an amendment to the restrictive covenants.[11] The committee members were all officers or employees of Presley.[12] This amendment deleted nine lots from the effect of the covenants.[13] This allowed Presley to subdivide these lots into smaller lots and sell them for the purpose

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1. Appel v. Presley Cos., 111 N.M. 464, 466, 806 P.2d 1054, 1056 (1991).
2. Knight v. City of Albuquerque, 110 N.M. 265, 266, 794 P.2d 739, 740 (Ct. App. 1990).
3. *Id.*
4. *See* Appel v. Presley Cos., 111 N.M. 464, 806 P.2d 1054; Knight v. City of Albuquerque, 110 N.M. 265, 794 P.2d 739; Wilcox v. Timberon Protective Servs., 111 N.M. 478, 806 P.2d 1068 (Ct. App. 1991).
5. 111 N.M. 464, 806 P.2d 1054 (1991).
6. *Id.* at 465, 806 P.2d at 1055.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

of constructing townhouses.[14] This type of amendment was expressly authorized by provisions contained within the restrictive covenants.[15]

Appel filed suit alleging that Presley violated the restrictive covenants.[16] He sought an injunction to prevent Presley from further subdividing the lots that had been removed from the protection of the restrictive covenants.[17] The trial court granted summary judgment in favor of Presley.[18] It determined that the restrictive covenants expressly authorized the Architectural Control Committee to modify the covenants.[19] Appel appealed the trial court's decision.[20] The New Mexico Supreme Court reversed and remanded.[21]

The supreme court agreed that the language of the covenants permitted the Architectural Control Committee to amend the covenants.[22] The court, however, also noted "the inherent inconsistency between an elaborate set of restrictive covenants, designed to provide for a general scheme or plan of development, and a clause reserving in the grantor the power to change or abandon any part of it."[23]

Drawing on the law of other jurisdictions, the court reconciled this inconsistency by reading into the restrictive clause a requirement of reasonableness.[24] The court stated that "[a] determination of whether the exceptions were reasonably exercised or whether they essentially destroyed the covenants requires resolution of a factual matter."[25] The supreme court instructed the trial court that in the event the exceptions were applied in an unreasonable manner, thus breaching the covenants, the trial court was to apply the doctrine of relative hardships[26] to determine whether to grant injunctive relief in favor of Appel.[27] The court then remanded the case for further proceedings.[28]

Appel has changed New Mexico law on the issue of restrictive covenants in subdivisions to include the requirement that enforcement of such

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14. *Id.*
15. *Id.* at 466, 806 P.2d at 1056.
16. *Id.* at 465, 806 P.2d at 1055.
17. *Id.*
18. *Id.*
19. *Id.* at 466, 806 P.2d at 1056.
20. *Id.* at 465, 806 P.2d at 1055.
21. *Id.*
22. *Id.* at 466, 806 P.2d at 1056.
23. *Id.* (citing Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc., 303 So. 2d 665 (Fla. Dist. Ct. App. 1974)).
24. *Id.* (citing *Flamingo Ranch Estates, Inc.*, 303 So. 2d 665); *see also* Moore v. Megginson, 416 So. 2d 993 (Ala. 1982).
25. *Appel*, 111 N.M. at 466, 806 P.2d at 1056.
26. *Id.* at 467, 806 P.2d at 1057. The doctrine of relative hardships requires a balancing of hardships and equities. The factors which the trial court should consider include:

> (1) [T]he character of the interest to be protected, (2) the relative adequacy to the plaintiff of injunction in comparison with other remedies, (3) the delay, if any, in bringing suit, (4) the misconduct of the plaintiff if any, (5) the interest of third persons, (6) the practicability of granting and enforcing the order or judgment, and (7) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied.

27. *Id.* at 466, 806 P.2d at 1056.
28. *Id.* at 467, 806 P.2d at 1057.

covenants be equitable. Prior to *Appel*, the court examined only the language of such covenants, and enforced that language unless ambiguous.

In *Knight v. City of Albuquerque*,[29] the New Mexico Court of Appeals focused on a developer's ability to make representations in an attempt to encourage the purchase of property within the subdivision and later renege on those representations. The original developers of Paradise Hills filed a plat showing that a certain amount of land within the subdivision would be used as a golf course.[30] The plat showing the golf course was used as a selling tool.[31] When Knight made the decision to purchase land within the subdivision, he relied on the developer's representation that the land designated as a golf course would not be developed for other uses.[32] The developer later attempted to develop the land that had been set aside for the golf course.[33] Knight responded by filing suit. It was undisputed that the developer had reserved "the right to build hotels, cottages, or other facilities on any tract shown on the Paradise Hills Country Club Estates plat without the permission of the owners of any lot located within the subdivision."[34] This reservation was contained within the recorded conditions and restrictions on development that was incorporated within the purchaser's warranty deeds.[35]

The trial court granted summary judgment in favor of Knight and issued a declaratory judgment delineating the boundaries of the golf course.[36] The court of appeals affirmed, holding that the use of the plat showing the existence of the golf course used as a selling tool created a private right, or implied covenant, in favor of the purchasers of land within the subdivision that was superior to the developer's attempt to reserve the power to modify the plat.[37] The court stated that "a developer will not be allowed to induce purchasers to buy property by purporting to include open space such as parks or golf courses in a subdivision plat, only to subsequently change the uses of those open space areas."[38]

Prior to *Knight*, New Mexico law maintained that a developer may not induce purchasers to buy property by purporting to include such amenities as golf courses in the subdivision plat and later modify the use of these open spaces.[39] *Knight* represents an extension of this rule to those cases where the developer has expressly retained the right to build structures anywhere on the plat without the approval of the landowners.

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29. 110 N.M. 265, 794 P.2d 739 (Ct. App. 1990).
30. *Id.* at 266, 794 P.2d at 740.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 266, 794 P.2d at 740. The court limited the use of that property to use as a golf course, park, or other similar open space purpose.
37. *Id.*
38. *Id.*
39. *See, e.g.*, Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 77 N.M. 730, 427 P.2d 249 (1967); Cree Meadows, Inc. v. Palmer, 68 N.M. 479, 362 P.2d 1007 (1961).

In *Wilcox v. Timberon Protective Association*,[40] the New Mexico Court of Appeals addressed two questions regarding restrictive covenants. The court first addressed whether a restrictive covenant prohibiting the classification of mobile homes as residences was ambiguous. Second, the court addressed whether the trial court abused its discretion in upholding affirmative defenses to the enforcement of the covenant.[41]

Wilcox purchased a lot in Timberon, a large, planned resort community located in Otero County and developed by North American Land Development, Inc.[42] The development consisted of thirty-three separately developed subdivisions that contain lots owned by several thousand property owners.[43] The developer prepared and recorded separate sets of restrictive covenants applicable to each subdivision as it was developed.[44] The developer initially enforced the restrictive covenants, including architectural control within the developments.[45] Timberon Property Association ("TPA") took over this responsibility in 1983.[46] TPA was responsible for the enforcement of restrictive covenants within Timberon, including the approval or disapproval of building plans from 1983 until the time of trial.[47]

The restrictive covenants for the subdivision in which Wilcox's lot was located contained a provision that limited the use of various structures as permanent residences, including mobile homes.[48] Wilcox purchased his land relying on the restrictive covenants and the representations of sales people.[49] He was assured that mobile homes could not be used as permanent residences in this subdivision.[50] Further, Wilcox saw no mobile homes being used as residences within the subdivision during his inspection of it.[51]

Wilcox was not informed of a long-standing policy of TPA that allowed the placing of mobile homes on lots within the subdivision if the mobile homes were permanently converted to non-moveable structures and if

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40. 111 N.M. 478, 806 P.2d 1068 (Ct. App. 1991).
41. *Id.* at 481, 806 P.2d at 1071.
42. *Id.*
43. *Id.*
44. *Id.* at 482, 806 P.2d at 1072.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* The full text of the provision follows:

> No trailer, mobile home, basement, tent, shack, garage, barn or other outbuilding shall at any time be used as a residence, nor shall any residence of a temporary character be erected or permitted to remain. However, contractors may use a temporary building during the course of construction. And a travel trailer may be used as a temporary residence for a period of up to thirty (30) days if it is not connected to a water line and septic tank and if it is so connected, then the travel trailer may be used for a period of up to one-hundred eighty (180) days out of any one year period. The travel trailer must be removed from the lot during the remaining balance of each year.

49. *Id.* at 483, 806 P.2d at 1073.
50. *Id.*
51. *Id.* at 482, 806 P.2d at 1072.

certain cosmetic changes were made.[52] At the time Wilson made his purchase, three mobile homes were already located within the subdivision, and more were added over time.[53]

Wilcox filed suit alleging breach of the restrictive covenants and seeking declaratory judgment and injunctive relief after making repeated complaints to the Architectural Control Committee and the Board of Directors of TPA.[54] The trial court entered judgment in favor of the defendants on the basis that the restrictive covenants were ambiguous.[55] The trial court reasoned that it was unclear whether only temporary structures were intended to be prohibited or whether the restriction was one on mobile homes per se.[56] Alternatively, the trial court held that even if the covenants had been intended to prohibit all mobile homes, conditions had so changed that the restrictive covenants were no longer enforceable.[57] Further, the court concluded that under a "balancing of hardships" test Wilcox was limited to an action for damages.[58] Wilcox appealed.[59]

The New Mexico Court of Appeals held in favor of Wilson, finding that the phrase "mobile home" as used in the restrictive covenants was unambiguous.[60] The court cited an Illinois case that held the phrase "mobile home" is unambiguous and refers to a method of construction rather than the mobility of the completed structure.[61] The court buttressed this holding by noting that the restrictive covenant in question also prohibited the use of other types of construction for living purposes, *i.e.*, trailers, basements, garages, barns and other outbuildings.[62]

The court then went on to address defendant's equitable defenses. In determining whether to grant the request for injunctive relief, the court considered a number of factors and balanced any existing equities and hardships.[63]

The court found that the interest protected by the covenant in question was the architectural and aesthetic integrity of the subdivision unit.[64] Prior to the filing of the suit, only approximately ten of the 412 lots had been used for the permanent placement of mobile homes.[65] This number of mobile homes was insufficient to allow the court to find that

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52. *Id.*
53. *Id.*
54. *Id.* at 483, 806 P.2d at 1073.
55. *Id.*
56. *Id.*
57. *Id.* at 481, 806 P.2d at 1071.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 484, 806 P.2d at 1074 (citing Brownfield Subdivision, Inc. v. McKee, 19 Ill. App. 3d 374, 311 N.E.2d 174 (1974)).
62. *Id.* at 485, 806 P.2d at 1075.
63. *Id.* at 486, 806 P.2d at 1076. For a list a factors to be considered when balancing existing equities and hardships see *supra* note 26 and accompanying text.
64. *Wilcox*, 111 N.M. at 486, 806 P.2d at 1076.
65. *Id.*

conditions had changed to such an extent that the covenant could no longer protect the interest for which it was created.[66]

In examining the relative adequacy of an injunction, the court found that legal remedies, in this case damages, are always inadequate because damages due to loss of quiet enjoyment of land are incalculable.[67] The court stated "[w]here one enters into a restrictive covenant and then breaches it, he will be enjoined, irrespective of the amount of damage caused by his breach, and even if there appears to be no particular damage."[68]

The court held that plaintiff had not delayed in filing suit, that plaintiff had exhibited no misconduct, and that defendants, as third parties, had no interest that outweighed the effect of the restrictive covenants that ran with the land.[69] In addition, the court held that it would be practical to enforce the covenant and that the relative hardship to the defendants, if any, was not so substantial so as to outweigh plaintiff's right to injunctive relief.[70]

Wilcox has added only slightly to New Mexico law by holding that the term "mobile home," when used in a restrictive covenant, refers to the method of construction of the structure, and not whether the structure is capable of being moved.

B. Covenants of Title

New Mexico has long recognized common law warranty covenants of title. Traditionally, these covenants have included covenants of seisin, right to convey, freedom from encumbrances, warranty, quiet enjoyment, and further assurances.[71] These common law warranties of title are now codified.[72]

Issues pertaining to warranty covenants of title have only been addressed once during the survey period. In *Bloom v. Hendricks*[73] the New Mexico Supreme Court addressed the question of whether the grantor of a general

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66. *Id.*
67. *Id.*
68. *Id.* at 487, 806 P.2d at 1077.
69. *Id.* at 487-88, 806 P.2d at 1077-78.
70. *Id.* at 489, 806 P.2d at 1079.
71. 6A R. POWELL, THE LAW OF REAL PROPERTY ¶ 900[1] (1992).
72. *See* N.M. STAT. ANN. § 47-1-37 (Repl. Pamp. 1991). This section reads:
> In a conveyance of real estate the words, 'warranty covenants' shall have the full force, meaning and effect of the following words: 'the grantor for himself, his heirs, executors, administrators and successors, covenants with the grantee, his heirs, successors and assigns, that he is lawfully seized in fee simple of the granted premises; that they are free from all former and other grants, bargains, sales, taxes, assessments and encumbrances of what kind and nature soever; that he has good right to sell and convey the same; and that he will, and his heirs, executors, administrators and successors shall warrant and defend the same to the grantee and his heirs, successors and assigns forever against the lawful claims and demands of all persons.
73. 111 N.M. 250, 804 P.2d 1069 (1991).

warranty deed is responsible for the attorney's fees expended by the grantee in a successful defense of the title conveyed.[74]

Bloom purchased a forty-acre tract in Otero County in 1981.[75] He obtained a general warranty deed from Hendricks, the grantor.[76] At the time of purchase, Bloom expressed concern that a portion of the land was being used by a third party, the Lanes.[77] He was assured by the grantor that the "use was permissive and would cease upon request."[78] After completing the purchase, "Bloom wrote to the Lanes revoking permission for their use of the tract."[79] The Lanes claimed title to a portion of the land under several theories.[80] The parties were unable to resolve the dispute and the Lanes sued, claiming title "by virtue of a boundary by acquiescence, and alternatively, claiming a prescriptive easement."[81]

The trial court found in favor of the Lanes and quieted title to a 1.474 acre portion of the property in favor of the Lanes.[82] The Blooms were evicted from that portion of the property.[83] The decision was appealed to the New Mexico Court of Appeals, which reversed the trial court's decision.[84] The court of appeals quieted title to the tract in the Blooms with the exception of a prescriptive easement across 0.302 acres used as a parking area by the Lanes.[85] The Blooms then filed suit against the grantor, Hendricks, seeking to recover the costs of defending the title to the property, including attorney's fees.[86] The district court held for Hendricks and Bloom appealed.

The New Mexico Supreme Court first declined to extend the holding of *Tabet Lumber Co. v. Golighty*[87] to possession by acquiescence. The court held that a suit "under the doctrine of acquiescence implicates . . . covenants" contained within a general warranty deed "regardless of any open and obvious encroachment."[88] The court further stated that unlike a prescriptive easement, the claim of possession by acquiescence infringes on the title itself.[89] In arriving at this conclusion, the court reasoned that an open and obvious prescriptive easement is apparent to the purchaser upon inspection of the real estate and it is presumed that any injury to the purchaser was contemplated by the purchaser and seller and taken

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74. *Id.*
75. *Id.* at 252, 804 P.2d at 1071.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 253, 804 P.2d at 1072.
85. *Id.*
86. *Id.* at 251, 804 P.2d at 1070.
87. 80 N.M. 442, 457 P.2d 374 (1969). *Tabet* held that open and obvious prescriptive easements do not breach warranty deed covenants against encumbrances. *Id.* at 443, 457 P.2d at 375.
88. *Bloom*, 111 N.M. at 254, 804 P.2d at 1073.
89. *Id.*

into consideration in the price of the property.[90] It is not necessarily apparent to a prospective purchaser, however, that a landowner has assented to a boundary consistent with adverse use.[91]

The court then addressed the question of when grantee may recover the costs of the defense of the title from adverse claims from the grantor.[92] The court held that the purchaser is allowed to recover the costs of defending the title when the seller bears no responsibility for the substance of the adverse claim and had no knowledge of the potential adverse claim when he conveyed the property. The purchaser must, however, first demand that the grantor appear and defend the title and the purchaser's own defense of the title must be unsuccessful.[93] If the seller bears some responsibility for the substance of the adverse claim or had knowledge of the potential claim when he conveyed and warrantied the property, the purchaser can recover the costs of defending the title, including attorney's fees, except when the purchaser made no demand on the seller to appear and defend the title and the purchaser's own defense of the title was unsuccessful.[94]

The question of whether a grantee, based upon a warranty covenant, can recover the cost of defending the title to the property has not previously been addressed in New Mexico. Thus, *Bloom* has extended New Mexico law in this area.

II. PRESCRIPTIVE EASEMENTS

New Mexico courts addressed issues regarding prescriptive easements only once during the survey period. Perscriptive easements are acquired by land use which is "open, uninterrupted, peaceable, notorious, adverse, continuous, and under a claim of right for a period of ten years or longer."[95] In *Maloney v. Wreyford,*[96] the New Mexico Court of Appeals addressed the question of whether the trial court had sufficient evidence to find that a prescriptive easement forty-three feet wide and 400 feet long existed over Wreyford's property in favor of Maloney.[97]

Wreyford owned a tract of land adjacent to land owned by Maloney.[98] The two tracts were surveyed beginning at different corner posts, resulting in an overlap of forty-three feet, caused by surveying error.[99] Maloney used a portion of that land for an access road to his property.[100] He had done so for a period in excess of ten years.[101] The road had a gate

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 255-56, 804 P.2d at 1074-75.
94. *Id.*
95. Herbertson v. Iliff, 108 N.M. 552, 775 P.2d 754 (Ct. App. 1989).
96. 111 N.M. 221, 804 P.2d 412 (Ct. App. 1990).
97. *Id.*
98. *Id.* at 223, 804 P.2d at 414.
99. *Id.*
100. *Id.*
101. *Id.*

across its entrance and Maloney locked the gate and exercised control over it for the full ten-year period.[102] The trial court found that Maloney had a prescriptive easement forty-three feet wide by 400 feet long across the servient estate and awarded Maloney compensatory damages of $3,007.07 and costs.[103] Wreyford appealed.[104]

The New Mexico Court of Appeals declined to address the question of damages because the issue was not raised in the docketing statement.[105] The court did, however, address the question of whether the finding that a prescriptive easement existed was supported by the evidence.[106] The Court of Appeals held that the easement did exist, but that there was insufficient evidence to find that it occupied the entire forty-three foot width of the disputed property.[107]

The court first examined whether the plaintiff had acquired the easement by use that was "open, uninterrupted, peaceable, notorious, under a claim of right, and continuous for a period of ten years with the knowledge or imputed knowledge of the owner."[108] The court found that all of these requirements were met, except that there was insufficient evidence to show that Maloney used the full fifty foot width of the roadway for the prescribed period of time.[109] Rather the evidence only supported the use of a sixteen foot width of the property, the width of the gate.[110] The court further held that a prescriptive easement, used for the prescribed ten year period for general purposes for the access to a parcel of land, could continue to be used once the use was changed to access to a home built upon that parcel of land.[111] The court stated that general use established a general right.[112] Construction of the house did not constitute a material change in the nature or character of the use.[113]

III. COMMERCIAL LEASES

New Mexico courts addressed commercial leases and the relationship between lessee and lessor three times during the survey period.[114] In *Mesilla Valley Mall v. Crown Industries*,[115] the New Mexico Supreme Court addressed the question of whether a lessor could recover unpaid rent from a tenant who had vacated the premises when the lessor had

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 225, 804 P.2d at 416.
106. *Id.*
107. *Id.*
108. *Id.* at 224, 804 P.2d at 415.
109. *Id.* at 225, 804 P.2d at 416.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. Mesilla Valley Mall v. Crown Indus., 111 N.M. 663, 808 P.2d 633 (1991); Goradia v. Hahn Co., 111 N.M. 779, 810 P.2d 798 (1991); Highway & Transp. Dep't v. Garley, 111 N.M. 383, 806 P.2d 32 (1991).
115. 111 N.M. 663, 808 P.2d 633 (1991).

allowed a local museum to occupy the leased premises rent-free after the tenant had vacated.[116]

Crown Industries ("Crown") occupied retail space at the Mesilla Valley Mall under a long term lease with the Mesilla Valley Mall Company ("Mesilla").[117] Crown attempted to renegotiate the lease terms, but Mesilla refused to make adjustments.[118] Crown informed Mesilla that it would vacate the premises, and later did so.[119] The unpaid rent under the terms of the lease was $35,056.58 at the time Crown vacated the premises.[120] Mesilla repossessed the premises and allowed the Las Cruces Museum of Natural History to occupy the space rent-free.[121] Mesilla described the museum as "a tenant at sufferance."[122] The museum was aware that it might have to vacate the premises with as little as one day notice.[123]

Mesilla filed suit against Crown to collect all amounts due under the terms of the lease.[124] At trial, Crown raised the affirmative defense of surrender and acceptance.[125] The trial court found that "nothing in the lease agreement allowed the Mall to re-enter the property for any other purpose than to relet for the benefit of the tenant, and, in particular to re-lease the property for no rent and for its own benefit."[126] Mesilla appealed.[127]

The New Mexico Supreme Court affirmed the lower court ruling stating that in the absence of legal justification, a tenant who abandons property is liable for rent for the remainder of the lease term.[128] The lessor is under no obligation to relet the premises to mitigate the tenant's liability under the terms of the lease.[129] The lessor, however, may elect to take possession of the leased property and relet it for the benefit of the lessee.[130] In the alternative, the lessor may accept the tenant's offer of surrender of the leasehold, thereby terminating the lease.[131] If the lessor chooses this option, the lessee is liable only for rent accrued prior to the acceptance.[132] The court found that Mesilla's actions had the effect of accepting Crown's offer of surrender, thus relieving Crown of any further obligation under the terms of the lease.[133] The Mall Company's re-entry of the leased premises was for its own purposes, primarily the

116. *Id.* at 664, 808 P.2d at 634.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 665, 808 P.2d at 635.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 664, 808 P.2d at 634.
128. *Id.* at 665, 808 P.2d at 635.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 666, 808 P.2d at 636.

improvement of community relations by placing a branch of the local Natural History Museum in the mall.[134] This action by the lessor was inconsistent with the continuing rights of the tenant under the lease.[135] Therefore, the doctrine of surrender applied as a matter of law.[136]

In *Goradia v. Hahn Co.*,[137] the New Mexico Supreme Court addressed the question of whether a shopping center tenant was discriminated against by the management of the shopping center when the manager refused to renew his lease. Goradia operated a small shop within a shopping center operated by the Hahn Company ("Hahn") for a period of eight years.[138] At the end of the lease period, Hahn refused to renew Goradia's lease.[139] Hahn did offer to allow Goradia to lease another space on the periphery of the shopping center, but only on the condition that Goradia pay an $80,000 finder's fee to induce the tenant in that space to move.[140] Goradia rejected the offer and filed suit against Hahn alleging that Hahn refused to renew the lease because of Goradia's nationality.[141]

At trial, Hahn defended its action as a legitimate business decision based on its efforts to improve tenant mix.[142] As a reason for its decision not to renew Goradia's lease, Hahn stated that Goradia's methods of merchandising set up a "garage sale" atmosphere that was inappropriate for the shopping center.[143] After Goradia vacated the premises, Hahn rented the area to a flower shop, which had lower sales than Goradia's store, thus lowering Hahn's income from the space.[144] Hahn argued, however, that the flower shop would draw more people to the shopping center, thus, in total, increasing Hahn's income.[145] The trial court granted summary judgment in favor of Hahn and Goradia appealed.[146]

The supreme court affirmed the holding of the trial court stating "[t]here is nothing in the record to suggest that [Goradia's] lease would have been renewed if, for example, an Irish person had been selling Indian clothing in Goradia's shop in a 'garage sale' atmosphere."[147] Any discrimination against Goradia was for valid business reasons and not for invalid racial or ethnic reasons.[148]

In *Highway & Transportation Department v. Garley*,[149] the New Mexico Supreme Court addressed the question of whether a commercial lessee

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134. *Id.*
135. *Id.*
136. *Id.*
137. 111 N.M. 779, 810 P.2d 798 (1991).
138. *Id.* at 779, 810 P.2d at 798.
139. *Id.*
140. *Id.*
141. *Id.* at 780, 810 P.2d at 799.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 781, 810 P.2d at 800.
148. *Id.* at 782, 810 P.2d at 801.
149. 111 N.M. 383, 806 P.2d 32 (1991).

could avoid the effect of a condemnation clause of a lease on the grounds of misrepresentation, mutual mistake, or unconscionability.[150]

In 1977, Garley leased a piece of property, on which a bar and lounge was located, to Jerry Olguin.[151] After a substantial period of time, during which the lease was renewed twice without material change to its terms, the State Highway Department brought a condemnation proceeding, seeking to condemn the entire property, due to the reconstruction of the intersection of State Highways 47 and 49.[152] Only the lessor, Garley, was named as a defendant to the action.[153] The lessee "intervened and asserted an interest in the tract by virtue of his lease."[154] On a motion for summary judgment, the trial court found for the lessor, and the lessee appealed.[155]

The standard long-form lease executed by the parties contained a provision that stated that the lease would terminate if the property was condemned.[156] At the time the lease was executed, the parties believed that some portion of the property would eventually be condemned due to the planned reconstruction of the intersection of State Highways 47 and 49, and that this condemnation would probably result in the destruction of the lounge.[157] The lessee, however, later swore by affidavit that both he and the lessor believed that the State Highway Department would only condemn that portion of the property that contained the lounge.[158] He further alleged that the lessor had stated that the proceeds from the condemnation would be used to rebuild the lounge on the remaining portion of the property.[159]

On appeal, the lessee contended that the lease should not be enforced because the parties were mutually mistaken in their belief that the condemnation would be partial instead of total.[160] He alternatively claimed that the lease should be reformed to delete the condemnation clause due to the parties' mutual mistake; that the lessor's statements to him about his intention to rebuild the lounge on the property remaining after a

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150. *Id.*
151. *Id.* at 384, 806 P.2d at 33.
152. *Id.*
153. *Id.*
154. *Id.* N.M. STAT. ANN. § 42-2-15(D) (1978) provides that a court in a condemnation proceeding shall apportion the amount awarded among the defendants to the action according to their interests in the condemned property.
155. *Garley*, 111 N.M. at 384, 806 P.2d at 33.
156. *Id.* The full text of that provision reads:

> Further, Lessee hereby covenants and agrees with Lessor that in the event the said demised premises, or any part thereof, are taken, damaged consequentially or otherwise, or condemned by public authority, this Lease shall terminate, as to the part so taken, as of the date title shall vest in the said public authority, and the rental received shall be adjusted . . . . All damages and payments resulting from the said taking, damaging or condemnation of the said demised premises shall accrue to and belong to Lessor, and Lessee shall have no right to any part thereof.

Id.
157. *Id.*
158. *Id.*
159. *Id.* at 385, 806 P.2d at 34.
160. *Id.*

partial condemnation were misrepresentations, which entitled the lessee to avoid or reform the condemnation clause.[161] Finally, the lessee argued that the condemnation clause should not be enforced because it was unconscionable.[162]

In rejecting the lessee's contention that the parties were mutually mistaken as to the extent of the condemnation, the New Mexico Supreme Court adopted section 152 of the Restatement (Second) of Contracts that states that a contract is voidable by the adversely affected party when the parties have made a mutual mistake as to a basic assumption on which the contract was based.[163] The court found that the lessee's sworn statements in his affidavit were sufficient to raise the issue of mutual mistake.[164] The court held, however, that because the lessee sought only partial avoidance of the lease, the doctrine of mutual mistake was inapplicable. Again citing the Restatement (Second) of Contracts, the court stated that a party to a contract "cannot disaffirm part of the contract that is particularly disadvantageous to himself while affirming a more advantageous part, and an attempt to do so is ineffective as a disaffirmance."[165]

The court stated several additional reasons why the lessee could not use the doctrine of mutual mistake as grounds to avoid the condemnation clause. First, the mistake did not relate to a fact that was presently existing at the time the original lease or the subsequent renewals were executed.[166] While both parties to the lease may have believed that only some portion of the property would be condemned, there was no evidence that the State Highway Department had any then existing intention to condemn the entire parcel.[167] The doctrine of mutual mistake applies only to facts that exist at the time of execution of the contract.[168] As the Highway Department did not plan to condemn the entire property at the time the lease was executed, the doctrine of mutual mistake was not applicable.

Additionally, the doctrine of mutual mistake was not applicable because the doctrine may not be used by a party who has accepted the risk of

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161. *Id.*
162. *Id.*
163. *Id.* at 386, 806 P.2d at 35. The pertinent portion of Section 152 reads:

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of mistake.

RESTATEMENT (SECOND) OF CONTRACTS § 152 (1979).
164. *Garley*, 111 N.M. at 386, 806 P.2d at 35.
165. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 383 comment a (1979)).
166. *Id.*
167. *Id.*
168. Section 151 of the Restatement states:

> [T]he erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined here."

RESTATEMENT (SECOND) OF CONTRACTS § 151 comment a (1979).

the mistake.[169] Section 154 of the Restatement, states that a party bears the risk of a mistake when

> (a) the risk is allocated to him by agreement of the parties, or
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

The court found that all three sub-rules apply in this case.[170] The lease specifically allocated the risk of partial condemnation to the lessee, therefore, subsection (a) is applicable.[171] Further, the context of the parties' negotiations and dealings made subsections (b) and (c) applicable.[172]

As an alternative, the lessee sought the equitable remedy of reformation.[173] While a contract may not be avoided in part, if not "devisable," the contract may be reformed on the ground of either mistake or misrepresentation.[174] New Mexico has recognized mutual mistake as a ground for reformation in a number of cases.[175] The court, however, found several problems with reformation in this case. First, the mistake was not a mistake as to the contents of the writing, but was instead a mistake that the condemnation would be partial.[176] Further, no evidence was found that, in the event of total condemnation, the parties intended a result different than the one specified in the lease.[177] Second, it would not help the lessee to reform the lease to express the agreement between the parties that he described in his affidavit. As that agreement only concerned rebuilding the lounge on remaining property, in the event of partial condemnation, the agreement so reformed would not apply to the actual situation which developed.[178] The lessee's contention that the reformation should take the form of deleting the condemnation clause would have amounted to partial avoidance, which the court found was not permitted.[179]

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169. *Garley*, 111 N.M. at 387, 806 P.2d at 36.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 388, 806 P.2d at 37.
174. *Id.* (citing RESTATEMENT (SECOND) CONTRACTS § 383 comment a (1979).
175. *See, e.g.*, Chromo Mountain Ranch Partnership v. Gonzales, 101 N.M. 298, 681 P.2d 724 (1984) (land sale contract); Morris v. Merchant, 77 N.M. 411, 423 P.2d 606 (1967) (reservation of mineral rights in deed); Buck v. Mountain States Inv. Corp., 77 N.M. 261, 414 P.2d 491 (1966) (fire insurance policy); Cleveland v. Bateman, 21 N.M. 675, 158 P. 648 (1916) (deed). These cases represent application of the RESTATEMENT (SECOND) OF CONTRACTS which states:

> Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement . . . .

RESTATEMENT (SECOND) OF CONTRACTS § 155 (1979).
176. *Garley*, 111 N.M. at 388, 806 p.2d at 37.
177. *Id.*
178. *Id.*
179. *Id.*

As another alternative argument, the lessee argued that the lessor's statements that he would rebuild the lounge on any remaining property were misrepresentations that should allow the lessee to avoid or reform the lease.[180] The court rejected this argument, finding the misrepresentation, if it occurred, insufficient to allow the lessee to partially disaffirm the lease for the same reasons the court found with regard to the lessee's claim of mutual mistake.[181] Similarly, reformation of the lease would not help the lessee any more than would reformation based upon mutual mistake.

The lessee's final assertion was that the condemnation clause was unconscionable.[182] The court recognized the doctrine of unconscionability, both in general and as applied to leases.[183] The court, however, found that the lessee had presented no evidence that this clause, was in fact unconscionable.[184] The lessee admitted that there was ample authority upholding the validity of clauses of this type.[185] Based on this evidence, the Court found that it was proper for the court below to grant the lessor's motion for summary judgment.

Garley has not substantially changed New Mexico's law regarding the reformation or rescission of commercial leases. It was, however, the first time that New Mexico specifically adopted the Restatement (Second) of Contracts' definition of mutual mistake. Further, *Garley* clarifies New Mexico's position on the use of mistake and misrepresentation as grounds for rescission or reformation of commercial leases.

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180. *Id.* at 388-89, 806 P.2d at 37-38.
181. *Id.* at 389, 806 P.2d at 38.
182. *Id.*
183. *Id.*; *see* Drink, Inc. v. Martinez, 89 N.M. 662, 665, 556 P.2d 348, 351 (1976) (enforcement of option to purchase was held unconscionable as to property not subject to the original lease); Guntermann v. La Vida Llena, 103 N.M. 506, 511, 709 P.2d 675, 680 (1985) ("When terms are unreasonably favorable to one party a contract may be held to be substantively unconscionable.").
184. *Garley*, 111 N.M. at 390, 806 P.2d at 39.
185. *Id.*