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Property Law

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This section of the Survey of New Mexico Law reviews judicial decisions in the area of property law. The cases present some significant developments in the law, such as equitable interpretations of real estate contracts and the expansion of the right to trial by jury. The Article discusses these developments in four parts: Actions and Proceedings; Deeds and Titles; Non-Possessory Interests in Land; and Real Estate Contracts.

I. ACTIONS AND PROCEEDINGS

Three cases decided in this period addressed procedural questions. Two cases focused on what constitutes adequate notice in tax sales.[1] The other resolved the question of whether parties to a suit in equity have a right to a jury trial when their counterclaim involves legal issues.[2]

A. Tax Sales: Adequate Notice

Buescher v. Jaquez,[3] involved a suit to quiet title in the Bueschers' to certain real property. The Bueschers' claimed ownership under a tax deed issued to them subsequent to their purchase of the property at a tax sale. The Jaquez' claimed ownership pursuant to their 1976 purchase from a private party.[4]

The Jaquez' claimed that the tax sale was invalid because they never received notice of either a tax liability or a tax sale. Their position was that the state had to give them notice pursuant to section 7-38-66 of the New Mexico statutes, the section in effect at the time of the tax sale.[5]

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1. *See* Buescher v. Jaquez, 101 N.M. 2, 677 P.2d 615 (1983) *and* Wine v. Neal, 100 N.M. 431, 671 P.2d 1142 (1983).

2. *See* Evans Fin. Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983).

3. 101 N.M. 2, 677 P.2d 615 (1983).

4. *Id.* at 3, 677 P.2d at 616.

5. *Id.* N.M. Stat. Ann. § 7-38-66 (Repl. Pamp. 1983) provides, in pertinent part:

> A. [T]he division shall notify by certified mail, return receipt requested, to the address as shown on the most recent property tax schedule, each property owner whose real property will be sold that his real property will be sold to satisfy delinquent taxes. . . .
>
> . . .
>
> C. Failure of the division to mail the notice by certified mail, return receipt re-

On appeal, the plaintiffs argued that the court should have applied section 72-31-66, the predecessor statute to the one the trial court applied, which was the statute in effect when the tax lien arose.[6]

The critical difference between the two sections was that section 7-38-66 invalidated a tax sale if the State Taxation and Revenue Department failed to receive the return receipt indicating that the delinquent taxpayer received the notice[7] and section 72-31-66 does not invalidate a tax sale if the delinquent taxpayer fails to receive notice.[8] Rather, all that section 72-31-66 requires is that notice of sale be sent by certified mail.[9] The court held that section 7-38-66 applied, citing precedent[10] for its conclusion "that a tax sale must comply with the requirements of the statute in effect at the time of the tax sale."[11]

The court also considered whether the evidence presented was sufficient to establish that the Jaquez' had proper notice; it resolved the question in the Jaquez' favor. Testimony indicated that the Jaquez' had taken the requisite steps to give notice of their new address to the state.[12] The court was satisfied that this evidence was sufficient. If a citizen gives the state notice of an address change and the state then mails notice to the wrong address, the state has not given proper notice.[13]

In the second notice case, *Wine v. Neal,*[14] the court reviewed a lower court ruling that a tax sale was void due to insufficient notice. In *Wine,*

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quested, or failure of the division to receive the return receipt shall invalidate the sale; provided, however, that the receipt by the division of a return receipt indicating that the taxpayer does not reside at the address shown on the most recent property tax schedule shall be deemed adequate notice and shall not invalidate the sale.

6. *Buescher,* 101 N.M. at 3, 677 P.2d at 616. N.M. Stat. Ann. § 72-31-66 (1953) provides in pertinent part:

> B. [T]he department shall notify by certified mail each property owner whose real property will be sold that his real property will be sold to satisfy delinquent taxes. . . .
>
> . . .
>
> D. Failure to receive the notice of sale does not affect the validity of the sale.

7. 100 N.M. at 3, 677 P.2d at 616. *See supra* note 5.

8. N.M. Stat. Ann. § 72-31-66(D) (1953). *See supra* note 6.

9. *Buescher,* 101 N.M. at 3, 677 P.2d at 616.

10. The court cited to State v. Thompson, 79 N.M. 748, 751, 449 P.2d 656, 659 (1969), which held that a 1937 tax sale was "controlled by the law in effect at that time."

11. *Buescher,* 101 N.M. at 4, 677 P.2d at 617.

12. *Id.* at 4-5, 677 P.2d at 617-18. Mrs. Jaquez' sister-in-law testified that she went to the assessor's office and gave them the Jaquez' new address. In addition, Tom Garcia, the Chief Deputy Assessor testified that notice of changes of address are made both in the treasurer's office and in the assessor's office and that it is possible that the notice of a change made in one office may not be received in the other.

Testimony by the county treasurer indicated that the tax statements for 1977 and 1978 were sent to the incorrect address and that the 1979 and 1980 statements were sent to the address listed as a correction, the one the sister-in-law had filed.

13. *Id.* It is noteworthy that the testimony concerned changes made in the treasurer's office which were not received in the assessor's office, yet the case dealt with the reverse situation.

14. 100 N.M. 431, 671 P.2d 1142 (1983).

the taxpayer failed to give notice to the state when he moved and relied on a technicality regarding notice in an attempt to defeat the tax sale.[15]

The plaintiffs, the Wines, purchased the land in 1980 at a tax sale auction.[16] Taxes had not been paid from 1976 through 1979. Prior to the sale, the Taxation and Revenue Department, pursuant to section 7-38-66(B), sent a notice to Stafford, the property owner and one of the defendants in the case.[17] The department sent the notice to Stafford at his address as listed in the tax records, but made a technical error in addressing the notice.[18] At the time the notice was mailed, Stafford had moved and had not notified the department of his change of address.

After the tax sale, the plaintiffs brought an action to quiet title. The trial court entered a partial default judgment and awarded the plaintiffs title in fee simple.[19] Subsequently, the defendants sought to regain title and filed a counterclaim in the trial court.

At trial, the defendants argued that the sale was void "merely because the address printed on the letter was 'not the same as the address shown on the latest property tax schedule.'"[20] The court found that the tax sale and deed were void because the defendant was without the statutorily required notice. Because the notice was sent to an incorrect address, the court entered judgment for the defendants.[21]

The supreme court, however, dismissed the importance of a technical error in addressing the notice requirement and reversed the lower court's ruling that voided the sale.[22] It held that a technically incorrect address resulting from a misprinting on an envelope is immaterial.[23] The importance of the notice requirement, according to the court, lies in sending notice to the address shown on the latest tax schedule; the actions in *Wine* were held to have "substantially complied" with the statutory requirement.[24] Thus, the court gave a practical application to the statutory re-

15. *Id.* It is important to distinguish this from the situation in the *Buescher* case. In *Buescher*, the defendants notified the state of their change of address, but the state mailed notice to the incorrect address. In *Wine*, the delinquent taxpayer did not notify the state of a change of address. The only mistake the state made in the mailing of the notice was a technical one. *See infra* note 18.

16. 100 N.M. at 432, 671 P.2d at 1143.

17. *See* N.M. Stat. Ann. § 7-38-66(B) (Repl. Pamp. 1983).

18. The address as listed on the tax records was 2316 CMN D LS ARTESANDOS, NW. The address on the notice sent to Stafford by the Taxation and Revenue Department was 2316 CMN S LS ARTESANOS, NW. Therefore, the address to which the notice was sent was technically incorrect. *See* 100 N.M. at 432, 671 P.2d at 1143.

19. *Id.*

20. *Id.* at 433, 671 P.2d at 1144.

21. *Id.* at 432, 671 P.2d at 1143.

22. *Id.* at 434, 671 P.2d at 1145.

23. *Id.* at 433, 671 P.2d at 1144.

24. *Id.* It appears, therefore, that making a technical error in addressing a notice to the address listed in the tax records constitutes giving proper notice when a taxpayer has failed to notify the department of a change of address.

quirement, rather than distorting its purpose by an overly technical reading of the provision. A technical violation will not protect someone who fails to give notice to the state of a change of address.[25]

B. Right to Jury Trial

In *Evans Financial Corp. v. Strasser,*[26] the supreme court addressed a "significant question of law and . . . of substantial public interest" when it considered "whether parties to a suit in equity have a right to a jury trial when their counterclaim involves legal issues."[27] This decision shows a liberal trend to allow juries in instances where legal counterclaims are raised in equity cases. Thus, in the property area, where equitable claims arise frequently, this trend may increase the number of jury trials.

The issue arose in the context of a mortgage foreclosure action where the complainants also sought to recover on three promissory notes. The parties agreed that the complaint placed the case under the equity jurisdiction of the court, and thus trial by jury was not initially an option.[28] The issue of whether trial by jury was permissible, however, surfaced when the defendants-appellants, after filing an answer and a counterclaim, filed a demand for a jury trial. The plaintiffs-appellees moved to strike the jury demand on the grounds that the original complaint was based upon the court's equity jurisdiction.[29] The trial court struck the jury demand and the court of appeals granted an interlocutory appeal.[30] Because of the nature of the question presented, however, the court of appeals certified the matter to the supreme court.[31]

The significant constitutional question regarded the provision in the New Mexico Constitution that states: "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate."[32] The New Mexico Supreme Court has interpreted this provision to mean that parties to litigation are entitled to a jury trial if they seek legal relief.[33]

The plaintiffs asserted that the New Mexico Constitution does not guarantee a right to trial by jury in a mortgage foreclosure case based on

25. *Id.*
26. Evans Fin. Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983).
27. *Id.* at 788-89, 664 P.2d at 986-87.
28. *Id.* at 789, 664 P.2d at 987.
29. *Id.*
30. *Id.*
31. *Id.*
32. N.M. Const. art. II, § 12.
33. *Evans Financial,* 99 N.M. at 789, 664 P.2d at 987. *See also* Pankey v. Ortiz, 26 N.M. 575, 195 P. 906 (1921); Organic Act Establishing the Territory of New Mexico, ch. 49, § 17, 9 Stat. 446, 452 (1850) (codified at N.M. Stat. Ann. vol. 1, pamp. 3 (1978)) (preserving the distinction between legal and equitable issues). There is no entitlement to a jury trial if the relief sought is equitable.

their reading of *Young v. Vail*.[34] In *Young*, the supreme court held that there was no right to jury trial on a legal defense asserted in an answer to a complaint seeking equitable relief,[35] and no right to a jury trial on legal claims asserted as permissive or voluntary cross-claims or counterclaims asserted in the same action.[36] The plaintiffs alleged that this principle also is applicable to compulsory counterclaims.

The court analyzed the plaintiff's *Young* argument in three parts. First, it analyzed the New Mexico rules under which the *Young* case was decided; second, it sought guidance from federal court decisions under the analogous federal rules; and third, it looked at other jurisdictions' treatment of the issue.[37]

The court found it noteworthy that the rules under which *Young* was decided were "significantly" different from those currently on the books.[38] The court focused on the mandatory language regarding the joinder of compulsory counterclaims and agreed with the defendants' argument that the right to a jury trial should not depend on who files a suit first. Thus, the *Young* decision was not dispositive of the question at hand.

The court proceeded to the second part of its analysis and looked at decisions under Rule 13 of the Federal Rules of Civil Procedure, which

34. 29 N.M. 374, 222 P. 912 (1924). *See* 99 N.M. at 789, 664 P.2d at 987.

35. 29 N.M. at 376-77, 222 P. at 926-27.

36. *Id.* at 379, 222 P. at 927.

37. 99 N.M. at 790, 664 P.2d at 988.

38. *Id. See* N.M. R. Civ. P. 13(a) which provides as follows:

> (a) Compulsory counterclaims. A Pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13. (Emphasis added).

By contrast, the relevant statute in *Young* read, in part, as follows:

> Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he *may*, in addition to his answer, file at the same time, or by permission of the court subsequently a cross-complaint. . . .

1917 N.M. Laws ch. 46 (emphasis added).

The language in this statute is permissive with respect to cross-claims whereas, as can be seen above, the language of the statute governing the *Evans Financial* case is compulsory with respect to counterclaims that arise out of the same transaction. The *Young* court had already decided that it saw "no distinction [in the legal nature] between a counterclaim and a cross-complaint," so that they should be treated as the same insofar as a right to a jury trial is concerned. 29 N.M. at 379, 222 P. at 927.

is similar to the New Mexico rule on counterclaims.[39] Using the leading United States Supreme Court case in the area, *Beacon Theatres, Inc. v. Westover,*[40] the court held that only in unique circumstances could the right to a trial by jury be lost because of a prior adjudication of equitable claims.[41] In addition, the court relied on a recent Ninth Circuit case that refused to deny a defendant a jury trial on a legal claim merely because it was incidental to an equitable claim.[42] The constitutional guarantee of the right to a jury trial on any legal issues raised in a counterclaim was of paramount importance in the circuit court's decision. The Supreme Court of New Mexico also emphasized the importance of this right.

Lastly, in its analysis the court looked to other state courts' treatment of the issue and noted that numerous tribunals have decided that persons are entitled to jury trials in the adjudication of legal issues raised as counterclaims to equitable claims. Thus, the court concluded that, because the right to a jury trial is an important constitutional right, it is available to persons who raise legal counterclaims to equitable claims unless the right is waived.[43]

The court's opinion goes beyond the narrow question that the case presented. The defendants based their claim of right to a jury trial on a compulsory counterclaim. Yet the court concluded that

> when the applicable rule of procedure requires or allows the defendant to assert as a counterclaim any claim he has against the plaintiff if it arises out of the subject matter of the original action, the defendant is entitled to a jury trial of the legal issues presented in the counterclaim.[44]

Thus, New Mexico now seems to have a firmly entrenched right to a trial by jury on any legal counterclaim, regardless of its compulsory nature.

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39. *See* Fed. R. Civ. Proc. 13. Rule 13 states in pertinent part:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Compare this rule with N.M. R. Civ. P. 13(a), *quoted supra* note 38.

40. 359 U.S. 500 (1959).

41. *Evans Financial,* 99 N.M. at 790, 664 P.2d at 988.

42. The court relied on Myers v. United States Dist. Court, 620 F.2d 741 (9th Cir. 1980). *See* 99 N.M. at 790-91, 664 P.2d at 988-89.

43. 99 N.M. at 791, 664 P.2d at 989.

44. *Id.*

II. DEEDS AND TITLES

During the last year, the New Mexico courts decided three cases that involved deeds and titles. One addressed the issue of what damages are recoverable when a seller who is or should be aware of a defective condition in the property does not disclose the defect to the buyer. The other two cases looked at the intent of the transferor, as reflected in documents and circumstances surrounding the transfer, in the analysis of the validity of real estate transactions.

A. Damages: Failure To Disclose

In *Newcum v. Lawson*,[45] the plaintiffs purchased residential property from the defendants and subsequently sued them for breach of contract, seeking damages. The basis of the claim was a subterranean water problem about which the defendants knew but did not disclose. The trial court entered judgment in favor of the plaintiffs and awarded compensatory and punitive damages. The court also awarded the defendants a set-off against the plaintiffs' judgment in the amount of $30,000, the balance on a promissory note the plaintiffs executed as part of the purchase price, and disallowed interest owing on the note. The defendants appealed exclusively on the damage awards.[46]

The court of appeals affirmed the propriety of awarding compensatory damages. It also affirmed the punitive damages award because it found substantial evidence to support the trial court's conclusion that the defendants' actions were intentional, willful, and wanton.[47] The court of appeals also held that the amount of the set-off was not error. The reviewing court agreed with the lower court's disallowance of interest based on the equitable principle that the defendants, having intentionally deceived the plaintiffs, should not benefit from an action they did not take in good faith.[48] The result is a liberal outlook in the allowance of damages in real estate transactions that involve the sale of residential property where bad faith and fraudulent acts form the basis for the decision.

B. Intent of the Transferor

In *Roybal v. Morris*,[49] the New Mexico Court of Appeals ruled on the validity of a deed that allegedly had been obtained by exercising undue influence. In its decision, the court gave guidance with respect to what acts may constitute undue influence.[50]

45. 100 N.M. 512, 672 P.2d 1143 (Ct. App. 1983).
46. *Id.* at 513, 672 P.2d at 1144.
47. *Id.* at 514, 672 P.2d at 1145.
48. *Id.*
49. 100 N.M. 305, 669 P.2d 1100 (Ct. App. 1983).
50. *Id.* at 310, 669 P.2d at 1105.

In *Roybal,* the plaintiff initiated the suit on his own behalf and on behalf of Daniel Roybal (Roybal), his adoptive father, to set aside a warranty deed Roybal gave to his natural daughter, the defendant. The plaintiff claimed that the defendant had obtained the deed from her father through fraud and undue influence.[51]

Roybal began living with the defendant, his only natural child, in 1979, following a major illness. In 1980, he executed and delivered to the defendant a warranty deed to the property in question, which the defendant recorded. The defendant did not disclose this conveyance to anyone for over two years.[52]

In May of 1981, Roybal suffered a stroke and thereafter lived in a nursing home. In April 1982, he executed a power of attorney to the plaintiff. In August of that year, Roybal formally adopted the plaintiff, a nephew who he raised from infancy.

The trial court found that the defendant obtained the deed by exercising undue influence over her father. The court, therefore, ordered that the deed be impressed with a trust, to the extent of a half interest each to the defendant and the plaintiff.[53]

The court of appeals affirmed the trial court's finding of undue influence in obtaining the deed. It bifurcated the issues of competency to convey property and undue influence. Mental competency to make the transfer, therefore, is not the "controlling issue."[54] Rather, the question is "whether there was undue influence exercised by defendant so that the transfer was not his free will."[55]

In assessing undue influence, the court focused on the findings of the trial court. The court found that, after his illness, Roybal depended on his daughter to manage his affairs. His illness made him "susceptible" to influence. Additionally, the court considered two factors to be noteworthy. First, Roybal previously had expressed his intention to leave the property equally to the plaintiff and the defendant. Second, Roybal was not cognizant that the deed he executed only favored the defendant, and had he known this, he would not have executed the deed. Thus, the court of appeals concluded that the resolution of the question of undue influence depended on "the confidential relationship, the opportunity and susceptibility of influence, the circumstances surrounding the procurement of the deed, the father's earlier repeated refusals to give such a deed, the unequal disposition of the property, and the secrecy of defendant."[56]

51. *Id.* at 307, 669 P.2d at 1102.
52. *Id.* at 308, 669 P.2d at 1103.
53. *Id.*
54. *Id.* at 310, 669 P.2d at 1105.
55. *Id.* The court continued to state that "[a] person may be mentally competent, but a transaction performed by him may be invalidated if it is the result of undue influence." *Id.*
56. *Id.* (citing Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968)).

The court of appeals also extensively discussed the propriety of imposing a constructive trust and set aside the trial court's imposition of such a trust. The effect in this case of imposing such a trust would be to deprive Roybal of his interest in the property without his express intention to convey the land in question. Thus, the court set aside the constructive trust that the lower court had imposed and remanded the case with instructions to void the deed to the defendant and reinstate title to the real property in Roybal.[57] This latter ruling reinforces a very strong traditional property law notion of not divesting individuals' property rights without their clear acquiescence.

The second case that focused on the intent of the transferor in invalidating a real property transaction was *Howard v. Howard*.[58] It established property interests in an action for dissolution of marriage and division of property.

In *Howard,* the petitioner and the respondent, the respondent's parents, and the respondent's aunt each initially acquired an undivided one-third interest in the property in question. Subsequently, the aunt conveyed her one-third interest to the petitioner and respondent by warranty deed. In 1977, the couple acquired the respondent's parents' one-third interest, also by warranty deed. This deed was made out to the petitioner and respondent, although the aunt had paid one-half of the purchase price for the parents' interest. In the action for dissolution of marriage, the trial court found that the aunt had a $15,000 interest in the property; the court credited this amount to the respondent. The petitioner appealed.[59]

The supreme court reversed the trial court. It concluded that the trial court's finding regarding the aunt's interest in the property was not supported by substantial evidence.[60] In reaching its determination, the supreme court looked to the language of the conveyances. First, the conveyance from the aunt to the petitioner and respondent clearly stated an intention to make a gift. Second, the warranty deed that transferred the interest from the respondent's parents to the petitioner and respondent did not indicate that the aunt had any interest in the property.[61]

The court concluded that the intent of the parties to transfer must be derived from the language in the instrument of transfer, except where fraud, accident, or mistake exists. None of those exceptions were evident. Thus, the court reversed the finding of the trial court and remanded the case for an analysis of the effect that the deletion of the aunt's interest would have on the distribution of property.[62]

57. 100 N.M. at 312, 669 P.2d at 1107.
58. 100 N.M. 105, 666 P.2d 1252 (1983).
59. *Id.* at 106, 666 P.2d at 1253.
60. *Id.*
61. *Id.*
62. *Id.*

III. NON-POSSESSORY INTERESTS IN LAND

The New Mexico courts decided two major cases on easements; one concerned interference with a private easement and the other concerned eminent domain. The courts also decided one noteworthy case on covenants.

A. Easements

Germany v. Murdock[63] involved an action to enjoin the defendants from interfering with an easement. The defendants put forth alternative defenses. First, they argued that there was no valid easement because the real estate contract pursuant to which they purchased the property did not refer to an easement. Alternatively, the defendants argued that, because the originally granted easement was insufficiently described, they could put the easement in a reasonable location.

Both the plaintiffs and the defendants in *Germany* traced their titles to a common grantor. In 1975, the defendants purchased their property (tract fourteen) from a McPherson, whose deed reserved to the grantor a twenty foot easement across the north end of the tract. The conveyance from McPherson to the defendants specified that it was subject to easements and restrictions of record and the reservation by McPherson of a ten-foot easement across the land.

The plaintiffs bought their property (tracts fifteen and sixteen) in 1977. Their chain of title included a real estate contract with a road right-of-way across tract fourteen. Although a plat attached to the contract depicted this right of way, the contract did not actually refer to the plat. Both the plat and the contract were properly recorded.[64]

When the defendants purchased tract fourteen, a visible road crossed the tract leading to tract fifteen. The common grantor had built this road. Flooding damaged part of this road; the plaintiff then used another path across the defendants' land until it, too, was damaged by a flood. The plaintiffs then built yet another roadway across the defendants' land; this third roadway was located approximately where the first road had been.[65]

The defendants argued that no valid easement existed. The trial court concluded that the plaintiffs had a valid easement across the defendants' land and the supreme court affirmed.[66]

The court also concluded that the easement could be ascertained from the recorded documents. First, prior deeds described the easement location. Second, the plat that depicted the easement had been recorded

63. 99 N.M. 679, 662 P.2d 1346 (1983).
64. *Id.* at 681, 662 P.2d at 1348.
65. *Id.*
66. *Id.* at 682, 662 P.2d at 1349.

properly. The court was not troubled that the plat was not acknowledged pursuant to statutory requirements in effect at the time of the litigation. Rather, it noted that, at the time of the plat's recording, no statute required acknowledgement for effecting proper recordation.[67]

Next, the court discussed the effect of different types of notice on the case.[68] It recognized that inquiry notice suffices for the establishment of the notice requirement.[69] In the instant case, the defendants were charged with notice because of the easement's acknowledgement in previous deeds, on the recorded plat, and in the real estate contract. The defendants, therefore, had a duty to inquire. Consequently, they were charged with knowledge of the facts that inquiry would have revealed. Further, the court found that the record clearly indicated the defendant had actual notice of the existence and location of the easement.

Finally, the court disposed of defendants' argument that the court should substitute a new easement for the old easement because the defendants had purchased additional acreage to provide access to the plaintiffs' property. The court disagreed with the defendants' position because the new easement did not extend the whole length of the road on defendants' property and because this "new" easement never was made part of the public record.[70]

Thus, in *Germany,* the court protected an easement holder's right to the extent of the original interest where an attached plat depicted the right of way even though the instrument of conveyance lacked a written description. In addition, the court protected the scope of the easement by holding that the defendants were on inquiry notice of the right, notwithstanding the content of the documents. Thus, the court expanded the protection to a nonpossessory easement holder by broadly looking at the notice element.

The other easements case was *North v. Public Service Co.*[71] In *North,* the court discussed various important topics, including eminent domain as an exclusive remedy where there is a taking for public use and the limitation of damages to those available under an eminent domain action when a condemnor's actions are not in bad faith.

In *North,* the damages claimed arose out of the installation by the Public Service Company (PNM) of power lines on the plaintiff's property. PNM's staker told the plaintiff, pursuant to the plaintiff's request, that

67. *Id.* at 681, 662 P.2d at 1348.

68. *Id.*

69. *Id.* The "law charges a person with notice of facts which inquiry would have disclosed where the circumstances are such that a reasonably prudent person would have inquired." Otero v. Pacheco, 94 N.M. 524, 526-27, 612 P.2d 1335, 1337-38 (Ct. App.), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980).

70. 99 N.M. at 682, 662 P.2d at 1349.

71. 101 N.M. 222, 680 P.2d 603 (Ct. App. 1983).

PNM would not construct the power line on the plaintiff's property. Notwithstanding this assurance, PNM in fact constructed the power line over the plaintiff's property and damaged the property in the process. The plaintiff sued PNM for trespass and negligence, seeking compensatory and punitive damages. PNM then filed an eminent domain action against the plaintiff seeking to condemn the area where it had erected the line. The trial court consolidated the two actions.[72]

At trial, the jury found against PNM on both the trespass and the right to condemn issues. The jury awarded sizeable compensatory and punitive damages.[73] On PNM's motion for judgment notwithstanding the verdict, the court ordered a new trial unless the plaintiff accepted a remittitur. The plaintiff accepted and both parties then appealed.[74] On appeal, the plaintiff questioned PNM's authority to condemn. In addition, the plaintiff argued that the taking of the property, which PNM previously agreed was unnecessary, showed bad faith.[75]

The court of appeals set aside the judgment and the verdict and remanded the case for further proceedings.[76] The court concluded that the plaintiff's sole recourse for the taking and damages suffered pursuant to the normal installation of power lines was under eminent domain. On remand, the trial court was to determine whether PNM abused its discretion or acted in bad faith, which results in excessive damage to plaintiff's property.[77]

In *North,* as in other cases,[78] the existence of an exclusive remedy under eminent domain mandated that the court dismiss the trespass action. The New Mexico Constitution provides that if a property owner's property is taken or damaged for public use, the owner is entitled to just compensation.[79] The amount of payment for compensation is ascertained pursuant to the eminent domain statute.[80] When the condemning authority takes or damages property for public use, the owner's exclusive remedy is pursuant to inverse condemnation proceedings.[81] Only if a justiciable issue exists regarding excessive damage, can a plaintiff pursue a trespass claim.

In refusing to include the trespass claim, the court confirmed that the

72. *Id.* at 224, 680 P.2d at 605.
73. *Id.*
74. *Id.*
75. *Id.* at 226, 680 P.2d at 607.
76. *Id.* at 232, 680 P.2d at 613.
77. *Id.* at 229, 680 P.2d at 610.
78. *See* Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966); Zobel v. Public Serv. Co., 75 N.M. 22, 399 P.2d 922 (1965).
79. N.M. Const. art. II, § 20.
80. N.M. Stat. Ann. §§ 42-1-1 to -40 (1978) (repealed effective July 1, 1981 and replaced by N.M. Stat. Ann. §§ 42A-1-1 to 42A-4-1 (Repl. Pamp. 1981)).
81. N.M. Stat. Ann. § 42-1-23 (1978), now codified as § 42A-1-29 (Repl. Pamp. 1981).

judiciary will not interfere with a legislative grant of eminent domain. A legislative grant of authority to exercise the power of eminent domain gives the grantee the power to decide the necessity issue. Such a decision is not subject to judicial review absent fraud, bad faith, or clear abuse of discretion. In *North,* however, the plaintiff did not claim fraud, bad faith, nor abuse of discretion. The reasons for the declaration of the need to take land is of no concern to the land owner. Thus, the plaintiff's challenge of PNM's authority to condemn and the necessity of taking his property failed.

The court noted that the specific location of the right-of-way to be condemned for public use was a matter within the company's discretion. Thus, the court refused to inquire into the matter absent bad faith or gross abuse of discretion. In addition, PNM was not liable for bad faith because it had merely exercised a right granted to it by the legislature.[82]

However, the manner in which the condemnor effects the condemnation, such as when the condemnor causes excessive damage, may render it liable in trespass.[83] To determine excessiveness of damage, the court balances the interest of the property owner against the interest that society derives from a public purpose.[84] The action for excessive damages, however, will not include any claim for the portion of the taking that was necessary for the public purpose nor for the damage caused obtaining access thereto.[85] If an action for trespass lies, then a claimant may pursue the recovery of punitive damages.

It is noteworthy that the court commented that it did not intend to limit the principles presented in the decision to the facts of the case. Rather, it gratuitously mentioned areas such as the construction of highways, airports, schools, and other public facilities as areas where it considered it proper to take land without judicial interference.[86]

B. Covenants

In *Lex Pro Corp. v. Snyder Enterprises, Inc.*,[87] the supreme court ruled that a restrictive covenant in a deed creating a building setback was enforceable in equity by successors in interest to the original grantor against a subsequent owner of the property. The transactions giving rise to *Lex Pro* began in 1970. In that year, the Redds conveyed certain property that was subject to a building setback of fifty feet to Security Federal Savings and Loan by warranty deed. The deed was duly recorded.

82. 101 N.M. at 230, 680 P.2d at 611.
83. This can only occur when, as in this case, less than the fee is condemned.
84. 101 N.M. at 230, 680 P.2d at 611.
85. *Id.*
86. *Id.* at 229, 680 P.2d at 610.
87. 100 N.M. 389, 671 P.2d 637 (1983).

The property underwent several transfers of ownership before the defendant obtained the property in 1980. Upon acquiring the property, the defendant constructed a building that violated the setback covenant. The plaintiffs sued, claiming that the covenant bound the defendant. They sought an injunction to require the defendant to comply with the setback. The trial court ruled in favor of the defendants.[88]

On appeal, the court of appeals held that this covenant was not enforceable against the subsequent owner, because it was a personal covenant that does not run with the land.[89] The court reasoned that neither the language in the deed nor the facts and circumstances surrounding the execution of the deed indicated an intention by the originally covenanting parties that the covenant run with the land.

The supreme court reversed the court of appeals.[90] It concluded that the deed created a building setback by a restrictive covenant which was enforceable in equity against subsequent owners by successors in interest to the original grantor.[91] The court enumerated the requirements for the covenant to run in equity: (1) the parties must intend that the covenant "touch and concern" the land; (2) the covenant must in fact "touch and concern" the land; and (3) the successors in interest must have notice of the existence of the covenant.[92]

First, the court held that it must look to the intention of the parties in construing a deed. A court must ascertain the intent from the instrument as a whole, considering the language as well as the facts and circumstances surrounding the grant and the restrictions imposed.[93] In *Lex Pro,* the court found only one possible interpretation: that the parties intended to restrict the use of the land conveyed and did not merely impose a personal limitation on the original grantee. The covenant's subject matter appeared so closely connected to the land that it had to be the parties' intention that the covenant "touch and concern" the land. In addition, the original grantor retained land that benefitted from the restriction. This further indicated that there existed an intent that the covenant run with the land.[94]

Second, a covenant "touches and concerns" the land if the benefit and burden respectively increase or decrease the value of the owner's legal interest in the land.[95] In *Lex Pro,* both the benefit and the burden "touched and concerned," because each respectively made the land more or less valuable in the property owners' hands. The court relied heavily on the

88. *Id.* at 391, 671 P.2d at 639.
89. *Id.*
90. *Id.* at 392, 671 P.2d at 640.
91. *Id.*
92. *Id.* at 391, 671 P.2d at 639.
93. *Id.*
94. *Id.*
95. *Id.*

permanent nature of the restriction in ascertaining whether the parties intended the burden to run. The court emphasized the benefit to the original grantor's retained land from the restriction.[96]

Finally, the court agreed with the court of appeals' conclusion that the defendant had notice of the restriction because the deed was duly recorded.[97] It is established law that such constructive or record notice satisfies the notice requirement for enforcing a restrictive covenant in equity.

The court thus reversed the court of appeals and remanded the case to the trial court for further proceedings. In so doing, the court noted that the plaintiffs may be estopped from enforcing the covenant if the defendants can prove a defense of laches, waiver, or estoppel.[98]

IV. REAL ESTATE CONTRACTS

The final portion of this Article analyzes two cases concerning real estate contracts.[99] This devise for purchasing real estate in New Mexico is quite important because it facilitates the purchase of realty by offering an alternative to the traditional mortgage. These cases shed light on how courts are prone to interpret the rights of parties, notwithstanding technicalities in the documents.

In *Huckins v. Ritter,*[100] the plaintiffs and the defendant entered into a real estate contract for the sale of residential property. The purchase price of $155,000 included: a down payment of $45,000; an assumption of a real estate contract for $40,725.73; and a balance of $69,274.67, due and payable on October 15, 1981.

When the plaintiffs could not make the payment of the balance due in 1981, the defendant sought to terminate the contract. The plaintiffs then filed an action on November 30, 1981, seeking to enjoin the defendant from terminating the contract, or in the alternative, to recover a portion of the down payment.[101]

The trial court awarded temporary injunctive relief to prevent the defendant from terminating the contract. At a later hearing the parties stip-

96. *Id.* at 392, 671 P.2d at 640.

97. *Id.* at 391, 671 P.2d at 639.

98. *Id.* at 392, 671 P.2d at 640.

99. *See also* Otten & Wilson, *Commercial Law,* 15 N.M.L. Rev. ___ (1985), in this issue (discussing real estate contracts). *See generally* Note, *Increased Risk of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts:* Albuquerque National Bank v. Albuquerque Ranch Estates, Inc., 15 N.M.L. Rev. 99 (1985); Note, *The Future of the Real Estate Contract in New Mexico:* Huckins v. Ritter, 14 N.M.L. Rev. 531 (1984); Note, *The Real Estate Contract in New Mexico:* Eiferle v. Toppino, 8 N.M.L. Rev. 247 (1978).

100. 99 N.M. 560, 661 P.2d 52 (1983); *see also* Note, *The Future of the Real Estate Contract in New Mexico:* Huckins v. Ritter, 14 N.M.L. Rev. 531 (1984).

101. 99 N.M. at 561, 661 P.2d at 53.

ulated to an extension until January 10, 1982 for the plaintiffs to make the requisite payment. However, the plaintiffs again were unable to make the payment.

On February 25, 1982, the defendant terminated the real estate contract and obtained the closing documents from the escrow agent. On June 29 of that year, the trial court entered an order in favor of the defendant, holding that "the real estate contract forfeiture provisions should be enforced."[102] Thus, the defendant was entitled to the down payment pursuant to the terms of the contract. The plaintiffs appealed.[103]

The supreme court recognized that New Mexico allows the enforcement of real estate contracts where, upon default, the vendor is entitled to terminate the contract, to regain possession, and to retain the payments already made. It forcefully stated, however, that it will not enforce such contracts where the enforcement of the literal terms of the contract would result in an unfairness that shocks the conscience of the court.[104] The *Huckins* court held that to permit the defendant to keep the down payment, which was close to one-third of the purchase price, and also to regain possession of the property would constitute an unwarranted forfeiture. Thus, the court concluded that the plaintiffs should have the down payment returned, deducting from it the following amounts: (1) the reasonable rental value of the house during their occupancy; and (2) the diminution in value of the property during their occupancy.[105]

The other real estate contract case, *First National Bank in Alamogordo v. Cape*,[106] arose after the Capes sold real estate to Donald McKeeman, a single person, on a real estate contract. The down payment of $4,500 and five monthly payments totalling $2,144.55 were traceable to the separate funds of Dora McKeeman, a woman who married the vendee after the sale. She was not a party to the real estate contract.

The vendee defaulted on the real estate contract, and Dora McKeeman later died in an unrelated auto accident. After her death, her estate's personal representative filed suit against her husband for an accounting of funds and a declaration that the real estate in question belonged to the estate. On the same date, a notice of *lis pendens* was filed against the property.[107]

The trial court in the original case held that the estate would be deemed the purchaser of the realty and could assume all rights and obligations under the real estate contract.[108] A Special Master transferred the realty

102. *Id.* at 560, 661 P.2d at 52.
103. *Id.*
104. *Id.* at 562, 661 P.2d at 54.
105. *Id.*
106. 100 N.M. 525, 673 P.2d 502 (1983).
107. *Id.* at 527, 673 P.2d at 504.
108. *Id.*

from McKeeman to the estate by warranty deed, thus establishing the rights between the husband and the estate. The vendors under the real estate contract, however, insisted on their right to ownership and refused to accept the estate representative's offers to make current the payments under the real estate contract.[109]

The trial court in the case entered a judgment that: (1) the estate's personal representative was entitled to a resulting trust in the amount that the deceased wife had contributed plus interest; and (2) the real estate contract would not be reinstated and the documents in escrow should be given to the vendors. The estate's representative appealed.[110]

The court, as in *Huckins,* reiterated that real estate contracts which include a forfeiture provision, such as the one in question, are enforceable in New Mexico *unless* the forfeiture provisions would result in an unfairness that would shock the conscience of the court.[111] The court accepted the trial court's findings that there were no unlawful dealings between the vendor and the vendee in order to defeat the estate's interest. The presumption that they dealt in good faith was not overcome. The court, noting the important role played by real estate contracts in the state, refused to deny the vendors the rights for which they had contracted, as such an interpretation might jeopardize the viability of such an important financing tool. The court concluded that the appellees' exercise of their contractual rights in effecting a forfeiture did not result in an unfairness that shocked the conscience of the court.[112]

These cases are important because although they preserve the real estate contract in New Mexico, pursuant to the court's vision of such devises as important financing tools, they inject into their analysis an element of fairness which gives the court flexibility to reform or to modify the contracts as entered into by the parties.

109. *Id.*

110. *Id.* As in the *Huckins* case, the supreme court considered both procedural issues and issues on the merits of the case. In *Cape,* the appelles (the vendors) raised a technical issue regarding the sufficiency of appellant's brief. Again liberally interpreting the rules of procedure and citing *Huckins,* the court held that technical violations in the brief would not preclude the court from considering an appeal, so long as the record was sufficient to present the question for review on the merits. *Cape,* 100 N.M. at 528, 673 P.2d at 505.

111. *Cape,* 100 N.M. at 528, 673 P.2d at 508.

112. *Id.*